

# INNOCENCE PROTECTION ACT OF 2001

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTH CONGRESS

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ON

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# INNOCENCE PROTECTION ACT OF 2001

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TUESDAY, JUNE 18, 2002

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 4:05 p.m., in Room 2237, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order. I'm going to recognize Members for opening statements, after which I'll introduce the witnesses. And I'll recognize myself for an opening statement first.

Today's hearing will examine H.R. 912, the Innocence Protection Act of 2001, introduced by a Member of this Subcommittee, Congressman Delahunt.

This legislation provides convicted offenders in capital and non-capital cases with access to post-conviction DNA testing, notwithstanding any statute of limitation or other procedural bar to relief. The bill promotes the full utilization of DNA testing technology and aims to ensure that effective legal representation is provided in cases involving the death penalty.

I support the broad objectives of this bill but do have some reservations about the specifics. For example, under this legislation, the post-conviction DNA testing requirements would apply to every Federal and State crime, not just those crimes where a defendant is facing the death penalty. This would allow defendants even in misdemeanor cases to petition the courts to have DNA testing done. The results would be added costs to the States and increased backlogs of both convicted offender and crime scene DNA samples.

The standard that a court must use to determine if evidence should be tested for DNA following a conviction is whether or not the test has the "scientific potential" to produce evidence that the defendant did not commit the crime. It would be helpful, in my judgment, if the term "scientific potential" was defined.

Legislation should not lead to abuses in cases where DNA testing was available at the time of the trial and the defense declined to seek it. If a defendant passed up DNA testing the first time, there should be no cause to seek it later. Post-conviction DNA testing should only be allowed in those cases where it would establish the defendant's actual innocence.

I'm also concerned about provisions in the bill to deny Federal DNA grant funding to States that are unwilling to adopt federally

prescribed standards for post-conviction DNA testing. This is an unfunded Federal mandate that would compel States to conform to the new Federal requirements in order to maintain their current eligibility for DNA grant funding.

The bill also requires the retention of evidence in criminal cases beyond the point of conviction in order to facilitate post-conviction challenges to convictions and sentences on the basis of DNA evidence. Evidence that could be subjected to DNA testing would have to be retained in all cases for at least 6 months. Imposing such a requirement might be impractical. Whenever an offender was present at a crime scene or touched some object involved in a crime, some biological residue might remain. The physical evidence in almost every case would have to be retained by Federal, State, and local law enforcement agencies in order to avoid liability and post-conviction appeal issues.

For example, if a stolen vehicle was used in the commission of a crime, a person accused of the crime might claim that DNA testing of the interior of the vehicle would establish his innocence. Under the provisions of this bill, the defendant could refrain from seeking DNA testing prior to trial and would then be free to apply for post-conviction DNA testing. The Government, meanwhile, would be required to retain the vehicle beyond the point of conviction. It could not be returned to its rightful owner, and the Government would bear the expense and logistical difficulties of continuing to maintain it in a condition that preserves the DNA.

The bill before us today contains a number of provisions that are unrelated to post-conviction DNA testing or effective representation in capital cases. DNA testing should be used as a tool to confirm innocence, not as a tool to undermine the broadly supported use of capital punishment. According to a recent Gallup Poll, 72 percent of Americans favor the death penalty for persons convicted of murder.

One section of the bill strikes language from current law in the drug kingpin statute that directs the court to impose the death penalty when a jury has recommended that a sentence of death be imposed. The bill gives the court the option of sentencing a defendant to life in prison even if a jury has determined that a death sentence is warranted. This rolls back existing law and waters down capital punishment.

I'm not sure that that's what the author intended, and I look forward to hearing from him on that issue.

I also look forward to hearing from the witnesses on these particular issues and welcome the opportunity to consult with Mr. Delahunt on this legislation to ensure that it protects and assists innocent defendants.

That concludes my opening statement, and I'll now recognize the gentleman from Virginia, the Ranking Member, for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I'd like to thank you for scheduling the hearing on the Innocence Protection Act of 2001. I'd also like to thank and congratulate our colleagues, Bill Delahunt, a Member of this Subcommittee, and Ray LaHood for their outstanding job in shepherding this bill to the point where they have

gained a broad, bipartisan co-sponsorship of 236 Members of the House of Representatives.

There can be no greater calling for this Subcommittee than the call to protect innocent people from unjust convictions and even execution. That's what the hearing is all about, criminal law and procedures premised on the golden thread of criminal justice; that is, the presumption of innocence. It's a common law relating back to the Romans.

In recent years, the advent of DNA evidence has shown us unequivocally that we have been violating this principle with astounding frequency. There are now up to 108 convicted and sentenced individuals who have been exonerated by DNA evidence, including 13 who were on death row.

The numbers are even greater on exclusions at the outset of criminal investigations. The FBI reveals that almost a quarter of the suspects who are DNA-tested are exonerated. Our DNA is incontrovertible proof that innocent people are sentenced to death in this country. Despite our reverence for the presumption of innocence, DNA evidence is simply a way of revealing that there are fatal flaws in our system.

The real question that we have to answer is, what is wrong with a system where, but for DNA evidence, innocent people would be put death?

As awful as it is to be wrongfully accused of committing a crime, it would seem an unimaginable horror to languish on death row for years for a murder you didn't commit. Yet, that's exactly what's happening all over the country. Since the death penalty was reinstated in 1977, 101 people on death row have been exonerated. The figure represents one exoneration for every seven executions.

In Illinois, the number of exonerations outpaced the number of executions. And that prompted Governor Ryan—a conservative Republican—in good conscience to declare a moratorium on executions until the system could be examined.

Death penalties have been erroneously meted out based on the willingness to tolerate significant defects in our criminal system. As we saw in the case of the former boxer Rubin "Hurricane" Carter and the Ramparts cases in Los Angeles, police and prosecutorial misconduct is one serious flaw. Add to that the inaccurate witness identifications, the use of jailhouse snitches, confused confessions by mentally retarded defendants, and ineffective representation, all of which have led to unjust application of death penalties.

In a 23-year study conducted by a professor at Columbia University, involving 4,500 capital cases in 34 States, the study revealed that courts found serious reversible error in 68 percent of capital cases. Of these, 82 percent were not sentenced to death on retrial, including 7 percent who were found to be factually innocent of the capital charge.

I understand that the Innocence Project finds—and Mr. Neufeld, one of our witnesses will be testifying, that project found that in one-third of the cases it handles in which DNA evidence is still available, convicted defendants were found to be outright innocent. When we consider that the reason they were convicted is due to flaws in our criminal justice system, there's every reason to believe

that the percentage of erroneous convictions is the same in cases where DNA evidence is not available.

The notion that flaws in the system can be addressed through a Governor's clemency powers is clearly an inadequate response to a serious problem. Our criminal justice principles are designed to ensure a fair trial for all accused persons.

Ultimate questions of life, death, or freedom should not depend on the politics of the moment or the popularity of a defendant or whether the Governor is in an election campaign or any such vagary. Furthermore, the Governor's office is an inappropriate forum to decide such questions. The Governor has no subpoena power, no right or opportunity to cross-examine key witnesses or to observe witnesses subjected to cross-examination by advocates familiar with the case. Nor does the Governor have other investigatory powers to ensure fairness.

The forum for testing the reliability of evidence is the trial process, not the political forum of a Governor's office.

H.R. 912 goes a long way in addressing these flaws in our criminal justice system which put innocent people on death row. However, there are flaws in the administration of the death penalty in this country which H.R. 912 does not address.

There is overwhelming evidence, for example, that sometimes the death penalty is administered in a racially disparate manner in this country. In a March 1994 study of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, entitled "Racial Disparities in the Federal Death Penalty Prosecutions, 1988 to 1994," revealed the following: Racial minorities are being prosecuted under the Federal death penalty far beyond their portion in the general population or the population of criminal offenders. Analysis of prosecutions under the Federal death penalty provisions in the Anti-drug Abuse Act of 1988 reveals that 89 percent of the defendants selected for capital prosecution have been either African-American or Mexican-American.

In February of that year, the U.S. Supreme Court Justice Harry A. Blackmun, after voting to uphold the death penalty for a number of years, wrote the following: Twenty years have passed since this Court declared that the death penalty must be imposed fairly and with reasonable consistency or not at all. And despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

Mr. Chairman, I believe it is our responsibility to ensure that people are not mistakenly put to death or deprived of their freedom on account of preventable errors or flaws in our system of justice. We have a bill before us which will go a long way in providing that assurance, and a list of witnesses who can guide our efforts. I look forward to their testimony and working with you and our colleagues in furthering this vitally important initiative.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from Wisconsin, Mr. Green, is recognized for his opening statement.

Mr. GREEN. I have no opening statement. Thank you, Mr. Chairman.

Mr. SMITH. The gentleman from Massachusetts, Mr. Delahunt, one of the authors of the bill, is recognized for his opening statement.

Mr. DELAHUNT. Mr. Chairman, let me begin by thanking you for scheduling this hearing and, additionally, for the multiple courtesies that you have extended to me and my staff. And also, let me note that some preliminary discussions have begun among our staffs. And while I am aware and cognizant that there are some differences, I genuinely believe that we have a real opportunity to reach an agreement that can result in an end product that we can all be proud of and embrace. And I thank you for that.

This bill is about much more than simply preventing wrongful convictions. I would suggest it's about restoring confidence in the very integrity of our justice system, a system that is essential to a healthy, viable democracy. And the success of that system depends on its ability to maintain the confidence of the American people. And the truth is that the confidence has been profoundly shaken by recent findings about the rate of serious, reversible error in death penalty cases. Who knows what goes on in noncapital cases? But an error rate of nearly 7 out of 10 is unacceptable in the United States of America. It's that simple.

In addition, there's a growing number of highly visible cases in which innocent people have been totally exonerated of the crime—people like Kirk Bloodsworth, who spent 9 years in prison in Maryland, including 2 years on death row; and Ray Krone, who spent 10 years in prison in Arizona, 3 of them on death row. And both of whom are here today, and I would like to acknowledge their presence.

Now, during his testimony, it's my understanding that Mr. Neufeld will introduce two other individuals, who, though not sentenced to death, endured lengthy prison terms for crimes of which they too were innocent.

I would submit it's cases like these that have caused respected judges, like Supreme Court Justice Sandra Day O'Connor, to express concern, and I have a quote here, that we may well be allowing some innocent defendants to be executed. This is a Supreme Court Judge of the United States making this public statement.

Now, DNA technology has been a powerful tool in exonerating the innocent as well as convicting the guilty. But I would suggest, as importantly, it has illuminated the frailties within the criminal justice system and simultaneously provided us with a map, a blueprint, if you will, for correcting them, for providing some remedies.

And it's inescapable that DNA testing has taught us that the best safeguard against wrongful convictions is a qualified attorney with the necessary resources to present a vigorous defense.

Some suggest that the high rate of reversals show that the system is working. I can't accept that. I would say that's absurd. We cannot know whether the appeals process is catching all those errors or not. But what we do know is that the errors are not being caught at trial and that innocent people are being convicted while the guilty remain free to prey on our communities.

Now, DNA has exonerated 12 of the people freed from death row and another 96 who were wrongfully convicted of other serious crimes. In at least 16 of these cases, the same test that exonerated

an innocent person has led to the apprehension of the real criminal, the individual who perpetrated the crime—16 times. This proposal and what we're doing here today is as much about public safety as it is deterring wrongful convictions.

Yet, access to testing is often opposed by prosecutors and must be litigated, sometimes for years. Evidence that might have established innocence has been misplaced or destroyed. And this bill would ensure that biological material is preserved and DNA testing is made available in every appropriate case, and I underscore "appropriate case."

But DNA is not a magic bullet that will eliminate the problem of wrongful convictions. We must take steps to prevent wrongful convictions in the first place. And providing qualified counsel is the essential safeguard against unjust verdicts in capital cases.

I spent 20 years of my life as a prosecutor, and I know that the adversarial process can find the truth only when both sides are up to the job. Now, some have suggested that our society cannot afford to pay for qualified counsel in every capital case.

Well, the truth, Mr. Chairman, is that we cannot afford to do otherwise, if our system of justice is to have the confidence of the American people.

Mr. Chairman, that concludes my statement, and I would ask that the statement of Congressman LaHood be included in the record together with a number of endorsements, editorials, and other materials pertaining to the bill.

And, again, Mr. Chairman, thank you.

Mr. SMITH. Thank you, Mr. Delahunt. And, without objection, the materials that you referred to will be made a part of the record.

[The prepared statement of Mr. Delahunt follows:]

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

Mr. Chairman, on behalf of Congressman LaHood and the 236 House cosponsors of this bipartisan bill, I want to thank you for convening this hearing.

I also want to express my thanks to you and Chairman Sensenbrenner for being so accommodating to me and to our witnesses, and for working with us to address your concerns about the bill and to perfect it. And I think we have a real opportunity to reach an agreement that can go to the floor.

This bill is not about the death penalty. It's about the quality of justice in America. Congressman LaHood and I have differing views on capital punishment, but we agree that a just society does not deprive innocent people of their life or their liberty.

Over the past 25 years, 782 people have been executed in the United States. During the same period, 101 have been exonerated after spending years on death row for crimes they did not commit. Some came within days or hours of being put to death.

Two of those people are here with us today: Kirk Bloodsworth, who spent nine years in prison in Maryland, including two years on death row; and Ray Krone, who spent 10 years in prison in Arizona, three of them on death row.

It's cases like theirs that have caused conservative judges like Justice O'Connor to express concern that the system, and I quote, "may well be allowing some innocent defendants to be executed." It's cases like theirs that convinced Governor George Ryan—a longtime supporter of the death penalty—to suspend executions in Illinois. And caused Governor Glendening of Maryland to take a similar step just last month.

A major Columbia University study looked at 4,500 capital sentences handed down over a 23-year period, and discovered that the courts had found serious, reversible error in 68 percent of those cases. That's an error rate of nearly seven in 10.

Seven in 10. A failure of such magnitude calls into question the fairness and integrity of the American justice system itself.

Some suggest that the high rate of reversals shows that the system is working. That is nonsense. We cannot know whether the appeals process is catching all the errors or not. But we do know that the errors are not being caught at trial. Innocent people like Kirk Bloodsworth and Ray Krone are serving lengthy sentences for crimes they did not commit, while the real perpetrators go free.

The Innocence Protection Act focuses on the two most effective steps we can take to ensure greater fairness and accuracy in the administration of justice: access to post-conviction DNA testing, and the right to competent counsel in death penalty cases.

These reforms have been endorsed by leading jurists, prosecutors and legal experts, including seven former State attorneys general and Judge William Sessions, a former director of the FBI. And by commentators from across the political spectrum, including Bruce Fein and George Will.

DNA has exonerated 12 of the people freed from death row, and another 96 who were wrongfully convicted of serious crimes. In at least 16 of these cases, the same test that exonerated an innocent person has led to the apprehension of the real perpetrator.

Yet access to testing is often opposed by prosecutors and must be litigated, sometimes for years. Evidence that might have established innocence has been misplaced or destroyed. Our bill would help ensure that biological material is preserved and DNA testing is made available in every appropriate case.

But DNA is not a “magic bullet” that will eliminate the problem of wrongful convictions. Even when it is available—even when it exonerates an inmate after years of imprisonment—it cannot give back the life that he or she has lost.

We must take steps to prevent wrongful convictions in the first place. And the single most important step is to ensure that every indigent defendant in a capital case has a competent attorney. The Innocence Protection Act would encourage States to develop minimum standards for capital representation, and would provide them with resources to help ensure that lawyers are available who meet those standards.

I was a prosecutor for over 20 years. And I know that the adversarial process can find the truth only when the lawyers on both sides are up to the job.

We cannot tolerate a system that relies on reporters and journalism students to develop new evidence that was never presented at trial. We cannot tolerate a system in which chance plays such a profound role in determining whether a defendant lives or dies.

Some have suggested that our society cannot afford to pay for qualified counsel in every capital case. The truth, Mr. Chairman, is that we cannot afford to do otherwise, if our system of justice is to have the confidence of the American people.

Thank you.

Mr. Chairman, I would ask that the statement of Congressman LaHood be included in the record, together with a number of endorsements, editorials and miscellaneous materials pertaining to the bill.

[The prepared statement of Mr. LaHood follows:]

PREPARED STATEMENT OF THE HONORABLE RAY LAHOOD, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I would like to thank you and the members of the House Subcommittee on Crime, Terrorism, and Homeland Security for holding a hearing on the Innocence Protection Act and allowing me the opportunity to submit a statement for the record.

As you know, in January of 2000, Illinois Governor George Ryan declared a moratorium on executions in Illinois after raising concerns about the state’s death penalty system. The state executing an innocent person is the ultimate nightmare. My great state has nearly done this 13 times since 1977 when the death penalty was reinstated in Illinois. This number is astonishing. As the recent 101st exoneration has exhibited, this problem is not limited to Illinois. As you know, Maryland Governor Parris Glendening declared a moratorium on executions in his state on May 9th until a study could be conducted to examine Maryland’s death penalty system.

Mr. Chairman, I support the death penalty, and as a supporter, I strongly believe the system must be fair. As you can see by the figures I just gave you, our system is fatally flawed.

To help fix the system, Governor Ryan appointed a Commission, in March of 2000, to study what had gone so terribly wrong. His Commission was chaired by a former

judge, senator, and U.S. attorney, and was also made up of former prosecutors, defense lawyers, and non-lawyers. After nearly 2 years of study and discussion, the Commission put together an invaluable document developing 85 recommendations to improve our justice system. I commend Governor Ryan on his efforts.

Several of the main components of these findings are mirrored in H.R. 912, the Innocence Protection Act of 2001, which I have reintroduced, in the 107th Congress, with my colleague Congressman Bill Delahunt. I introduced this bill because I believe that those of us who support the death penalty have a special responsibility to ensure it is applied fairly. As I mentioned before, I am pleased to report that we have 236 cosponsors of this legislation with 62 of them Republicans. This is enough to pass this legislation should we be given the opportunity to bring it to the floor for a vote. To me, this means people are beginning to recognize the importance of this bipartisan legislation.

As long as innocent Americans are on death row, the guilty are on our streets. As shown by countless cases, many defendants lack competent counsel and are unable to obtain and present evidence that will establish their innocence. The Innocence Protection Act seeks to address both of these concerns by giving those accused of murder access to new DNA technology that may not have been available at the time of their trial and by ensuring that the attorneys, in whose hands these lives are placed, are qualified. In Illinois alone, 22 defendants have been sentenced to death while being represented by attorneys who have either been disbarred or suspended at some time during their legal careers. In some cases, attorneys have even been found sleeping or under the influence of alcohol during the trial. I believe ensuring competent counsel is a vitally important step in the right direction toward fixing our capital punishment system.

This legislation would increase public confidence in our nation's judicial system specifically as it relates to the death penalty. People have spent years on death row for crimes they did not commit. Some have come within hours of execution. A death sentence is the ultimate punishment. Its absolute finality demands that we be 100% certain that we've got the right person. For in protecting the innocent, we also ensure that the guilty do not go free.

Again, Mr. Chairman, thank you and the Committee for the opportunity to submit my statement for the record.

Mr. SMITH. The gentleman from North Carolina, Mr. Coble, is recognized for his opening comments.

Mr. COBLE. Thank you, Mr. Chairman. I have no prepared opening statement, but I will say a word or two and be brief.

I commend you for having scheduled this hearing. I furthermore commend the distinguished gentleman from Massachusetts, Mr. Delahunt, and the distinguished gentleman from Illinois, Mr. LaHood, for having introduced this bill.

Mr. Chairman, I am a proponent for the imposition of the death penalty. I am also a co-sponsor of this bill. And I do not see that that is inconsistent.

Now, you did raise some points, Mr. Chairman, in your statement that we might want to examine if some fine-tuning becomes necessary, and that may in fact be the case. But I think, on balance, this is probably a good first step toward addressing what is a problem. And I am not uncomfortable being a co-sponsor, but there may be some fine-tuning, and of course we have time to do that.

I thank you again, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

The gentleman from California, Mr. Schiff, is recognized for his opening statement.

Mr. SCHIFF. I'll waive statement, Mr. Chairman.

Mr. SMITH. Okay, thank you.

The gentleman from Virginia, Mr. Goodlatte, is recognized for an opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. I'd like to commend you for holding this hearing and to associate myself with your remarks.

I will say to the gentleman from Massachusetts that I am very interested in what he's attempting to accomplish here. I think there are many good and important provisions in this bill. I'm concerned particularly regarding the miscellaneous provisions in the bill, which, quite frankly, they seem to me to be miscellaneous and somewhat extraneous from the main purpose of the bill.

And if there could be some changes with regard to provisions relating to drug kingpins and certain capital offenses committed by 17-year-old juveniles, like mass murders and so on, then I would be interested in what I take to be the core of the bill, which is making sure that innocent individuals are able to get the evidence to prove their innocence. And that is certainly a good and worthy cause, and I commend you and want to work with you in that direction. But I do have some concerns, as were raised by the Chairman.

Mr. COBLE. Mr. Chairman, may I have one more, brief—

Mr. SMITH. Thank you, Mr. Goodlatte.

Yes, the gentleman from North Carolina is recognized.

Mr. COBLE. To reiterate what you said concerning the revenue involved, I think we need to be careful in examining that, to be sure that we instill prudence as we look at the revenue side of this; that is, unfunded mandates, et cetera. But knowing the gentleman from Massachusetts as I do, and the gentleman from Illinois, they're easing dogs with whom to hunt—[Laughter.]—so we ought to be able to do okay.

Mr. SMITH. Thank you, Mr. Coble.

Let me thank all the Members for their attendance. This is exceptionally good attendance, but it's an exceptionally important hearing as well.

I'll introduce the witnesses, and they are the Honorable Paul A. Logli, State's attorney, Winnebago County, Rockford, IL; Mr. Peter J. Neufeld, co-director, Innocence Project, Benjamin N. Cardozo School of Law, New York, NY; Mr. Robert A. Graci, assistant executive deputy attorney general of Pennsylvania, from Harrisburg, PA; and Ms. Beth A. Wilkinson, former Federal prosecutor, Oklahoma City bombing case, Washington, DC.

We welcome you all. Before we begin, let me issue the requisite warning that you also took note of, I hope, in the letters you received from the Subcommittee, and that is, we do need to limit your testimony to 5 minutes. And I am going to have to enforce that rule today.

Mr. Logli, we'll begin with you and look forward to your testimony.

**STATEMENT OF THE HONORABLE PAUL A. LOGLI, STATE'S  
ATTORNEY, WINNEBAGO COUNTY, ROCKFORD, IL**

Mr. LOGLI. Thank you, Mr. Chairman. I appreciate this opportunity, on behalf of the National District Attorneys Association, to testify in the matter of this bill. I want to emphasize first to the Committee that, as a prosecutor, I represent the only trial attor-

neys in the United States whose primary ethical obligation is to seek the truth wherever it takes us.

I, as well as all local prosecutors, support the use of DNA technology in catching criminals, convicting the guilty, and identifying the truly innocent.

To augment my remarks, I'm asking that a copy of the "National District Attorneys Association's Policy on DNA Technology and the Criminal Justice System" be placed in the record. It sets out in greater details the nature of our position on DNA.

Our association has consistently embraced DNA technology. For 20 years, we've been in the trial courts of this Nation, seeking to introduce DNA evidence, many times over defense objection. We have also been in the forefront of training our lawyers to work with DNA evidence.

We have supported the use of DNA testing where such testing will prove the actual innocence of a previously convicted individual and not serve as a diversionary attack on the conviction. We want to point out that the type of post-conviction DNA testing, such as contemplated by this act, involves only cases prosecuted before adequate DNA technology existed. In the future, the need for this post-conviction DNA testing should cease, because of the availability of pretrial testing we have now. And, thus, while the debate is important, we are examining a finite number of cases whose numbers are dwindling.

Post-conviction DNA testing, again, should be employed only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence, exonerating the defendant as a perpetrator or accomplice of the crime.

Post-conviction DNA testing may be appropriate where testing previously had been performed because present-day methodologies allow the testing of much smaller samples in a shorter time and are reliable on degraded samples.

Having said this, we want to point out that the resources for DNA testing are finite. We believe that post-conviction relief remedies must protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system. Thus, the remedy should be subject to reasonable time limits on the relief that can be granted.

The peace of mind of a crime victim or crime victim's family should not be frivolously disturbed by a lack of finality arising from post-conviction relief remedies. We think that the testing, DNA testing in post-conviction situations, we support, but when identity is an issue and when the test can prove actual innocence.

No one, when we talk about competency of counsel, no one, especially prosecutors, wants incompetent counsel on the other side of the table, especially in a murder case. It doesn't do anybody any good to have to retry a case because of error by either prosecution or defense. It benefits no one, especially the victims.

But we believe that federally mandated or coerced competency standards for State court defense counsel are neither, at this point, workable or necessary. We point out to you that of the 38 States that have the death penalty, 22 of those States already have counsel competency standards. Illinois has competency standards not only for defense lawyers but for assistant prosecutors as well. It ex-

empties the elected prosecutors, but any assistant prosecutor has to be certified to try a capital case. And many States have had statutes for defense counsel, and more States are considering those.

We support counsel competency. And because of that, we ask for this body to consider the idea of helping us to attract and retain prosecutors and defenders. We know that prosecutors and defenders come to us with heavy student loan obligations, that they're paid amounts of money that don't provide them with the money to pay those student loans. So we're asking that student loan forgiveness be part of any plan to increase counsel competency on both sides, for both prosecutors and defenders. Competency is affected by high turnover and the lack of the ability to attract prosecutors and defenders and to retain them.

We would ask that any counsel competency scheme passed by the Congress would incorporate provisions for student loan forgiveness and for continuing training at national centers that includes, also, ethics training, such as the National Advocacy Center, which is for State and Federal prosecutors in Columbia, South Carolina. We need to make an effort to give our prosecutors and defenders the opportunity to strive for excellence not merely to seek to get through the next case.

On behalf of America's prosecutors, I and the National District Attorneys Association urge you do to those things that we believe will truly advance our mutual goals of improving the criminal justice system. We look forward to continuing to work with you on maximizing our use of DNA technology and ensuring that our criminal justice system has provided the highest degree of legal skills on both sides of counsel table and in every courthouse in our Nation.

[The prepared statement of Mr. Logli follows:]

PREPARED STATEMENT OF PAUL A. LOGLI

My name is Paul Logli and I am the elected state's attorney in Winnebago County, Illinois. I want to thank you, on behalf of the National District Attorneys Association, for the opportunity to present our position on DNA testing in post conviction settings and share some thoughts on the issue of counsel competency. The views that I express today represent the views of that Association and the beliefs of thousands of local prosecutors across this country.

To place my remarks in context—let me briefly tell you about my jurisdiction. Winnebago County is located about 70 miles west of Chicago. It has a population of nearly 280,000 people living in a diverse community. The county seat is Rockford—the second largest city in the state. I have been a prosecutor for 18 years and am honored to have served in my current position for 16 years, having been elected to office 4 times. I previously served as a judge of the local circuit court for nearly 6 years. I currently supervise a staff that includes 38 assistant state's attorneys. Annually, my office handles about 4000 felony cases.

I want to emphasize to the Committee that as a prosecutor I represent the only trial attorneys in the United States whose primary ethical obligation is to seek the truth wherever it takes us. I, as well as all local prosecutors, support the use of DNA technology in catching criminals, convicting the guilty and identifying the truly innocent.

DNA TESTING IN THE CRIMINAL JUSTICE SYSTEM

To augment my remarks I would like to ask that a copy of the National District Attorneys Association's Policy on DNA Technology and the Criminal Justice System be placed in the record. It sets out in greater detail the points that I wish to make today.

Our Association has consistently embraced DNA technology as a scientific breakthrough in the search for truth. Since the mid-1980s, when DNA evidence was first

introduced we have fought for its admission in criminal trials and we have been instrumental in providing training to prosecutors on using DNA Evidence in investigations and in the courtroom. With the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant in cases where identity is at issue. Prosecutors and law enforcement agencies also utilize DNA technologies to eliminate suspects and exonerate the innocent. It is our view that this powerful weapon against the criminal offender is best used when such resources are made fully available in the earliest stages of an investigation and before a conviction.

Forensic DNA typing has had a broad, positive impact on the criminal justice system. In recent years, convictions have been obtained that previously would have been impossible. Countless suspects have been eliminated prior to the filing of charges. Old, unsolved criminal cases, as well as new cases, have been solved. In a very few cases, mistakenly accused defendants have been freed both before trial and after incarceration. Increasingly, the unidentified remains of crime victims are being identified.

Advances in DNA technology hold enormous potential to enhance our quality of justice even more dramatically. However, significant increases in resources are needed to enlarge forensic laboratory capacity and expand DNA databases. No other investment in our criminal justice system will do more to protect the innocent, convict the guilty and reduce human suffering.

In keeping with these beliefs, the National District Attorneys Association has supported funding for forensic laboratories to eliminate backlogs in the testing of biological samples from convicted offenders and crime scenes. Funding by the federal government is a critical component in realizing the full potential of DNA testing. Federal funding should not be contingent upon a state's adoption of any specific federally mandated and unfunded legislation such as post conviction relief standards.

We strongly supported the Paul Coverdell National Forensic Science Improvement Act in recognition that we needed to strengthen our ability to exploit DNA technology and we will continue to support legislative efforts to provide funding support for state forensic laboratories, an example of which is our association's support of Senator Biden's efforts to eliminate the unconscionable backlog of untested rape kits in police department evidence rooms across this country.

#### POST-CONVICTION RELIEF

The National District Attorneys Association has always supported the use of DNA testing where such testing will prove the actual innocence of a previously convicted individual and not serve as a diversionary attack on the conviction.

First, we need to clear up several popular misconceptions.

The vast majority of criminal cases do not involve DNA evidence. Just as fingerprint evidence, although available for decades, is seldom a conclusive factor in a prosecution, DNA evidence will likewise, even though it is increasingly available and more determinative, will not be a factor in a large majority of cases.

Secondly, the absence of a biological sample, in and of itself, is not necessarily dispositive of innocence. There can be many reasons why an identifiable biological sample was not available at a crime scene, yet an individual can still be guilty of the commission of a crime. In many cases DNA testing results that exclude an individual as the donor of biological evidence do not exonerate a suspect as innocent. In a sexual assault involving multiple perpetrators, for example, a defendant may have participated in the rape without depositing identified DNA evidence. In such cases, the absence of a sample or a comparative exclusion is not synonymous with exoneration. Moreover, as powerful as DNA evidence is, it tells us nothing about issues such as consent, self-defense or the criminal intent of the perpetrator.

Lastly, the issue of post-conviction DNA testing, such as contemplated by the Innocence Protection Act, involves only cases prosecuted before adequate DNA technology existed. In the future, the need for post-conviction DNA testing should cease because of the availability of pretrial testing with advanced technology. Thus, while the debate is important, we are examining a finite number of cases whose numbers are dwindling.

We believe that post-conviction DNA testing, in most cases, should be afforded only where such testing was not previously available to the defendant. Post-conviction testing should be employed only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence, exonerating the defendant as the perpetrator or accomplice to the crime.

In limited circumstances post-conviction DNA testing may be appropriate where testing previously has been performed. Although DNA testing in criminal cases became available in the mid-1980s, the forms of testing typically used today were not widely available until the mid-1990s. These present-day methodologies allow the

testing of much smaller samples in a shorter time and are reliable on degraded samples.

Because of these considerations the National District Attorneys Association has consistently supported state legislation that removes barriers to post-conviction DNA testing in appropriate cases and with appropriate safeguards.

We recognize that in some states, legislative enactment of new legal remedies may be required to provide post-conviction DNA testing. Many states have enacted such legislation, and others are considering such measures. The NDAA supports enabling legislation that addresses concerns of prosecutors and victims, such as avoiding frivolous litigation and preserving necessary finality in the criminal justice system. These statutes should provide for the inclusion in the national CODIS database of DNA profiles obtained as a result of post-conviction DNA testing. This provision will help to solve crimes and deter abuses of the post-conviction relief mechanism.

Having said this, however, I need to emphasize that post-conviction testing should be employed only in those cases in which a result favorable to the defendant establishes proof of the defendant's actual innocence. Requiring only that the results of a DNA test produce material, non-cumulative evidence, and not specifically prove innocence, allows defendants to waste valuable resources, unnecessarily burden the courts and further frustrate victims. Decisions about such issues as the categories of convicted persons to be offered post-conviction relief and the standards to be employed are best made at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities.

The resources for DNA testing are finite. Conducting frivolous or non-conclusive tests could mean that another test freeing an innocent person or apprehending a guilty person would not be done in a timely manner or at all.

The National District Attorneys Association believes that post-conviction relief remedies must protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system. Thus, such remedies should be subject to limits on the period in which relief may be sought.

Current prohibitions limiting post-conviction relief are grounded in legitimate policy, enhancing the search for the truth and minimizing potential abuse. The defense, for example, should be expected to exercise due diligence in developing and presenting all legally appropriate exonerating or mitigating evidence to the trial jury. Potentially exonerating evidence should be actively pursued. A trial jury's verdict should be accorded great weight and normally should be overturned only where harmful legal error has occurred or an innocent person convicted. The peace of mind of a crime victim or crime victim's family should not be frivolously disturbed by a lack of finality arising from post-conviction relief remedies. For these reasons, any initiatives to identify and exonerate the innocent should also protect against abuses.

Time limits on the period in which post-conviction relief may be sought provide one of the most important means to ensure finality in the criminal justice system. Post-conviction relief remedies are needed only for a relatively small group of cases prosecuted before present-day DNA technology existed. Reasonable time limits on the consideration of these cases should not interfere with due process for convicted individuals who may seek relief.

Law enforcement should be permitted to destroy biological samples from closed cases, provided that convicted individuals are given adequate notice and opportunity to request testing. Otherwise, police agencies and the courts would be required to retain virtually all evidence for all time.

NDAA also support the decisions of individual prosecution offices to initiate post-conviction DNA testing programs. Such programs can serve to strengthen public confidence in the criminal justice system.

In summary, any post-conviction DNA testing program should focus only on those cases where identity is an issue and where testing would, assuming exculpatory results, establish the actual innocence of an individual. Such programs should recognize the need for finality in criminal justice proceedings by establishing a limited time period in which cases will be considered and then reviewing those cases in an expedited manner.

#### COMPETENCY OF COUNSEL

No one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. This issue is not only confined to the 38 states with capital punishment, but also concerns the 12 states and the District of Columbia that do not have the death penalty. Any prosecutor who has had to retry a case more than once, especially a capital case, is most supportive of good and competent counsel for the defense. It benefits no one, especially victims, to have to retry a major case. Having said that, we do not believe that federally-

mandated or coerced competency standards for state court defense counsel are either workable or necessary.

Our system of criminal law is inherently a state system—some 95% of all criminal trials are at the local level of government. A single solution to issues of counsel competency fails to recognize the distinction between the various state systems and the authority of the judiciary in each. The judiciary is trusted with serving as the arbitrator for all facets of the court system and, in real world instances, serve as the final determinator of counsel competency every day.

We can only assume that the judiciary would find it most disturbing that anyone other than they would be tasked to determine the competency of any attorney appearing in a state courtroom. Moreover even if other means are pursued to determine competency the judiciary will still have the final word in the matter.

The president of NDAA, Kevin Meenan, recently directed that a survey be completed of state competency standards and the results are, I believe, significant in terms of the work before this committee.

Of the 38 states that allow a death sentence to be imposed as a criminal penalty, 22 states have either a statute or court rule that establishes standards for competency of counsel at the trial, appellate and/or post-conviction level. Among these statutes and rules there are certain common elements; while the specifics may vary these include: minimum years of experience; minimum number of trials; minimum number of capital trials; whether the attorney has demonstrated necessary proficiency; the amount of training in capital defense required; whether the attorney is familiar with the practice and procedure of the state criminal court; and whether the attorney is familiar with the utilization of experts, including but not limited to psychiatric and forensic experts.

My point is that the states are fulfilling their obligations to their citizens. I recognize that not all states have adopted competency standards and believe that there are meaningful incentives that the Congress can provide to effectively enhance competency in all jurisdictions.

In many states the criminal justice system is strapped for operating funds and setting up or expanding effective public defender offices becomes an impossible proposition. “Seed” money to set up systems and purchase equipment; assistance in providing training for both prosecutors and defense counsel; and help in bringing the best lawyers to work in the criminal justice system will do more than federally imposed requirements.

The Bureau of Justice Statistics has just released a survey on local prosecutors (“Prosecutors in State Court, 2002, May 2002) that has some telling insights into counsel competency. While the report refers only to prosecutor offices I would suspect that it applies equally to those in public defender offices.

In portraying issues in regard to recruiting and retaining assistant prosecutors the report points out that in 2001 half the entering prosecutors in this country earned less than \$35,000 a year, half of our experienced prosecutors earn less than \$45,000, and most supervisory attorneys earn less than \$60,000 per year.

The assistant state’s attorneys in my office start at \$38,000 I would note that administrative assistants and paralegals earn more here in Washington than do our young prosecutors and public defenders who provide essential legal representation on a daily basis in the state courts back home.

My point in relating this is that the provisions advanced by the Innocence Protection Act as to counsel competency miss the mark. If we can’t recruit and retain the best our law schools and profession have to offer we can never hope to artificially mandate competency standards.

What we need to do, with your assistance, is to shore up the foundation of our criminal justice system to ensure that attorneys who participate in the system receive the training and compensation necessary to be able to stay in the system without compromising choices of getting married or starting a family.

The Federal Government cannot, and is not expected to, pay the salaries of local prosecutors and public defenders. But there is something you can do that would serve as a powerful incentive for many to stay in the state criminal justice system.

A study done of the student loan indebtedness of assistant district attorneys in New York (nine separate offices) found that 70% of them have over \$50,000 of loan indebtedness while nearly 20% of them owe in excess of \$100,000 on student loans.

The result of these dire financial forces is that, according to the BJS report, over 1/3 of prosecutor offices report difficulty with recruiting and retaining staff lawyers. Another report in the March 21, 2001 New York Law Journal states that in both Queens and Brooklyn, about 2/3 of the assistant district attorneys hired between 1992 and 1996 had already left the prosecutor’s offices.

This should not be news to you. The Congress has considered the concept of student loan forgiveness in several forms in recent years.

- Federal agencies had been authorized to pay student loans for attorneys for several years but the programs are just now being funded because of problems retaining attorneys
- To retain military attorneys a “bonus” is being paid after about 10 years of service
- In a bill before you now, to reauthorize the federal court system, there is a provision for loan forgiveness for federal public defenders

Bottom line—we cannot compete with the private sector in recruiting and retaining attorneys. When we have continual turnover it impacts on our ability to serve justice. It adversely affects our entire system, from our most junior prosecutor, or public defender, to our supervisory attorneys and division chiefs.

I would urge that the Congress examine ways to provide student loan forgiveness as a means of allowing us to recruit and retain the “best and the brightest” in both prosecutor and public defender offices.

In addition to providing incentives to young public defenders and prosecutors to stick with their chosen careers, I would suggest that ensuring that adequate training is available will further enhance the “competency” of the system. Congress can best help by providing opportunities for training, including ethics training, at the state level and at national facilities such as the National Advocacy Center for state and federal prosecutors in Columbia, South Carolina.

If we want competent counsel for our system we need to make the effort to give them the opportunity to strive for excellence, not merely seek to get through the next case. With-holding funds from state criminal justice programs in order to enforce federally dictated counsel competency standards, only serves to set back efforts to strengthen our system.

On behalf of America’s prosecutors I, and the National District Attorneys Association, urge you to do those things that we believe will truly advance our mutual goals of improving the criminal justice system. We look forward to continuing to work with you on maximizing our use of DNA technology, and ensuring that our criminal justice system is provided the highest degree of legal skills on both sides of counsel table, and in every courthouse in our nation.

Mr. SMITH. Thank you, Mr. Logli.  
Mr. Neufeld?

**STATEMENT OF PETER J. NEUFELD, CO-DIRECTOR, INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK, NY**

Mr. NEUFELD. Mr. Chairman, thank you very much for inviting me here today.

Let me begin by telling a story, because I think many of the points I want to make can be made more effectively through a couple of stories involving people who this law will obviously impact.

On July 17, 1982, in Hanover County, Virginia, a rural county outside of Richmond, a young, white woman was attacked by a black man on a bicycle, and viciously beaten and raped. After the rape, she reported it to the county sheriff, and she told the sheriff that the man who did this boasted that he had himself a white girlfriend.

The sheriff thought to himself who in this community was black and had a white girlfriend. And he only came up with one person. That person was Marvin Anderson. Mr. Anderson is the person sitting in the first row, in the first seat, in the gray pinstripe suite.

And so Marvin Anderson was approached. But unfortunately, Mr. Anderson had never been arrested in his life, so there were no mug shots to show the victim. So the police officers went to Marvin’s place of employment. They asked for his employment identification card. They then took a half-dozen black and white mug shots, and the seven pictures were shown collectively to the victim. She identified Marvin Anderson.

Marvin Anderson was then picked up, and a few minutes later he was put in a lineup. None of the other people in the photo array were put in that lineup. And again Marvin was identified, indicted, and charged with a count of rape in the first degree, assault in the first degree, and robbery in the first degree.

He had a family to support him, the same family that's here today. His mother is here, who stood by him all those years.

But at the trial, the jury decided to believe the eyewitness testimony of this victim, who was absolutely certain about the man who had done this, and reject the alibi testimony from loved ones and family members.

Marvin was convicted and sentenced to spend more than 100 years in prison.

About 6 years went by when another man by the name of Lincoln, Otis Lincoln, had pangs of conscience and came forward and said, "I'm the one who actually committed the crime."

And so, under Virginia law, a habeas hearing was held. And at that hearing, Mr. Otis Lincoln testified under oath that he had committed the rape. But the judge found him incredible and sent Mr. Marvin Anderson back to prison.

Meanwhile, DNA gets invented and Marvin Anderson wants DNA tests. But he's told that the PERK kit, the rape kit that was collected, the evidence from that victim on the night of the rape, had long ago been destroyed. And so everybody who attempted to get that evidence failed. He was told that by the clerks, by the prosecutors, and by the police. And none of them were lying.

He then approached us at the Innocence Project, and we worked on the case for a few years when, all of a sudden, the head of the Virginia State Crime Laboratory called me up and said, "You'll never guess what happened." It turned out that the criminalist who had done the initial serology work back in the early 1980's, when this case had occurred, had violated the rules. And instead of returning the evidence to the kit, so it could go back to the police department and be destroyed, she illegally Scotch-taped it her laboratory notebook, writing down what each piece of cotton stood for.

Well, fortunately, the head of the laboratory found this, and we wanted to do DNA testing. We went to the Commonwealth attorney, and he said, "Great, let's go ahead and do the testing." So testing was about to go forward when the attorney general said, "No way. We're not going to have testing. And the reason we're not going to have testing is because, in Virginia, we only have testing if a judge orders it." But a judge couldn't order testing in Virginia because there was a 21-day rule, which prevented you from going back into court with newly discovered evidence.

But fortunately, even though it was overruled by the attorney general, the State of Virginia recently enacted a statute, much like the one that you folks are considering here today. And they enacted a statute which gave Marvin Anderson the right to have DNA testing.

So we went back into court. The judge ordered testing. And sure enough, Marvin Anderson was excluded.

He was not only excluded, but they then took the profile of that evidence and they ran it through the Virginia convicted offender

DNA databank. And guess what? It matched Otis Lincoln, the same man who had confessed in open court back in 1988.

Today, Marvin Anderson is here in this building, and Otis Lincoln stands indicted for that crime. Otis Lincoln, meanwhile, had been out, had committed other rapes, was then in prison on a terrible rape, all of which could have been avoided, obviously, if DNA testing had been available a long, long time ago.

I mention the case for two reasons: one, because there are preservation provisions in this bill, which some people think are unduly burdensome. In the State of Virginia, where ordinarily evidence is kept routinely, and they have not found it unduly burdensome, in this particular case, it's only through sheer serendipity that this evidence existed and he was allowed to be exonerated. I implore you to pass a statute which has vigorous provisions for securing and preserving evidence, because, otherwise, more people like Marvin Anderson will be convicted.

Secondly, we can't simply have executives in Government decide arbitrarily that they don't want testing. Only if we have a statute with very strong, firm language can we ensure that people like Marvin will get the testing.

The second brief story I want to mention involves a fellow who unfortunately isn't here today, Mr. Chairman. His name is Bruce Godschalk. We had invited him to come, but because he's still suffering so much depression, having been released just 3 months ago, he was unable to board a plane and appear here today.

But the reason I bring up Mr. Godschalk's case, and I'll be very, very quick, if I can, Your Honor—I'm sorry, Mr. Chairman. [Laughter.]

I was in court this morning for 3 hours, and it was all "Your Honor."

Mr. SMITH. That will get you an extra 15 seconds. [Laughter.]

Ms. JACKSON LEE. You said that will get him another hour, Mr. Chairman? [Laughter.]

Mr. NEUFELD. The only thing I wanted to say about Mr. Godschalk is—it's a case in Pennsylvania. And in that case, he went into court to try and get testing. And every time he went into court to try and get testing, and it went all the way up to the highest court in the State, they said he couldn't get testing because he had confessed. And because he had confessed, it wasn't a case about identification being an issue. Because he had confessed, it wasn't the kind of case where actual innocence could be proven but could merely undermine the identification.

So the courts never allowed it. We went into Federal court. A Federal judge ordered it. And guess what? The DNA testing proved his innocence, and he was eventually exonerated.

And so if you have a standard which requires that people prove actual innocence, I can only tell you from my experience, sir, that I have seen too many people with the best of intentions nevertheless say, "This is not the right kind of case," because it's like Kirk Bloodworth with his five eyewitnesses. It's like Ray Krone, where they said that the evidence was not enough to prove actual innocence; it would just cast some doubt on the case. It took an exoneration requiring an identification from the convicted offender database to get it for him as well.

Thank you.  
 [The prepared statement of Mr. Neufeld follows:]

PREPARED STATEMENT OF PETER J. NEUFELD

There are now one-hundred and eight Americans who have been exonerated by post-conviction DNA testing. Thirteen of the exonerated had at one time been sentenced to death. Thirty-two of the exonerated were convicted of murder, and many of them would have almost certainly faced execution if the death penalty had been available in the jurisdictions where they were tried. Collectively, these 108 men have served 1,116 years in prison.

The pace of post-conviction DNA exonerations has accelerated because states have begun to pass statutes that permit those claiming innocence a chance to gain their freedom. In 1993 there were three DNA exonerations. In 2000 there were sixteen; and last year alone—27 post conviction DNA exonerations. Thirty-five law schools have started a network of “innocence projects” on shoe string budgets to prevent, as best they can, these DNA statutes from becoming unfunded, unrealized mandates. There can be no doubt that the number of wrongly convicted freed by DNA testing would dramatically increase if the post-conviction DNA legislation were passed by this Congress—the number of exonerations would at least double within five years—just as apprehension of the real perpetrators of these crimes through DNA databank “hits” would impressively proliferate. This is a “win-win” proposition for law enforcement, innocents who rot in America’s prisons and on death row, for crime victims, for families of all involved, and for anyone who believes in justice.

Accordingly, we who toil in the trenches trying to harness the enormous power of this technology for the public good are grateful to Congressmen Bill Delahunt and Ray LaHood for authoring the “Innocence Protection Act” and for using their extraordinary efforts to secure co-sponsorship by a majority of the House of Representatives, including members from both parties with positions in favor of and opposed to capital punishment.

DNA testing is not a panacea for what ails the administration of the death penalty in America or the rest of the criminal justice system. The vast majority (probably 80 percent) of felony cases do not involve biological evidence that can be subjected to DNA testing. DNA technology is no substitute for competent counsel, and nothing guarantees the conviction of the innocent more than incompetent, ill-trained, or ineffective defense counsel. That is why the counsel provisions of the legislation before you are so critical. But it would be a terrible mistake to overlook the unique importance of these post-conviction DNA exoneration cases. They have created a great “learning moment” in the history of our criminal justice system and surely constitute the most remarkable and instructive data set criminal justice researchers have ever possessed. It permits us to identify as never before the causes of wrongful convictions and their remedies for the good of the entire system.

In our book, *Actual Innocence* (Scheck, Neufeld, Dwyer, Doubleday 2000), we took a first step in this direction, but the eighty-five recommendations recently outlined by Governor Ryan’s Commission on Capital Punishment, based on a study of wrongful capital convictions in Illinois, take the agenda of “innocence reforms” much further, and help create a blueprint, within the criminal justice system, for a new kind of civil rights movement that benefits both the accused and the victims. Every time an innocent person is arrested, convicted or sent to death row, the real offender is at large, free to commit more crimes. There are no better examples of how the legislation you are considering today will produce these benefits than the cases of Marvin Anderson and Bruce Godschalk, both of whom are with me today.

**MARVIN ANDERSON:**

On July 17, 1982, a young white Hanover County, Virginia woman was brutally raped by a black man on a bicycle. She immediately notified the police. Evidence including the abandoned bicycle was recovered near the scene. She was taken to the hospital, and a physical evidence recovery [“PERK”] kit was prepared. Swabbings of biological evidence were collected from the relevant parts of the victim’s anatomy.

After the victim reported the rape, a police officer seized on Marvin Anderson as a suspect, solely because the perpetrator had apparently told the victim that he was having a relationship with a white girl, and the investigating officer knew that Mr. Anderson, a young black man, “was in a situation where he was with a white girl living, married, or what have you.”

The victim was presented with a photo spread that included Mr. Anderson’s picture. Since Mr. Anderson had never in his life been arrested, the police lacked a mug shot to show the victim. Instead, the officer visited Mr. Anderson’s place of employment and secured from his boss an employment identification card with photo.

Thus, the victim was shown a photo spread which contained several mug shots which, on their face, looked completely different from the one color employment identification card with "some type of employee number on the face of it."

The victim selected the Anderson employment card as that of her assailant. Within an hour of the photo spread, she was asked to identify her assailant from a physical lineup. The lineup, however, included none of the individuals whose photos had been in the photo spread, other than Mr. Anderson, and again she identified Mr. Anderson.

At Mr. Anderson's trial, which lasted a few hours and was held before an all-white jury, the victim again identified him as her assailant. The serologist for the Commonwealth testified that she had performed blood typing tests on portions of the swabs containing a mixture of sperm from the rapist and vaginal secretions from the victim. Her testing, unfortunately, was unable to ascertain the ABO blood type of the sperm. Thus, the test failed to exclude Mr. Anderson as the source of the semen.

Mr. Anderson's trial counsel called several witnesses, including Mr. Anderson's mother, who testified that Mr. Anderson was elsewhere at the time of the rape. Unfortunately for Mr. Anderson, the alibi was discounted and Ms. Gardner's in-court identification was accepted as reliable. Marvin Anderson was convicted, and sentenced to more than 200 years imprisonment. His appeal was denied, and he entered prison in 1984.

Mr. Anderson sought post-conviction relief, and in an evidentiary hearing before the Circuit Court of Hanover County on August 29, 1988, John Otis Lincoln admitted under oath that he, rather than Mr. Anderson, had robbed and raped the victim. Unfortunately for Mr. Anderson, the court deemed his testimony unreliable and denied the habeas petition. Indeed, all of Marvin Anderson's requests for post-conviction relief were denied on both the state and federal levels.

As a general rule, once the Virginia Bureau of Forensic Science completes its serology testing, the evidence is returned to the Perk kit and the Perk kit returned to the agency that submitted it. But in this case, the serologist of the state's Bureau of Forensic Science violated the lab policy and, instead, taped the unused samples of biological body fluid material from the Perk kit to one of her worksheets contained in the case folder for this case, with appropriate identification markings. The case folder eventually found its way to the archives where it sat unnoticed for almost two decades.

In the years since his conviction, after DNA testing became widely available, Mr. Anderson sought to prove his innocence of the crime by subjecting to DNA analysis the remaining samples collected in the PERK kit. However, neither Mr. Anderson's counsel nor the Commonwealth Attorney was aware that the critical evidence had been taped to the forensic examiner's worksheet and stored in the case file. The PERK kit itself had, in fact, been destroyed sometime in the late 1980's. Thus, all of Mr. Anderson's efforts came to naught when the various law enforcement agencies and court clerks reported that the Perk kit had been destroyed and that there was no evidence to test.

However, last year, Dr. Paul Ferrara, Director of the Division of Forensic Science, advised me that certain physical evidence from the case—including sperm and semen samples recovered from the victim's body—had been located in the twenty year old case file at the Division's archives. The Commonwealth Attorney for Hanover County consented to DNA testing but was overruled by representatives of the Attorney General of Virginia who took the position that without a judge ordering testing, no testing could be conducted.

Fortunately for Marvin Anderson, Virginia passed a post-conviction DNA access bill last year. The court granted an application for testing pursuant to the new Virginia statute. Just before Christmas, we learned that Marvin Anderson had been cleared by the DNA testing and that, after running the new evidence profile against the state's convicted offender database, they had gotten a "hit." Otis Lincoln, who was serving a sentence and was about to be paroled on another rape conviction, was the match. Last month Lincoln was indicted by a Hanover County grand jury.

But we are in a race against time and every day counts. In seventy-five percent of the cases where the Innocence Project has determined that a DNA test on some piece of biological evidence would be determinative of guilt or innocence, the evidence is reported either lost or destroyed, and without laws specifically to prevent it, precious DNA evidence is surely being thrown away, wittingly or unwittingly, every day. For Marvin Anderson, it was pure serendipity that the critical evidence was preserved and discovered. That is why the preservation provisions of the Innocence Protection Act must be passed.

*BRUCE GODSCHALK:*

In the summer of 1986, less than two months apart, two women were raped in King of Prussia, Montgomery County. The rapes were committed in the same housing complex and, given the descriptions and circumstances, appeared to have been committed by the same man.

Initially the two women were unable to make an identification. In December, following the media broadcast of a composite drawing prepared with the assistance of one of the victims, an anonymous caller claimed that the sketch resembled Bruce Godschalk. Although Bruce had no prior record for sexual assault, his photo was in the police files for a marijuana possession charge. On January 5, 1987, the mug shot, as part of an array, was shown to one of the victims who, after studying it for over an hour, identified Bruce as the assailant. The second victim could not make an identification.

On January 13, 1987, detectives visited Bruce at his home and asked him to accompany them to the police station. After a few hours of interrogation, the detectives claimed that Bruce confessed to both crimes. The full confession was tape recorded, although the hours of interrogation that preceded it were not. Indeed, the detectives asserted that Mr. Godschalk had provided information known only to the rapist. Mr. Godschalk recanted this "confession" and asserted that the detectives had threatened him and had provided the "inside" information to make his confession appear more credible. His motion to suppress the confession was denied.

In May of 1987, Mr. Godschalk was convicted of both rapes and sentenced to 10 to 20 years in prison. The police had recovered semen samples from both rapes but, in 1987, did not have the DNA technology to test this evidence. Mr. Godschalk's conviction was affirmed on appeal.

In 1995, Mr. Godschalk requested the District Attorney to provide the DNA material to the defense for testing. He offered to pay all costs and rightly asserted that the DA had no possible interest in not providing the material. The DA refused. Mr. Godschalk then sought judicial intervention. He appealed the trial court's denial of access to DNA testing through the appellate courts. The state courts denied him the material on the ground that he had "confessed" to the crime. The state's case was very strong and, thus, this was not a conviction based on possible mistaken identification.

In 1997, Bruce contacted the Innocence Project and requested representation. For the next two and one-half years, students and faculty at the project attempted, unsuccessfully, to get the prosecutor to consent to testing. Since all efforts, including appeals to the state courts, had failed, we joined with University of Pennsylvania School of Law Professor David Rudovsky to file suit in federal court to force release of the DNA.

In 2001, Federal Senior District Judge Charles R. Weiner ordered the DA to release the DNA. Upon testing, Mr. Godschalk was cleared and has just been released from prison after serving fifteen years for crimes he did not commit.

Judge Weiner relied in part on the Virginia Federal District Court decision in *Harvey v. Horan*, which was the first federal court decision in the country to recognize a constitutional right to post-conviction DNA testing secured through a civil rights lawsuit. Just last week, Judge Wilkinson of the 4th Circuit Court of Appeals reversed the District court decision and ruled that people like Bruce Godschalk do not have a constitutional right to DNA testing. Had Judge Weiner adopted the thinking of Judge Wilkinson, then Bruce Godschalk, a factually innocent man, would never have had the opportunity to demonstrate his innocence. Judge Wilkinson commented that convicted inmates should certainly have access to DNA testing and in fact encouraged Congress, noting the pendency of this legislation, to grant access. Without the firm language of the Innocence Protection Act, most courts faced with a fact pattern like Bruce's might do what they did in Pennsylvania—deny testing. Unless Congress takes action and passes the Innocence Protection Act, hundreds of other factually innocent men, currently languishing in prison or awaiting execution, will never get the chance to prove their innocence, nor the state to identify the real perpetrators.

Thank you.

Mr. SMITH. Thank you, Mr. Neufeld. Appreciate that.  
Mr. Graci?

**STATEMENT OF ROBERT A. GRACI, ASSISTANT EXECUTIVE  
DEPUTY ATTORNEY GENERAL OF PENNSYLVANIA, HARRIS-  
BURG, PA**

Mr. GRACI. Thank you, Chairman Smith and Members of the Subcommittee on Crime, Terrorism, and Homeland Security. I would like to thank you for giving me the opportunity to comment on H.R. 912.

At the outset, let me say that, to a great extent, the goals of this bill are laudable. My concerns about the bill, however, have little to do with its subject matter. They are, instead, concerns of federalism and the manner in which compliance with some of the provisions of these bills is forced upon the several States, the “carrot and stick” referred to by Chairman Leahy at the Senate Judiciary Committee hearing held last year on the Senate version of H.R. 912.

This bill largely addresses two issues: post-conviction DNA testing and counsel standards in capital cases.

As to the former, the bill establishes procedures for Federal cases and imposes obligations on the Federal courts and Federal prosecutors and then imposes those same obligations on State courts and State prosecutors and inflicts penalties for noncompliance in a variety of substantial ways.

As to the latter, the counsel standards provision, the bill establishes national standards for counsel appointed to represent indigent capital defendants and penalizes the States for any failure to comply with these extra-constitutional, constitutionally mandated standards.

As I said at the outset of my remarks, my concerns are those of federalism and the extent to which this Federal legislation intrudes upon the responsibility of the States to define crimes, their punishment, and the procedures to be followed in their courts.

These same concerns were voiced in 2000 when 30 of the States’ attorneys general signed a joint letter to then-Senate Judiciary Chairman Hatch and then-Ranking Member Leahy in opposing S. 2073, the predecessor of S. 486 and H.R. 912.

Some of the concerns raised in that letter have been address by the Congress, and for that you should be commended. However, many of the objections raised to S. 2073 still persist in 912.

The letter by the attorneys general pointed out that many States already had adopted post-conviction DNA testing statutes and procedures, and others were actively considering them. And that process continues today. It’s continuing in my State.

Pennsylvania’s General Assembly is now considering a post-conviction DNA bill, drafted in large measure by my staff and with Attorney General Fisher’s public support. In my view, that bill goes beyond the provisions of H.R. 912.

In light of these ongoing developments, the attorneys general urged the Congress not to preemptively short-circuit this process with legislation that imposes mandatory obligations on the States. The States are addressing these issues with solutions based on their views of them and with consideration of how best to deal with them in the context of their respective criminal justice systems.

This is consistent with the view that the States serve as laboratories for testing solutions to novel legal problems. If Congress

mandates a particular approach on this subject, experimentation by the States in attempting to deal with these problems will be stifled under pains of substantial loss of revenues generally unconnected to the obligations placed on the States. Motivated by those concerns in 2000, 30 attorneys general opposed any efforts by Congress to circumvent that process and prematurely intrude on it.

Let me explain those concerns. Section 103 of H.R. 912 requires a State applying for specified grants to certify that it will make post-conviction testing available to any person convicted of a State crime in a manner consistent with the newly minted sections of the Federal law contained in section 102. It will be up to a Federal bureaucrat to determine whether the applicant State's procedures are consistent with these Federal provisions. In this regard, I think that the bill being considered in Pennsylvania would provide relief based on positive DNA testing in circumstances over and above those which would be available to Federal convicts under H.R. 912.

However, some might think that the requirements for post-conviction DNA motion under Pennsylvania's proposed statute, which include an assertion of actual innocence not found in H.R. 912, would make that law inconsistent with H.R. 912. To avoid losing important Federal dollars, States would be disinclined to experiment and would simply adopt whatever Congress dictates.

On the merits of H.R. 912, I first observe that any bill on this subject should recognize that DNA is only relevant when the perpetrator's identity was an issue at trial. And I respectfully disagree with my colleague to the right.

Senate bill 800 and Senate bill 2441 recognize this and attempt to take appropriate precautions to ward off frivolous delay-effecting claims. H.R. 912 does not.

Moreover, H.R. 912 generally requires preservation of evidence for extremely long periods of time, which will have a tremendous financial impact on the local police and prosecutorial authorities, who will have to store all of this material for what could be lengthy periods of time beyond incarceration.

In concluding my remarks on the post-conviction DNA provisions of H.R. 912, I echo the sentiments of my boss, Attorney General Mike Fisher of Pennsylvania: Any such statute must, at a minimum, establish a procedure by which the convict may request that DNA testing be performed on physical evidence left at the crime scene where there is a reasonable question as to the convict's identity as the perpetrator. Second, it must set standards within which testing may be administered in order to guarantee the integrity of the test results. And last, it must ensure that testing is only ordered where the result of the test has the potential to produce new, materially relevant evidence of the convict's assertion of innocence.

H.R. 912 fails this test in two important regards. The perpetrator's identity is not specifically delineated as a factor to be considered in determining if relief is appropriate, and the bill requires no assertion of innocence. What has generally motivated the discussion of post-conviction DNA testing is concern with actual, factual innocence and the availability of a procedure which would establish that innocence. That was the context in which the subject was first discussed.

Mr. Chairman, if I can continue for just an extra moment?

Mr. SMITH. Mr. Graci, you'll need to conclude your remarks pretty soon.

Mr. GRACI. Very good, sir.

In Pennsylvania, it was our office, the attorney general's office, and the State's prosecutors who urged expansion of any post-conviction DNA testing bill to include persons serving terms of imprisonment and not just those sentenced to death. We were and continue to be unable to rationalize the continued incarceration of a person who would be proven factually innocent by post-conviction DNA testing of a rape, for instance, any more than we could allow the execution of a death-sentenced convict who would be exonerated by such testing. H.R. 912, however, appears to have jettisoned any link to actual innocence and has, accordingly, lost its theoretical underpinnings.

Mr. Chairman, I'll rely on my written comments as to the counsel provisions in the bill, which we also think are extremely onerous to the States. And I'll respond to any questions on that matter as time permits.

[The prepared statement of Mr. Graci follows:]

PREPARED STATEMENT OF ROBERT A. GRACI

Chairman Smith and members of the Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security.

My name is Bob Graci. I am the Assistant Executive Deputy Attorney General for Law and Appeals of the Criminal Law Division of the Office of Attorney General of Pennsylvania. On behalf of Attorney General Mike Fisher, I would like to thank you for giving me the opportunity to comment on H.R. 912, the Innocence Protection Act of 2001. He would be here himself, but he is hosting the Annual Summer Meeting of the National Association of Attorneys General in Fayette County, Pennsylvania, and is currently at an executive board meeting.

At the outset, let me say that to a great extent, the goals of this bill are laudable. At General Fisher's direction, I have been involved in the drafting of Pennsylvania's post-conviction DNA testing procedures bill which has cleared the State Senate and is awaiting action in our House of Representatives. Though I am a prosecutor and have been for most of my career, I have also been involved over the years in continuing legal education efforts, including those involving capital defense representation and have co-authored a treatise—"Prosecution of a Death Penalty Case in Pennsylvania"—which is used by prosecutors, defense counsel and judges throughout the country.

My concerns about this bill have little to do with its subject matter. They are instead concerns of federalism and the manner in which compliance with some of the provisions of these bills is forced upon the several states—the "carrot and stick" referred to by Chairman Leahy of the Senate Judiciary Committee at the outset of the hearing held on June 27, 2001, on S.486, the Senate version of H.R. 912.

H.R. 912 largely addresses two very serious issues: post-conviction DNA testing and counsel standards in capital cases. As to the former, the bill establishes procedures for federal cases and impose obligations on the federal courts and federal prosecutors. It imposes those same standards on State courts and State prosecutors and inflicts penalties for non-compliance in a variety of substantial ways. As to the latter, the bill seeks to establish national standards for counsel appointed to represent indigent capital defendants and penalizes the States for any failure to comply with these extra-constitutional, congressionally-mandated standards.

Obviously, how the Congress chooses to direct the federal courts and federal prosecutors is of little or no concern to the States. As I said at the outset, my concerns are those of federalism and the extent to which any federal legislation intrudes on the responsibility of the States to define crimes, their punishment and the procedures to be followed in their courts. These same concerns were voiced in 2000 when 30 of the States' Attorneys General signed a joint letter to then-Senate Judiciary Chairman Hatch and then-Ranking Member Leahy in opposing S.2073, the predecessor of S.486 and H.R. 912.

To be sure, some of the concerns raised in that letter by the Attorneys General were addressed by the Congress in enacting legislation to authorize grant funds for

States such as the DNA Analysis Backlog Elimination Grants (Public Law 106-546) and the Paul Coverdell National Forensic Sciences Improvement Grants (Public Law 106-561). However, many of the objections raised to S.2073 still persist in S.486 and H.R. 912.

The letter from the Attorneys General pointed out that many States already had adopted post-conviction DNA testing statutes and procedures and that others were actively considering them. That process continues today. As I noted previously, the Pennsylvania General Assembly is now considering a post-conviction DNA testing bill, drafted in large measure by my staff and with Attorney General Fisher's public support. That bill goes far beyond the provisions of the bills currently pending in the Congress, including H.R. 912. In light of these on-going developments, the Attorneys General urged the Congress not to "preemptively short-circuit this process with legislation that imposes mandatory obligations on the [S]tates." I reiterate that request. The States are addressing these issues with solutions based on their views of them and with consideration of how best to deal with them in the contexts of their respective systems of criminal justice. This point, of course, is consistent with the view, long recognized by the United States Supreme Court, that the States serve as laboratories for testing solutions to novel legal problems. If Congress speaks on the subjects addressed in the pending legislation (assuming it has the constitutional authority to do so which is seriously questioned in some quarters), experimentation by the States in attempting to deal with these problems (which are, essentially, of local, not national concern) will be stifled under pains of substantial loss of revenues generally unconnected to the obligations placed on the States. Motivated by these concerns in 2000, 30 Attorneys General opposed any efforts by Congress to circumvent that process and prematurely intrude on it. These same concerns underscore my comments today.

Allow me the opportunity to explain my concern and those of many of my colleagues. Section 103 of H.R. 912 requires a State applying for specified grants to "certify that it will make post-conviction DNA testing available to any person convicted of a State crime in a manner consistent with" the newly-minted sections of federal law contained in section 102 of the bill setting forth procedures for federal convicts seeking relief from federal crimes in the federal courts based on DNA evidence. Section 103 also requires the State to "certify that it will preserve all evidence that was secured in relation to the investigation or prosecution of a State crime, and that could be subjected to DNA testing" for the same periods of time as set forth in section 102 as applicable to the federal DNA testing procedures. Apparently, it will be up to a federal bureaucrat to determine whether the applicant State's procedures are "consistent with" the federal provisions. In this regard, I think the bill being considered in Pennsylvania would provide relief based on positive DNA testing in circumstances over and above those that will be available to federal convicts under H.R. 912. However, some might think that the requirements for a DNA motion under Pennsylvania's proposed statute which include an assertion of actual innocence not found in H.R. 912 (which we think is critically important in the post-conviction DNA context and which is found in S. 2441 recently introduced by Senator Specter) would make that law, if enacted, inconsistent with H.R. 912. To avoid losing important federal dollars, States would be disinclined to experiment and would simply adopt whatever the Congress dictates. That is clearly not what the Founders envisioned of our federal system.

With this view in mind, I will address concerns with the merits of H.R. 912. First, the legislative findings on which it is based are suspect. If persons have been released from confinement because of newly-available DNA evidence or otherwise, it simply shows that the corrective processes of the States are working as intended. Surely State courts have ordered DNA testing in the post-conviction setting and, when warranted, afforded relief. That certainly does not demonstrate widespread, systemic flaws in the system that handles thousands upon thousands of cases every year. Instead, it shows that meaningful safeguards do exist and provide relief, when appropriate.

Any bill on this subject should recognize that DNA evidence is only relevant where the perpetrator's identity was an issue at trial. S.800 and S. 2441 recognize this and attempt to take appropriate precautions to ward off frivolous, delay-effecting claims. H.R. 912 does not. Moreover, H.R. 912 generally requires preservation of evidence for so long as the convict "remains subject to incarceration." As written, this would include any period of time during which the offender is on probation or parole for the underlying conviction because he or she would still be "subject to incarceration." Such a requirement will have a tremendous financial impact on the local police and prosecutorial authorities who will have to store all of this material for what could be extremely lengthy periods of time beyond conviction. Both S.800

and S. 2441 would only require preservation while a defendant is “serving a term of imprisonment” and for a finite time.

The Fourteenth Amendment enforcement mechanism found offensive to the 30 States Attorneys General in S.2073 remains in H.R. 912, though its reach has been limited to capital cases. Like its predecessor, H.R. 912 places no limit on the number of times evidence may be re-tested and invites a battle of so-called “experts” over whether “the type of testing . . . now requested . . . may resolve an issue not resolved by previous testing.” Indeed, this provision is even broader than its 2000 counterpart. And can anyone imagine the developer of a type of DNA testing who would not contend that his or her test will resolve an issue not previously resolved?

In concluding my remarks on the DNA portions of H.R. 912 I will echo the sentiments of Attorney General Fisher. Any post-conviction DNA testing statute must, at a minimum, do the following:

- establish a procedure by which a convicted defendant may request that DNA testing be performed on physical evidence left at the crime scene where there is a reasonable question as to the defendant’s identity as the perpetrator;
- set standards and parameters within which testing may be administered in order to guarantee the integrity of the test results; and
- ensure that testing is only ordered where the result of the test has the potential to produce new, materially relevant evidence of the convicted defendant’s assertion of innocence.

H.R. 912 fails this test in at least two regards. The perpetrator’s identity is not specifically delineated as a factor to be considered in determining if relief is appropriate and the bill requires no assertion of innocence. What has generally motivated the discussion of post-conviction DNA testing is concern for actual, factual innocence and the availability of a procedure which could establish true innocence. When speaking of actual innocence, as the United States Supreme Court recognized in *Sawyer v. Whitley*, 505 U.S. 333 (1992), we are generally speaking of the “prototypical example” where the State has convicted the wrong person of the crime. *Id.* at 340. That was the context in which this subject was first discussed: the possibility that a person who had not committed the offense could be executed. Everyone agrees that, if technology exists that would establish a convicted defendant’s actual innocence, that defendant should be able to obtain its benefit. In Pennsylvania, it was General Fisher’s office and the State’s prosecutors who urged expansion of any post-conviction DNA testing bill to include persons serving terms of imprisonment and not just those sentenced to death. We were and continue to be unable to rationalize the continued incarceration of a person who would be proven factually innocent by postconviction DNA testing of a rape, for instance, any more than we could allow the execution of a death sentenced prisoner who would be exonerated by such testing. And there is no opposition to an expansion of these protections to claims of innocence of crimes used to enhance sentences currently being served, including those used to seek a sentence of death. H.R. 912, however, appears to have jettisoned any link to actual innocence, unlike S. 800 and S. 2441. Accordingly, it has lost its theoretical underpinning.

The second major component of H.R. 912 is found at Title II and purports to be for the purpose of “ensuring competent legal services in capital cases.” Like its predecessor S.2073, H.R. 912 contains onerous legal representation requirements in death penalty cases. Failure to comply with the requirements for what the bills calls “an effective system for providing adequate representation” in capital cases, including investigative and expert services, may result in obligatory reductions in grants having nothing to do with capital cases or capital representation, including violent offender incarceration grants and truth-in-sentencing incentive grants. Surprisingly, unlike S.800, H.R. 912 does not condition the newly-minted “Capital Defense Incentive Grants” and “Capital Defense Resource Grants,” which are both clearly related to capital representation to any particular level of compliance with the new counsel standards provision.

Though H.R. 912 has substituted what appears to be a broad-based commission for the federal bureaucrat who was to establish the standards under S.2073, the system to be devised is fraught with potential pitfalls. In this regard, I echo the sentiments of Alabama Attorney General Pryor who testified before the Senate Judiciary Committee on S. 486, the Senate version of H.R. 912. This commission, if populated primarily by those opposed to the death penalty, could hamstring capital prosecutions by setting standards that are virtually impossible to meet and refusing to appoint counsel, thereby achieving a *de facto* abolition of the death penalty. Moreover, experience in capital cases shows those of us who labor in those vineyards that establishment of such standards will neither eliminate nor substantially reduce claims

of ineffective assistance of counsel which are raised in virtually all capital cases and successful in but a few.

I note in passing that if the Pennsylvania General Assembly directly tried to impose in Pennsylvania the counsel standards and appointment system that H.R. 912 will impose, the State Supreme Court would, I believe, declare the action unconstitutional as violative of the separation of powers doctrine embodied in our State Constitution. Such legislative action would intrude on the Pennsylvania Supreme Court's constitutional, if not inherent, power to regulate the practice of law and to adopt rules of procedure for the State courts of Pennsylvania. Requiring an "independent appointing authority" (which presumably would be independent of the courts) to appoint counsel having specified "qualifications" would run counter to what has traditionally, in Pennsylvania at least, been a function of the courts. I am not here to argue about what I believe will result in a diminution of power historically reserved to the State courts (which the State courts may argue on their own), but, instead, to point out that this is just another example of how H.R. 912 is an affront to our federalism, the overriding concern of my remarks.

Returning to the specifics of H.R. 912, even if a State should comply with the standards developed by the National Commission, the bill adds an additional layer of litigation to every State capital case tried a year or more after the commission formulated its standards. In every one of those cases, it would be up to the whim of the federal judge to whom the federal *habeas corpus* challenge was assigned to determine if the convicted and death-sentenced murderer was afforded the counsel, investigative, expert and support services required by the commission's standards. Though the bill is less than clear in this regard, the burden would presumably fall to the State to demonstrate compliance. This determination would have to be made in every federal *habeas* case and would have to be made in regard to every level of the proceedings, resulting in the imposition and affirmance of a sentence of death from pretrial motions through trial and direct appeal to post-conviction proceedings and appeal therefrom. If the State did not carry its burden, it would lose the presumption of correctness of State court factual findings on the federal constitutional issues raised by the convicted murderer in challenging the conviction in State court. Moreover, the federal judge would be permitted to examine claims which the State court was precluded from addressing because of violations by the convicted murderer of the State's procedural rules.

This provision is problematic for another reason, as well: its uneven effect on *habeas corpus* jurisprudence. The federal courts will apply the bar and presumption in all non-capital cases but refuse to apply them in some capital cases. They will always apply in cases from non-death penalty States but apply only sometimes in cases from death penalty States. Both of these results are a great affront to the States and constitute punishment for a non-existent problem.

On a point not related to either DNA testing or counsel standards, it must be noted that section 305 of H.R. 912 intrudes on the right of each State to define crimes, their punishments and the procedures to be followed in its courts. That section would require judges in capital cases to provide specific instructions on "all statutorily authorized sentencing options." The bill goes beyond that which is required by the Constitution as interpreted by the Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Kelly v. South Carolina*, 534 U.S. 246 (2002). It conditions grants under the Violent Crime Control and Law Enforcement Act of 1994 on assurances that an instruction not required by the Constitution is given whenever requested by a capital defendant. Like most of what I have addressed this afternoon, this, too, is an affront to State sovereignty in that it requires State court proceedings to be conducted in conformity with congressional mandate.

In closing, I note that more than a decade ago the National Association of Attorneys General, without dissent, resolved to oppose any legislation that would, among other things, "undermine or weaken the procedural default doctrine or broaden any exception to that doctrine," that would "create new requirements concerning the experience, competency, or performance of counsel beyond those required by the United States Constitution, as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984)," or that would "expand the grounds on which habeas corpus relief may be granted."

I was in accord with those views then and remain so now. H.R. 912 will undermine procedural default and eliminate the presumption of correctness accorded to State court fact-finding in capital cases. It will impose counsel requirements on the States far beyond that which the Constitution requires. It will expand federal habeas corpus relief by allowing new claims and by allowing litigation of claims procedurally barred in State court and relitigation of claims already decided on the facts by the State courts where a federal court decides that the State system of defense services is deficient when measured against the requirements established by the

National Commission on Capital Representation. These provisions will render nugatory finality of State court judgments and will drastically increase federal habeas corpus litigation of State court convictions.

I hope these comments are helpful to the Committee.

Mr. SMITH. Thank you, Mr. Graci.  
Ms. Wilkinson?

**STATEMENT OF BETH WILKINSON, FORMER FEDERAL PROSECUTOR, OKLAHOMA CITY BOMBING CASE, WASHINGTON, DC**

Ms. WILKINSON. Thank you, Mr. Chairman and fellow Committee Members. It's a privilege to be here today to testify in front of you not only from my personal experience but also as the co-chairman of the Constitution Project's Death Penalty Initiative.

As much as I support the DNA provisions of this bill, I will leave those issues to the expert, Mr. Neufeld, and have my comments focused only on competence of counsel.

I come to you today with a real passion for this subject, and I come to that because of my personal experience. In 1995, after the bombing of the Murrah Building in Oklahoma City, I was asked by the Attorney General to participate in the prosecution of Timothy McVeigh and Terry Nichols. I spent 2.5 years of my career with the privilege of representing the United States in that case, working with over 700 victims and their families to prepare for trial. And I stood in front to the jury at the end of the McVeigh case and represented the Government when I asked for the sentence of death for Mr. McVeigh. So I have very personal reasons and professional reasons for supporting competent counsel in every capital case.

I learned through that experience that not just prosecutors and defense attorneys and the public wish for competent counsel, but victims know that that is one of the most important things that protects the final verdict that they want to obtain. In every meeting that I had with victims, and we met with them approximately once a month during the 2 years we prepared for trial, not one victim ever asked me to make sure there's a conviction at any price. What they asked us over and over and over again was to make sure that the defendant was the actual perpetrator of the crime and that he was convicted fairly and justly so that there would be no issues on appeal, because what victims in these type of horrible crimes fear the most is that the litigation will go on forever, that there will be appeal after appeal, there'll be a new trial, and they'll never be able to have finality in the verdict that the original jury returns.

That's the reason that I support the provisions in H.R. 912 for competency of counsel. Those of us who have participated in the system know that it's beneficial for public safety, as Congressman Delahunt has pointed out; for the victims; for prosecutors; and for defendants to have fine, zealous counsel for a defendant facing the harshest sentence that our system allows.

In the bill, some of the criticism that I've heard focuses on the federalism concerns, that the Federal Government is designating, in some fashion, the standards for State counsel around the country. I think this is really a red herring. We've seen the system work thus far, and unfortunately, with the 87 or so people who have

been wrongly convicted and sentenced to death, those systems have not worked in the States.

This bill allows an overriding central authority in each State, so that State public defenders or other private counsel will have minimal standards that they must meet to defend a capital defendant.

I would like to commend specifically Congressman Coble's State, North Carolina, who has just enacted provisions very similar to what this bill represents. And those standards don't—or the central authority do not fall prey to some of the criticism that are in the written statements of my colleagues here at the table.

There is fear, for example, that defense attorneys who are anti-death penalty will take over these organizations and there will be no defendants—no capital cases go forward. That's not what's happened in North Carolina. In fact, it's just helped to professionalize the counsel on both sides of these capital cases and ensure that the resources that are most important for prosecutors and defendants are loaded at the front-end of the system. In other words, at trial, when most of us, whether on the prosecution or the defense side, know the challenges matter most, those resources are provided to the defense counsel, their investigators, and the prosecutors.

When that happens, and a verdict is returned and a death sentence is returned, there is much more of a chance and a guarantee for victims and for the system that that conviction will be upheld through the appellate process than when we withhold those resources from defense counsel and from investigators and then put those resources in at the backend during the appellate phase.

I can tell you that in the McVeigh and Nichols post-conviction challenges, none of the appeals were successful. And in large part, that was because the resources were frontloaded by Judge Matsch and others, allowing defense counsel to thoroughly explore all of the allegations.

You might recall that at the very end, before Mr. McVeigh was executed, there was a substantial challenge brought by the defense about documents allegedly withheld. And because Judge Matsch had allowed the defense counsel to thoroughly explore these issues, had provided the resources, the public believed that the conviction was correct. And ultimately, a new trial was denied and Mr. McVeigh was executed.

But from my personal experience and my experience as the co-chairman of the Constitution Project's Death Penalty Initiative, I urge you to support this bill.

[The prepared statement of Ms. Wilkinson follows:]

PREPARED STATEMENT OF BETH WILKINSON

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

The Innocence Protection Act is an important piece of legislation that is necessary to ensure the fair and just administration of the death penalty. While they may disagree on the necessity or propriety of the death penalty, both proponents and opponents of the death penalty can agree that every citizen, particularly those facing capital punishment, should be well-represented. Unless sufficient safeguards are in place to ensure that every defendant receives adequate representation, we cannot be sure that justice is being administered fairly. As a former federal prosecutor this issue is of particular importance to me.

For several years, I represented the government in its prosecution of Timothy McVeigh and Terry Nichols for the Oklahoma City bombing of the Alfred P. Murrah Building. In both of those cases, I saw the importance of effective defense counsel to the defendant, the government, and even the victims. Although all of us were frustrated by the challenges brought by our worthy adversaries, it was obvious that the ultimate convictions would be strengthened by a thorough and extensive exploration of any possible issues prior to or during the trial. The results of Mr. McVeigh's and Mr. Nichols' appeals prove that our belief was correct. None of the appeals were granted and the victims of the Oklahoma City bombing now benefit from the final convictions and sentences adjudicated by the original juries and judge. Nowhere is the fairness of a conviction more essential than in a capital case.

The Innocence Protection Act has the ability to ensure that every defendant facing capital punishment will have competent representation. The provisions in the Act regarding DNA testing are also important measures to ensure the administration of justice, but I would like to focus my testimony on the issue of competent legal services.

The competent representation of defendants facing capital punishment is essential for the efficient allocation of resources in criminal, and particularly capital, cases. Excellent representation at trial is necessary for getting at the truth and allows for a thorough examination of the facts at the beginning of the process. If good counsel thoroughly investigates and pursues a defendant's case, a verdict for the government is likely to be upheld on appeal. This frontloading of resources, in turn, creates a more streamlined process and gives finality to the victims and their families who often fear repeated appellate challenges and new trials ordered years after the initial verdict. My personal experience has shown that a strong challenge by effective counsel at trial puts an end to appellate challenges in a relatively short period of time. This gives the victims and families comfort in knowing that justice has been served and allows them to go on with their lives without having to relive the horrors of these crimes, at additional trials.

Competent legal representation also makes the job of a prosecutor much easier. It ensures that the right person is convicted and justice is served; both essential elements of our criminal justice system. It also saves time and resources by getting challenges resolved in the beginning of the process, rather than years later when evidence may have been lost and memories faded. A prosecutor has a much more difficult time preventing errors when defense counsel is inexperienced and incompetent. If defense counsel is incapable of properly defending a case, it hinders the investigation for the truth and raises the possibility that a conviction will later be overturned on the grounds of ineffective counsel.

No prosecutor or victim wants to see a conviction overturned on appeal. This creates suffering for the victims and families and undermines public confidence in the effectiveness of the criminal justice system. Recent revelations of innocent persons being exonerated after spending years on death row has created questions by the public about how such things can occur. Only an active and thorough defense counsel who adequately represents the interests of a defendant can prevent wrongful convictions by investigating the facts and bringing to light the weaknesses of the prosecution's case.

Having a competent defense attorney also ensures that an appealable procedural error does not occur which could lead to reversal. In many instances, victims cite their concern about convictions being reversed on appeal for what they deem are "procedural errors." Nothing can be more devastating to a victim than another trial for a defendant who benefited from the ineffectiveness of his own counsel. In my experience victims often asked me to do whatever was necessary to ensure a fair and just verdict. Many victims understand the necessity of competent counsel and see how a good lawyer for the defendant ultimately inures to the benefit of everyone involved with the case.

The National Commission to be set up by H.R. 912 will formulate national standards for a system of providing adequate representation. This measure is particularly important for establishing the necessary qualifications of attorneys that represent defendants in capital cases. Many states do not have specific guidelines for the qualifications of counsel, which means that often inexperienced, incompetent attorneys represent defendants facing capital punishment. This results in unreliable verdicts, which undermines public faith that the system is effective and fair.

Although many organizations have attempted to adopt standards and guidelines, many states have refused to implement them. The creation of a National Commission and tying government funding to the establishment of an effective system for adequate representation will give states incentive to create and follow acceptable standards for representation.

A centralized and independent appointing authority is a necessary element of the goal to provide competent legal representation. Requiring state systems to establish such an authority will ensure that across each state there is an independent body monitoring the quality of representation. Appointing attorneys from the centralized authority will enable states to weed out those attorneys who are not competent, making a stronger and more effective pool of representation for capital cases. No one wants to hear another story about capital defense counsel who was falling asleep or under the influence of alcohol during a trial.

The appointing authorities can refuse to appoint attorneys who have not met the standards for competent representation, ensuring that similar problems will not be faced by future defendants. By monitoring qualifications and performance, these authorities will also be able to appoint experienced attorneys who can adequately defend a client in the beginning of the process. Creating an independent authority to appoint counsel will reduce concerns of appointments based on a friendship with the judge or incentives given to counsel to keep their costs low and spend few hours on a case.

Training programs and requirements for completion of such programs in order to meet the necessary qualifications for representation of capital cases will further assist the goal of providing competent representation. Providing training will help ensure that those who represent defendants in capital cases are experienced and knowledgeable, making their representation much more effective. Further, as the law changes over time, attorneys need to be re-educated and kept abreast of those changes in order to be effective advocates.

The Innocence Protection Act, by creating an independent authority to assist in the training of attorneys, furthers this objective. It will ensure that minimum standards for training are met so that no defendant in a capital case will need to worry that his counsel does not adequately know the relevant law or procedure.

Adequate compensation is also a necessary element of any effective system for competent representation. Many states offer shockingly low rates of compensation for counsel in capital cases and courts will often refuse to make available funds for the necessary expert and investigative support that is crucial to an adequate defense. Defending capital cases is not only costly, but also a time-consuming project. This means that often the only attorneys willing to take on such cases are those with little experience and lacking the resources or desire to adequately investigate the facts.

Even experienced and competent lawyers are often over-worked and financially unable to take on many capital cases. Attorneys often face the problem of whether to expend their own resources for investigation and expert support or foregoing that aspect of the defense. This failure of the system often results in inadequate assistance even from the most committed counsel. Providing adequate compensation will help ensure that qualified and able attorneys are available for all defendants facing capital punishment.

The Capital Defense Incentive Grants proposed by the Innocence Protection Act will go a long way towards solving the problem of inadequate representation. These funds will allow the states to increase their compensation of defense attorneys and provide necessary training to give them the tools to be effective. Many states argue that they cannot afford to increase compensation and that the burdens of providing training and a independent appointing authority are too great. This legislation, however, will help the states by providing needed funds.

Some opponents of the legislation have suggested that the states should be left alone to determine the proper standards, rather than having a centralized federal organization establish a single system. However, the recent revelations about the innocence of certain defendants who were sent to death row, many of whom wasted years of their lives in prison, illustrates the weakness of the state systems. The Act provides for a national system while still permitting the states to create specific standards appropriate for their jurisdictions.

While some states have taken an active interest in the problem and are taking steps to add safeguards to the system, others have not. Defendants in those states should not be punished by having incompetent representation that may result in a wrongful conviction. Setting national standards will ensure that a minimum of qualifications and competency is met so that every defendant is given the opportunity to have a full and fair trial.

Concerns have also been voiced that the independent authority might be taken over by anti-death penalty advocates. Many people who defend death penalty defendants are opposed to the system and few others are willing to take on the financial and the time commitment necessary for adequate representation. Others, however, who do not share these views are more likely to get involved if compensation

for such work is adequate, permitting a lawyer to advocate zealously for his or her client.

In times of grave difficulty, such as our nation currently faces, these issues are particularly important in maintaining public faith in our system of justice. During the Nichols and McVeigh trials the entire nation was concerned about the possibility of an attack on the government. It would have been easy to justify minimal representation for the defendants, based on the fears of the American public. The system ultimately worked in this instance, however, because the defendants had zealous and effective counsel and were fairly convicted and punished. This enabled the process to move quickly, with few challenges afterward and gave the public assurance that justice was being served. Even when post-conviction challenges arose in the McVeigh case, the public had faith that the defendant was guilty and the conviction was correct. The resources expended and the thoroughness of defense counsel contributed to the Court's ultimate ruling denying a new trial for McVeigh.

The Innocence Protection Act will ensure that minimum standards for competent counsel in capital cases will be met in every state. The Act rightly uses monetary incentives to enforce standards, both through the increased compensation of counsel and the withholding of grants. This use of monetary incentives directly addresses two problems that exist in the system today, inadequate compensation and a lack of state resources to improve the system.

Incompetent counsel is one of the greatest problems with the death penalty system, creating concerns of fairness and arbitrariness, and raising questions about the correctness of verdicts. These minimal reforms provided for by the Act will benefit defendants, and also victims and society, by ensuring fair trials with a minimum of post-conviction challenges.

In closing, I urge the Congress to pass the Innocence Protection Act in order to safeguard the constitutional right of every citizen to effective assistance of counsel.

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

Thank you.

Mr. SMITH. Thank you, Ms. Wilkinson.

I think I'm going to save my detailed questions for a little bit later on and begin by asking a very general question to Mr. Graci and Mr. Logli. And that is that—and this, Mr. Graci, gives you a chance to elaborate on some of the points that you wanted to—in what ways would you change the legislation that we are considering? And why?

Mr. GRACI. When we reviewed originally last year S. 800, which basically provided for a DNA model for Federal prosecutions, we thought that was an appropriate thing for the Congress to do, and think so today.

But as I said, in Pennsylvania, we have been working on a bill since last year. I had heard as recently as last week that there was some movement on it. You better than I, Mr. Chairman, are familiar with the legislative process and how it sometimes plods along. But we have had input from the defense bar, from my office, from the State's prosecutors, and had agreement at least through the Senate as to a particular provision. It's not identical to H.R. 912 or any of the other provisions, but we think that this is a matter best left to the States within their respective systems, to determine how to address this issue.

The recent bill, I think it's 2441 introduced by Senator Specter in the Senate, is similar to S. 800 in that it provides for old convictions, because most of this, and I agree with my colleague to my left, that these things should be frontloaded, that DNA evidence should be available for testing by defendants as well as prosecution, although we recognize that more times than not it's going to be used to support a conviction rather than to support a defense. But those kinds of things have to go on at the front end of the prosecution.

I agree with my colleague as well with respect to the counsel standards, that we have to frontload that process.

But mandating a commission—and I have no disagreement with what Ms. Wilkinson said. And I'm not sure exactly what North Carolina did, but the point is, North Carolina did it.

As I said in my written remarks, in Pennsylvania, if the Pennsylvania Legislature—and, quite frankly, they tried to do this. Several years ago, the Pennsylvania Legislature directed the State's Supreme Court to adopt counsel standards in capital cases. The Pennsylvania Supreme Court promptly declared that statute unconstitutional as a violation of separation of powers under the State Constitution, because it's for the court to determine matters with respect to practice and procedure in the courts in Pennsylvania.

I recognize that in the Federal system the United States Supreme Court does not have that same authority. But as I said in my written remarks, it would be for the State to establish those standards by its mechanism.

It would be thoroughly foreign in Pennsylvania to have an independent appointing authority to appoint counsel for indigent defendants, capital or otherwise. That has, historically, been a function of the courts. If the courts want to adopt such a system in the State of Pennsylvania, that would be up to them.

But the problem that we in the States have argued against, for a number of years, Mr. Chairman, is the carrot and stick, that the Federal Government thinks that it can come up with the best idea. And oftentimes, if I can be candid, sir, the idea coming out of Washington is not necessarily the best idea for Pennsylvania.

So we would leave these matters—if the Federal Congress—and we've certainly done this before. We have modeled State legislation after Federal legislation. But it's been a determination of the policymakers of the State, elected by the people of the State, to make that determination.

So if you want to set broad standards without punishing the States by taking away grants and the like, that's fine. And we'll look to whatever you propose. But we're doing it ourselves.

And the reason I said that our bill is broader, because the bill—Mr. Delahunt's bill, for 234 Members, as I understand at this point, and its Senate counterpart, only go to provide relief for—if you can demonstrate the defendant did not commit the crime or did not commit an aggravating circumstance or any other non-charge conduct used to enhance a penalty. In Pennsylvania, we allow the use of DNA evidence to establish new mitigating circumstances for a death sentence prisoner, which none of the Federal bills that I know provide for. So I think, in that regard, we're broader.

But we do require, in that bill, should it become law, an assertion of innocence similar to S. 800 and S. 2441, because that's—in the post-conviction context, we're not talking about whether or not the person might be not guilty, which, as you know, Mr. Chairman, is different from a determination of innocence. But in the post-conviction context, the assertion of innocence should be a part of any of these bills.

So we would certainly include, as I had indicated, and it's in my prepared remarks, the portions of any bill would have to have the three parts that Attorney General Fisher has outlined. And we be-

lieve that H.R. 912 and its Senate counterpart are missing at least two of those.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Graci.

The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Thank you.

Mr. Graci, you mentioned that the counsel requirements were onerous, and you said you wanted to elaborate. Could you elaborate?

Mr. GRACI. I will try to, Mr. Scott.

We have, in Pennsylvania, I should say, and in the attorney general's office particularly, have echoed for many years—maybe it's not "echo," because that comes afterwards. But going back at least 10 years in my own experience, we have called for the adoption of standards and the funding for competent counsel on both sides of capital cases, both for the prosecution and for the defense. And I will concede that, over the years, the moneys for the defense have not generally been there, at least coming from the State Legislature. That's not to say that moneys for adequate defense are not there. In Pennsylvania, we have a decentralized system where the funding of the public defender services throughout the State are the responsibility of the several counties. That may not be the best way to do it, but that's the way it's done in Pennsylvania.

But we have long called for adequate representation at the trial stage. I agree with Ms. Wilkinson that this is where you need the best counsel. And we have long advocated in the attorney general's office that the best counsel should be appointed in these cases. And those would ward off—and understand—and I sat, as my curriculum vitae indicates, I sat, in 1989 and '90, on a task force put together by the State Supreme Court and the Third Circuit and again in 1998 on a similar task force put together by the Third Circuit to address matters of capital representation in these matters.

And I have always cautioned the people who, quite frankly, oppose the death penalty, and many of them are on these Committees, that by making sure that you have the best counsel up front, you will eliminate any successful challenges to ineffectiveness of counsel, which are brought, in large measure, for nothing more than delay.

In Pennsylvania—and I'm involved in a number of these matters at the appellate levels. And I've authored a treatise, co-authored a treatise on this subject.

Ineffectiveness of counsel claims are raised in every one of these cases, and in the greatest majority of them, they are rejected. And I have no doubt, quite candidly, Representative Scott, that when—if these standards are adopted, you will still see the very same number of ineffectiveness of counsel claims; there will just be more of them that are rejected.

But we fully agree and we fully support, and the attorneys general going back at least until the early 1990's in Pennsylvania, including Attorney General Fisher, have supported providing an adequate defense in these prosecutions.

We believe, however—and the problem we have with the bill is that it shouldn't be something mandated by the Congress. We question whether or not the Congress has the authority to do it. Al-

though I guess the authority that you utilize is the spending power. If that's an appropriate use of the spending power, then I suspect you have the authority. But these are matters historically left to the States.

And I laud North Carolina. If they have adopted such a standard, and if they've gone to, by whatever mechanism—and I don't know what it is in North Carolina, if it's the Legislature or if it's the court that adopts these standards. But it's for the State to do that.

Mr. SCOTT. Let me ask, Mr. Neufeld, when you see people on death row erroneously convicted, what are the factors that tended to get them there?

Mr. NEUFELD. Well, obviously, the single greatest factor, in terms of the first 108 cases that we've looked at, is mistaken eyewitness identification. And what's interesting about that is that it's not always a single eyewitness who had more than a half-minute to see the perpetrator. In some of the cases, for instance, like Kirk Bloodsworth's case—and Mr. Bloodsworth is sitting here—there were five eyewitnesses, all of whom thought he was the person who had raped and killed this little girl. But semen was recovered from the little girl, which obviously came from the perpetrator. And it turned out it came from someone other than Mr. Bloodsworth. So that's identification.

The other causes, 50 percent of the time, police misconduct or prosecutorial misconduct played a role in the convicting of an innocent person.

A third of the time it was bad forensic science, people working in crime laboratories who said that the evidence matched the defendant when it turned out it didn't or it was grossly exaggerated.

And a third of the cases, unfortunately, it was incompetent defense counsel. But, quite frankly, if you have competent counsel, that is the best defense to prevent misconduct by police or prosecutors. It's the best defense to prevent shoddy work by criminalists working for a laboratory. And it becomes the first line of defense for correcting all the other problems.

Mr. SCOTT. Can I ask one other question, Mr. Chairman?

Mr. SMITH. We'll have—

Mr. SCOTT. Okay, go ahead.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from North Carolina, Mr. Coble, is recognized for his questions.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us.

Ms. Wilkinson, thank you for your kind words regarding my State.

Mr. Neufeld, as an aside, and this is hindsight being applied, I hope that someone in a position of authority at least apologized to Mr. Anderson. Was that forthcoming, or do you know?

Mr. NEUFELD. The Commonwealth attorney, who was not the Commonwealth attorney who prosecuted him 20 years ago, but the current Commonwealth attorney certainly expressed his apologies and has been supportive of Mr. Anderson in the interim.

But you raise a very, very important question, sir, because in many of these cases, when the DNA exonerates the individual, a

Governor will reluctantly sign a pardon or a district attorney will reluctantly consent to a vacatory dismissal, saying not that the person is actually innocent but merely that we no longer can prove his guilt beyond a reasonable doubt. And the reason that is very, very important, sir, is that when you are talking about what the standard should be for testing, all these people—the 108—there is no question they are factually innocent. But people can always come up—good defense lawyers and good prosecutors can always come up with a new theory of a case. And unless we say that it's the kind of evidence that, you know, reasonable people would say undermines the confidence in the verdict, then we're always going to be faced with a situation where people will say, "Not in this case."

Mr. COBLE. I was just curious to know about that. I think the least that can be done would be "I'm sorry."

Mr. NEUFELD. Well, actually, your bill does more than that—

Mr. COBLE. Yes.

Mr. NEUFELD [continuing]. Because your bill says that there should be compensation—

Mr. COBLE. I know.

Mr. NEUFELD [continuing]. For people. And unfortunately, in Virginia, there is no compensation bill, and hopefully we'll get one.

Mr. COBLE. The Chairman imposes this red light against us as he does to you all, so let me move along here. [Laughter.]

I'm not admonishing you.

Mr. NEUFELD. Yes, sir.

Mr. COBLE. Folks, let me ask you this. I am not a scientist. How reliable or accurate is DNA testing? Is it foolproof? Probably not, but let me here from anybody.

Mr. LOGLI. Well, I'm not a scientist either, sir, but I would say that DNA is as close to foolproof, if the samples have not been degraded, if there are sufficient samples.

We just solved a case in Illinois involving seven murders at a restaurant from 12 years ago, because the police back then had the foresight to save a half-eaten meal that they found in the garbage that had just been emptied. They didn't know that DNA technology would be able to take a DNA sample from the saliva left on that half-eaten meal. But 12 years later, that was a crucial piece in solving that crime.

I have a tremendous amount of respect for DNA, as do the prosecutors of this country. So I think it's as close to foolproof as any scientific method we're going to find.

Mr. COBLE. And I'm pro-DNA also. This reverts to the Chairman's comment and to my comment, the concern about the possible revenue in this matter. What is the cost of DNA testing?

Mr. NEUFELD. The cost of DNA testing varies, depending on whether it's carried out by private laboratories or by State-run laboratories. The average criminal case in the jurisdictions that we deal with most frequently are telling us that in a case it could be \$500 or \$1,000 to do the testing.

What's interesting is that the average cost of housing somebody in prison, sir—

Mr. COBLE. I was about to—

Mr. NEUFELD [continuing]. Is about \$25,000.

Mr. COBLE. That was going to be my next question.

Mr. NEUFELD. It's about \$25,000, according to the reports from the various departments of correction.

Mr. COBLE. Per year, annual?

Mr. NEUFELD. Per year. So you take a person like Marvin Anderson, for instance, who was going to be spending the rest of his life in prison; the State saved several million dollars by expending the \$1,000 to get him the test.

And that is the truth in every single one of the 108 exonerations that we have today.

Mr. COBLE. Mr. Logli, I think I can beat the red light. [Laughter.]

Your testimony states that you support the use of DNA testing where such testing will prove the "actual innocence" of a previously convicted individual. If you will, define what you mean by "actual innocence" and how that relates to a defendant being exonerated by DNA evidence.

Mr. LOGLI. Well, sir, I can only give you a couple of hypotheticals. An individual who is asserting actual innocence and asks for the DNA test could be a rapist, somebody who was involved in the actual crime or is accused of being involved in the actual crime. There is DNA material with the victim or on the clothing of the victim. That test could actually show actual innocence, could actually exclude that person from committing that crime.

On the other hand, if you've got somebody who participated in the rape, not necessarily engaged in the penetration but, let's say, restrained the person, if you restrain somebody while somebody else rapes that person, you're guilty of the rape. But DNA testing isn't going to do anything to show that person guilty or innocent. It would be a waste of time, a waste of resources, just something to frustrate the system.

That would be just two hypothetical examples.

Mr. COBLE. The red light is in my eyes, so I'll yield back. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized for her questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I do want to add my appreciation for holding this hearing, for the Chairman holding this hearing. And I want to add my appreciation as well to my friend and colleague, Mr. Delahunt, for giving me the opportunity to join him as an original co-sponsor of this legislation. And to indicate to the Committee that I thank them for their tolerance for the young people that were in this room, part of the Leland-Johnson program from Minnesota, and "Leland" in tribute to Mickey Leland, the predecessor of mine in this congressional seat.

I mention that only because, for those who may know Mickey Leland, this is the appropriate place for anyone who is emulating him through a program to be. And this is an appropriate bill.

I cannot thank you enough, to Mr. Neufeld, for bringing Mr. Anderson here today. And as I listen to the testimony, and since I did not get an opportunity for an opening statement, I'm going to make a brief comment and then pose two questions.

I could not be moved more by your testimony, if you will, on the heavy burden that we are carrying with the death penalty in the

United States without balance. I said to the young people that this legislation goes to whatever your viewpoint may be about the death penalty. We have not chosen to take the radical surgical perspective, which is to offer legislation to end, in its finality, the death penalty. As you may know, in your business, this was a very hot discussion some 2, 3, 4 years ago, as the Governor of Illinois literally lifted his hands in frustration when, I believe, 13 individuals on his death row were found to be innocent, and maybe more to come.

And so this was a thoughtful and deliberative process of trying to see how we solve this problem. For the life of me—I appreciate the testimony of the other two witnesses. But for the life of me, I cannot understand how we can accept the word “burdensome” in the context of justice. How can we ignore the ability to solve the problem because we’re arguing burden?

One of the things that we use frequently in this Congress, and I come from local government, having been a member of the city council, is unfunded mandates. We use that rather willy-nilly. It’s always useful to use it when we oppose something. And we also use the issue of States rights.

But I am firm believer that those are sometimes dilatory tactics when we want to express our viewpoint and we don’t like something. You can’t use dilatory tactics in the question of someone’s life and the justice that we offer to say is the part of the very underpinnings of the Constitution.

So let me both thank Mr. Neufeld and, of course, Ms. Wilkinson.

By the way, I followed the case, as I guess everyone did, extensively, because, as you well know, as a Member of the Judiciary Committee, we had opportunity to review those matters, too.

And I do believe that your concept that victims want finality is really a higher calling than to try to quickly run through a prosecution just to do so. And I was very pleased to hear you, an expert by way of your past experiences, make that claim, because that’s all we’re trying to do here, is to clear the air and to ensure that as we proceed using the scales of justice, using the criminal code, that we are doing it without a shadow of a doubt and, in the instance of the death penalty or a criminal case, beyond a reasonable doubt.

Let me, if I can, to Mr. Neufeld, raise the question of the issue of burden and the issue of preservation of DNA. Are we not sufficiently endowed with modern technology that that burden can be lessened? Help me understand where that would be a burden for a prosecutor, if we were talking about preserving the evidence or being able to do DNA testing at a subsequent time.

Would you also just clarify for me how long Mr. Anderson was incarcerated for?

Mr. NEUFELD. About 16 years.

Ms. JACKSON LEE. Sixteen years.

Mr. NEUFELD. Yes.

Ms. JACKSON LEE. So he lost 16 years of his life. And the time frame where the gentleman came forward was what time frame?

Mr. NEUFELD. He came forward 5 years after the conviction to confess, but the judge rejected that confession.

Ms. JACKSON LEE. And how much longer thereafter?

Mr. NEUFELD. Another decade.

Ms. JACKSON LEE. Another decade. Sixteen years of an individual's life. I see his mother, and I don't know if those are—

Mr. NEUFELD. It's his sister and nephew.

Ms. JACKSON LEE. His sister and nephew.

So let me—I did this before one time, but let me publicly apologize to you. Let me offer my deepest apology. And if my apology can extend to a jurisdiction beyond which I have realm, let me offer those apologies to you and, I would say, on behalf of this Nation as well.

I'd ask the ability, Mr. Chairman, that he may answer the question.

Mr. SMITH. Okay, if you'll answer the question.

And then, Ms. Jackson Lee, we're going to continue, and we will have a second round.

Ms. JACKSON LEE. I do appreciate it. Thank you very much, Mr. Chairman.

Mr. NEUFELD. Some States already preserve the evidence routinely, and they have not deemed it to be burdensome at all.

I might point out that all the rape kits in a particular State, even a large State, would fit easily in this room. They do not need to be refrigerated. They do not need—any room like this which is air-conditioned, if you close the windows—you don't even want windows in a room like that—will maintain the evidence for 20, 30, 40, 50 years without any kind of additional expense.

You asked a question in your own comments, Mr. Chairman, about an automobile and the burdens of preserving an automobile. No one is suggesting you preserve an automobile.

What police departments do routinely in cases like that is—in fact, they're doing it right now, because we have a laboratory in New York that intends to use DNA testing to solve car thefts. And what they're doing is, they're going to go in there and they're going to swab the steering column, where the person played around with the ignition, okay? That's what they're going to do. And they're going to save those swabs. And if they believe that the perpetrator handled the rearview mirror, they'll swab that.

They don't have to preserve the car. They don't intend to preserve the car. It's a small amount.

Mr. SMITH. Mr. Neufeld, you don't know of any instance where a large object would have to be preserved, then?

Mr. NEUFELD. I know of none. And I don't think any exist. It is the—

Mr. SMITH. You've answered my question, and the gentlewoman's question. We'll need to move on. But, thank you.

Ms. JACKSON LEE. We both thank you.

Thank you, Mr. Chairman, for your indulgence. I look forward to a second round. Thank you.

Mr. SMITH. Okay, Ms. Jackson Lee, thank you.

The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I'd like to ask Ms. Wilkinson and Mr. Neufeld, the proponents of the legislation, about the miscellaneous provisions in the bill. I certainly see, and I see a considerable amount of merit in the concern

about preserving DNA and making sure that there is the ability to use it to prove innocence, and I certainly am concerned about provision of appropriate counsel.

I share Mr. Graci's concern about federalism, although I will tell you, Mr. Graci, that just this morning this Committee did not pay a great deal of attention to federalism. [Laughter.]

It passed a very good bill, but it was clearly a Federal bill dealing with another issue of interest to the Committee.

So I'm wondering why these miscellaneous provisions were included at the end of the bill. These are more directed not toward simply the protection of innocence and establishing innocence, but they are value judgments. And I certainly respect the value, and I respect the judgments of those who made them. But there's going to be substantial disagreement about whether any juvenile should ever, who is a mass murderer, should ever face the death penalty. There's going to be substantial disagreement about what the definition of mentally retarded is and what standard one has to meet before one would qualify for the protection against the death penalty based upon that. And there's certainly going to be substantial disagreement about the provision in this bill that says that we should create a new option in drug kingpin cases.

So why do we have these miscellaneous provisions at the tail end of the bill? Can you help me with that, Ms. Wilkinson?

Ms. WILKINSON. Yes, sir, as to some I can. I'm not sure I can speak to every one.

As you can see, the first few miscellaneous provisions deal with compensation, which is really a key element to effective assistance of counsel, which I'm sure you recognize. It's very difficult to get good counsel to defend defendants charged in capital cases if they're not fairly compensated. It's very difficult, just as I think Mr. Logli said, for prosecutors—

Mr. GOODLATTE. Since I'm limited in time, why don't you focus on the three points that I just raised?

Ms. WILKINSON. Yes, sir. Let me turn to the juvenile offenders and mentally retarded.

In our project with the Death Penalty Initiative, we studied all types of provisions that might be added to reform the current state of the death penalty in the United States. And one thing—

Mr. GOODLATTE. But see, the purpose of this bill is to make sure that innocent people are not prosecuted and convicted and executed under the death penalty laws of various States. These provisions are geared more toward changing the value judgment that has been already passed upon by the Congress as to who should be subject to the death penalty. And I wonder why you've mixed the two.

Ms. WILKINSON. Well, most respectfully, I don't believe the bill is just aimed at protecting the innocent. It's also aimed at protecting the integrity of the system and the public's view of the fairness of our system. When you have competent counsel, it doesn't mean only innocent people will be found not guilty. It means that guilty people will be found responsible for their crime but in a fair way.

And so these provisions, as to juvenile offenders and mentally retarded, go to, I think, the public's faith in the integrity of our system. Congressman Delahunt was talking about that earlier in his

statement. And what we've seen, because of the problems in Illinois, Texas, and elsewhere, is that the general public, who doesn't participate in the criminal justice system, is shocked by some of the things that go on in death penalty litigation. And there is a real debate about whether a juvenile offender, regardless of the type of crime that they commit, or someone who is mentally retarded should receive the ultimate sanction under our system.

So if we are aiming at addressing the integrity of the system and the faith the public has in what we do as prosecutors and defense counsel every day, these are essential elements that at least should be debated.

Mr. GOODLATTE. If the ability to move this bill forward to address in some fashion—and I agree with some of the concerns raised by others about exactly how we do the provisions related to DNA testing and how we assure competent counsel. But if the ability to move forward on that legislation is dependent on whether or not these miscellaneous provisions repealing certain aspects of our death penalty laws are to be included, do you insist that they be included?

Ms. WILKINSON. Well, I think I'm beyond my area of expertise since that's something you—

Mr. GOODLATTE. Well, that's up to you. This is simply—

Ms. WILKINSON [continuing]. Congressmen compromise or decide on every day.

Mr. GOODLATTE. Well, Mr. Neufeld, do you want weigh in on it?

Mr. NEUFELD. I don't dare. [Laughter.]

You know, I'm not going to pretend Solomon-like on such important issues. That's something that you folks do routinely.

Obviously, many people think that these matters are extremely important. The only one of them on which I would comment even briefly on has to do with informing jurors that they have an alternative to death, which is life without parole. Even people who I know who are in favor of capital punishment feel that a jury should at least be informed of the options, and nothing more than that.

So it's like the truth function of these proceedings. That's what it's about. DNA is about truth. Competent counsel is exposing the truth as much as possible, and telling the jury that, if they don't wish to execute, that a person will really be put away for life and won't be paroled on any technicality but really will go away for life. It's part of that truth-seeking function, nothing more.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I'm proud to say that every individual that I convicted, during my tenure as district attorney, for first degree murder has never been released. Of course, Massachusetts is a noncapital-punishment State.

And I'd point out to my friend and colleague from Virginia that one particular provision under title III—the miscellaneous provisions, section 307, relative to the execution of juvenile offenders and the mentally retarded—is a sense of Congress provision. And I'd be happy to discuss that—

Mr. GOODLATTE. My sense may not be the same as yours.

Mr. DELAHUNT. I'd be happy to take a long walk with my friend from Virginia and discuss what we could do with that particular provision.

In any event, I'd like to get back to—the issue of cost has been raised by both the Chair and Mr. Coble.

Let me direct this to Mr. Neufeld. Can you inform us what the experience of the State of New York is relative to DNA tests? I think some Members of the Subcommittee and other colleagues in the House have concern that there will be, to use their term, a flood of applications for DNA testing. Am I correct when I state that there is a similar even more expansive DNA law in New York and that's been in existence since 1994? Am I correct in that statement?

Mr. NEUFELD. That's correct.

Mr. DELAHUNT. Can you relate to us what the experience in New York is, and how many applications there have been, and what your cost estimate would be?

Mr. NEUFELD. I can not only give you the numbers from New York but also the numbers from Illinois.

And it's very important, because a lot of the arguments that have been made are not only speculative but they're actually not supported by any of the factual evidence. There's talk about how this is going to be a floodgate of petitions, how there's going to be overwhelming burdens in terms of storing evidence. And in fact, as I pointed out about the evidence, that's not the case.

It's also not the case in terms of the people who are requesting this relief. New York has the first statute in the country. We're averaging fewer than 20 petitions per year being filed Statewide. Illinois has the second-oldest statute in the country. They're averaging about 16 to 17 applications a year Statewide.

I don't know if you have the document, but the State of Rhode Island recently did a survey of how many people have been applying for DNA testing in the 20-some-odd States which currently have post-conviction DNA access statutes, and the numbers are very few with one exception. And that exception is Texas.

And the reason that Texas is higher is that Texas actually, when they passed the statute, they were required to notify every single prisoner in the State that this new bill existed and that they could file pro se applications. And so a lot of people filed pro se applications. None of the other States had a similar provision.

More importantly, in places like California what they did is the applications that come to the court are referred to the Innocence Projects of northern and southern California, and they screen them. So, ultimately, very few applications ever get filed in the court.

Mr. DELAHUNT. Let me just pursue that. You were saying, in New York, there's an average of around 20?

Mr. NEUFELD. Fewer than 20 a year.

Mr. DELAHUNT. Fewer than 20 annually, and an estimated cost of anywhere from \$500 to \$1,000.

Mr. NEUFELD. If it's done by the State, it could be \$500 to \$1,000. If it's done privately, it could be a few thousand dollars.

Mr. DELAHUNT. So we're talking, in real terms, maybe \$50,000 to \$100,000 annually, in terms of the experience of the State of New York, which has had this on its books since 1994?

Mr. NEUFELD. Actually, it's less than that in New York.

Mr. DELAHUNT. Okay. I thank you.

And I'd like to direct this question to the district attorney. Or is it State's attorney in Illinois?

Mr. LOGLI. State's attorney.

Mr. DELAHUNT. State's attorney.

On page 4 of your written testimony, you state that, "Law enforcement should be permitted to destroy biological samples from closed cases, provided that convicted individuals are given adequate notice and opportunity to request testing. Otherwise, police agencies and the courts would be required to retain virtually all evidence for all time."

Let me suggest, Mr. Logli, that that provision is incorporated within H.R. 912.

Mr. LOGLI. Right. And I'm not aware that we have any problems with the preservation of evidence sections.

In Illinois, we've had a preservation of evidence statute that has clearly delineated years in certain categories of crimes.

Mr. DELAHUNT. Fine. I just wanted to be clear about that.

And I see my time has expired, and I'll look forward to the second round.

Mr. SMITH. Thank you, Mr. Delahunt.

Let me address a question I think to the first three panelists, because Ms. Wilkinson didn't mention DNA, so I'll limit my question to the three gentlemen.

And that is this: Would you give me some examples of instances where an individual has been exonerated because of DNA evidence but who was still not innocent?

Mr. Logli, do you want to think about that?

Mr. LOGLI. Exonerated by DNA evidence but still—

Mr. SMITH. But still not innocent. In other words, there was one study that showed that 60 percent of the people who were exonerated by DNA were later reconvicted, for example.

Mr. LOGLI. Oh, okay.

Mr. SMITH. Or there might be an example of someone who was exonerated because it wasn't that individual's DNA, but he was still an accomplice of the crime, even though that wasn't his DNA. In other words, what are some examples of where individuals have been exonerated but they are not necessarily innocent.

Mr. LOGLI. Okay, I'm going to have to defer on that, because I'm not familiar with that statistic, and I'm not familiar with any particular cases. I'm not sure if that's a correct statement or if people have been released—

Mr. SMITH. Okay. Well, let me try Mr. Neufeld and Mr. Graci.

Mr. NEUFELD. I think, and correct me if I'm mistaken, that what you're asking is, have people been excluded through DNA testing, not necessarily exonerated.

Mr. SMITH. That's not what I'm asking. And I don't know how to restate it other than the way I just did, which is to say that there are a number of instances and other examples, which you may, yourself, have given—I don't know—where individuals have

been exonerated but who have either later been found guilty because of other evidence or who—and as you pointed out the distinction a while ago, to be found not guilty is not necessarily to be found innocent. And I'm just wondering what examples there might be of that.

Mr. NEUFELD. Well, of the 108 people who have been exonerated through DNA testing, none of them have ever been convicted of any of the crimes for which they were exonerated.

Mr. SMITH. That wasn't my question, and I know about the 108.

Mr. NEUFELD. I'm sorry.

Mr. SMITH. Maybe I'm having a hard—Mr. Graci, do you want to try? [Laughter.]

Mr. GRACI. Mr. Chairman, I guess I don't know of a specific answer to your question. The difficulty I'm having is with the use of the word "exonerated." I'm certainly familiar with a number of cases in my State, including the one to which Mr. Neufeld referred, where one might say that the defendant was exonerated in that the court directed that he be awarded a new trial. I'm aware of a number of instances where that has occurred. And I believe in the particular case that Mr. Neufeld referred to, the prosecutor determined that he didn't have sufficient evidence to go forward to retry the case.

I can think of another case in my State that's a reported case, and I can give you the opinion, because I think it points out a problem in this area. It's a case called *Commonwealth v. Reese*. I can communicate with your staff counsel as to the actual cite. I don't have that with me today.

But in Reese—and I don't mean to be graphic, but it's necessary in this context. It was a rape case. Reese claimed that he was not the rapist. There was a DNA swab obtained from the woman. The DNA swab did not match Reese.

Now, at the trial, all that the prosecution has to prove for a rape is penetration, however slight. It doesn't have to prove that any—I'll try to be careful here—that any DNA sample was left. The prosecutor didn't go into—and we have rape shield laws in Pennsylvania that prohibit examining the woman about her prior sexual activity.

It's reported in the Reese case that the victim did in fact explain after the fact why the defendant's DNA wasn't found. He hadn't left a sample, and I'm trying to pick my words carefully. And she admitted, post-conviction, to having had relations with her boyfriend, obviously a thing that a lot of people aren't going to be inclined to wish to talk about publicly. And that would have accounted for the DNA sample that did not match the defendant.

Was he exonerated? Well, a new trial was granted. And in that particular case, this court said you can't even consider that explanation—

Mr. SMITH. Right.

Mr. GRACI [continuing]. Which I think—

Mr. SMITH. You get at the answer that I was looking for, and I appreciate that.

Mr. Logli, I want to go really quickly to you. What changes would have to be made in this bill in order for the National District Attorneys Association to endorse it? And if you could just—

Mr. LOGLI. Sure, very briefly.

Mr. SMITH [continuing]. Go through some items.

Mr. LOGLI. We'd want to work on the standard for DNA testing. The standard we're living with in Illinois basically says that the test would have to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. And identification would have to be an issue in the trial. We would want a standard similar to that. I think we can come up with something that would satisfy everybody.

Number two, on counsel competency standards, Ms. Wilkinson basically makes my case. The States are already doing it. And in many cases, the States are doing it, I think, in a better fashion than what the Federal legislation would imagine. And I believe—on behalf of America's prosecutors, we believe that this is something that the States should do.

Illinois has done it. As I pointed out, we're the only the only State that has counsel competency standards for assistant prosecutors.

Mr. SMITH. Real quickly, what are a couple more ways you would change the bill?

Mr. GRACI. I think that those are our two main objections. I won't get into the miscellaneous provisions, the sense of Congress, et cetera. But those are, I think, our main problems.

Mr. SMITH. Okay, thank you, Mr. Logli.

Mr. LOGLI. You're welcome, Mr. Chairman.

Mr. SMITH. The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Mr. Chairman, I want to follow up on the onerous counsel.

The bill has guidelines. What's onerous in here?

Mr. LOGLI. Well, it also sets up an independent commission, independent from the courts. The courts in the various States jealously guard their right to dictate who practices law and how they practice law in those States. And I believe that an independent commission established under the statute really—which then issues directives or standards, really goes against the authority of the State courts. Plus, I think the way the commission is set up, we're concerned that there's not enough input from other than defense counsel.

Mr. SCOTT. Now, you have a procedure for establishing competent counsel in Illinois.

Mr. LOGLI. Yes, sir.

Mr. SCOTT. And you've seen other competent counsel statutes.

Mr. LOGLI. Actually, it's a supreme court rule.

Mr. SCOTT. Don't they all kind of follow the same guidelines?

Mr. LOGLI. I think many of them. And I pointed out that 22 of the 38 States with the death penalty have standards. And many of them have the same elements: number of years' experience, number of trials tried, number of capital trials tried.

Mr. SCOTT. And you would expect pretty much the—so, I mean, are we talking semantics as to who is going to set the standards?

Mr. LOGLI. I think that is true.

Mr. SCOTT. So it's not onerous to have good standards?

Mr. LOGLI. No, sir.

Mr. SCOTT. Ms. Wilkinson, the gentlelady from Texas said that we were looking at the Oklahoma case. As you will remember, we actually participated in the case, serving as an intermediate court of appeals—

Ms. JACKSON LEE. I was trying to be polite.

Mr. SCOTT [continuing]. Making rulings, helping the judge along the way. So we were doing more than just following. We were serving as judges, juries, and intermediate courts of appeal.

I don't know if you want to answer it or somebody—we mentioned the kingpin statute, where we require the judge to have some discretion. Is that not required by constitutional interpretation?

Ms. WILKINSON. No, not currently, sir. And I think it raises a very good point, going to your earlier question.

In North Carolina, there was a centralized independent appointing authority used, contrary to—or, what these prosecutors here are objecting to, to take that decision away from the courts where there are some allegations that judges appoint their friends or, you know, supporters. As you know, many judges are elected in State jurisdictions.

And I think what troubles me the most is that some of us are coming before you today and suggesting that the constitutional minimal is sufficient. I think Justice Sandra Day O'Connor was urging us to reconsider that in saying: Look, as a Justice on the Supreme Court, all I can decide is the constitutional standard.

But that doesn't mean, as a matter of policy, that the United States Congress and the public doesn't want a higher standard when we're using the most severe penalty available under our system.

So just because the State of Illinois or another State has the minimal constitutional standards as directed under Strickland, which is the United States Supreme Court addressing effective assistance of counsel, I don't think we should be proud of that. That has obviously led to some of the problems we see here today with some of the people who are standing up, having been found innocent years and years after their conviction.

What we want is a standard that will make the public sure and confident in our judicial system that we are giving the best competent counsel to defendants as they face serious penalty.

Mr. SCOTT. And back to the constitutional minimum, would—the bill changes the law, the kingpin statute, to allow the judge discretion in applying the death penalty. The present law, as I understand it, says, the jury says death; the judge has to impose death. What the bill will do is to allow the judge discretion in imposing the death penalty or not. There's been some objection to that. And my question was whether or not that was actually required, that discretion for the judge was actually required by constitutional interpretation.

Mr. DELAHUNT. Would my friend from Virginia yield?

Mr. SCOTT. I will yield.

Mr. DELAHUNT. I think that you might have misspoke, because it's my reading of the provision that it doesn't provide discretion to the judge to impose at his option either a death sentence or a life without parole. What it does do is it brings the drug kingpin stat-

ute into line with other Federal statutes that carry as its sanction the death penalty.

Ms. WILKINSON. I don't think, Congressman, that that's any change in what we understand the law is. For example, in the McVeigh and Nichols cases, once the jury imposed the death sentence against Mr. McVeigh, Judge Matsch had to impose it. He actually announces the sentence. In the Nichols case, they returned a life sentence. Again, he—I mean, they didn't make a determination. He pronounced a life sentence.

And I think in this provision, all they're trying to clarify is, when the jury returns that sentence of death, a judge doesn't have discretion, which is consistent with my understanding of Federal law in other death penalty cases. It's that the drug kingpin statute was the first death penalty-eligible offense passed under the Federal system. As you may recall, that was one of the very first, and then I think it was '94 when you all passed another crime bill that you added maybe 50 different offenses that had capital punishment for Federal crimes. And so I think this is just going back to fix that original penalty.

Mr. SCOTT. I have another question.

Mr. SMITH. The gentleman has another question, and rather than have a third round, I'd like for the gentleman to go ahead and ask the question now.

Mr. SCOTT. Mr. Neufeld, of the people that come to you with a DNA request, how many are exonerated?

Mr. NEUFELD. We have about 200 cases pending. We have about 4,000 cases in the hopper that are being processed at one stage or another. And so far, we've brought—our place has brought about 120 cases to lab. And we have gotten exclusions and exonerations in over 50 percent of those cases.

So in more than 50 percent of the cases where we eventually got the laboratory, and they did the testing, the testing results completely exonerated the individual. The convictions were vacated, and the charges were dismissed.

In those cases, it wasn't a situation where there was other evidence to suggest that the person had in fact committed the crime.

Mr. SCOTT. You started with how many? And you narrowed them down—

Mr. NEUFELD. Well, there are about 120 cases where we've gotten to lab. And our own project is responsible for approximately 60 exonerations of the 108.

So in 50 percent or more—maybe it's 53, 54 percent of the cases—we've gotten exonerations. And the rest of the time, the DNA testing confirmed the guilt of the individual.

Mr. SCOTT. Mr. Chairman, I'd like to follow through, if I can.

Now, how did you screen the people, because some of them were screened out because DNA evidence wasn't there and, presumably, had it been there, they would be in the 50 percent category, too?

Mr. NEUFELD. In 75 percent of the cases that we screen and accept, we eventually have to close out those cases because the evidence in the intervening years has been lost or destroyed. There's no reason to believe that our 50 or 55 percent batting rate would be any different for the hundreds and hundreds of cases that we had to close out.

The last comment, Congressman Scott, I'd like to make in response to that question has to do with what are the criteria. I can only tell you that the criteria are such that in many of these cases, when we've asked for testing, we've been opposed. We've been opposed because certain people have said that the DNA testing would not prove actual innocence. And if it doesn't prove actual innocence, you're not entitled to testing.

The best example of that is sitting right here in this room today with Ray Krone. In Ray Krone's case, the victim was attacked and murdered in a bar in Phoenix, Arizona. And they found some saliva on her shirt. She was bitten, and they found some blood drops in her pants, but there was no semen. And so when they wanted testing, the thinking of the prosecutors was, this will not exonerate him, because he still could have killed her without it being his blood or his saliva. That was the argument even though the theory at the trial was that one man acting alone had bitten her and had struggled with her and had bled on her, and it was his blood. So on a technical level, prosecutors were saying: You're not entitled to the testing, because even if he's excluded in the DNA, he's not exonerated.

The DNA testing was done for Mr. Krone. He was excluded. But it wasn't enough. But what happened is, they then ran it through the convicted offender database, and they got a hit on a guy who lived a few blocks away from the bar, who turned out to be the real perpetrator.

The point is, and this goes to something also that the Chairman asked before, one of the best things about this bill is that it has two tiers to it: one tier for getting a DNA test, and a second tier for the court conducting some kind of hearing after the results come in which are favorable, to decide what, if any, relieve should be accorded this individual.

There could be cases where you have a broad review for allowing testing, you get an exclusion, and then you decide, nevertheless, he's not entitled to his freedom because it just hasn't met that burden. This statute will give courts the right and the power to grant the testing yet, nevertheless, keep somebody in prison.

Mr. SMITH. Thank you, Mr. Scott.

Ms. Jackson Lee?

Ms. JACKSON LEE. Not knowing that Mr. Krone was in the audience, and I assume you've just suggested that he is, let me be complete and suggest and offer my apologies to him as well.

Mr. SCOTT. Will the gentlelady yield?

Ms. JACKSON LEE. Be happy to yield.

Mr. SCOTT. And Mr. Bloodsworth is here also from Virginia.

Ms. JACKSON LEE. Mr. Bloodsworth is here.

Mr. DELAHUNT. Please raise your hands, gentlemen.

Ms. JACKSON LEE. Let us all see you so that I can be complete in my apology. I did not mean to disregard any of you for the experiences that you've had.

Have I lost anyone? Have I not mentioned—

Mr. SCOTT. And I'd like to join in that apology. Thank you.

Thank you for yielding.

Ms. JACKSON LEE. Thank you. I'd be happy to be joined by the distinguished gentleman.

Let me proceed with a line of questioning and, of course, commentary, because I believe that 236 co-sponsors of this legislation really evidence a sentiment in this Congress to bring people from different political perspectives around the question of fairness and the question of ensuring that our system is without question, if it can be, if you will, if it is above reproach.

Mr. Logli, let me ask the question, because I did not hear your first answer to the Chairman's question, what it would take. And I have an abbreviated period of time, so what it would take for the Association of District Attorneys to support this legislation—you offered two; I didn't hear the first one, I believe.

Mr. LOGLI. The first one was the standard to be used to bring about DNA post-conviction testing.

Ms. JACKSON LEE. Okay. How would you craft a standard?

Mr. LOGLI. We would want the standard to talk about identity being an issue and that the evidence to be offered by the DNA tests would, if that evidence is exculpatory, prove actual innocence.

Ms. JACKSON LEE. Why do you think the bill now proves to be too difficult for you to operate under?

Mr. LOGLI. The bill, right now the standard is: ID is not required to be an issue, identification is not required to be an issue; and that the evidence has scientific potential to produce new, noncumulative evidence material to the claim of the prisoner, that the prisoner did not commit the offense for which he was sentenced or another offense used at sentencing.

That language talks about bearer materiality and the claim of the prisoner. We believe that the standard similar to one that is in Senator Feinstein's bill, or even the standard used in Illinois, that talks about evidence materially relevant to the defendant's assertion of actual innocence is important in order to provide finality and not to further frustrate victims.

Ms. JACKSON LEE. Let me make this comment, and I hope that, as the bill makes its way through markup, we will be open-minded on your representation or your suggestion. I would think the second tier of that material gives us a sufficient criteria and limitation, material to the question of innocence, the question of the issue raised by the defendant. And I would only hope that the Association of District Attorneys would be open-minded enough, with your leadership, coming from Illinois, knowing that your Governor went the extra mile to in fact call for a moratorium on the death penalty, because he was so appalled at the number of innocent victims that were apparently on your death row. I assume that if other States had done the same, we would be likewise appalled.

I think this question of—I will look at Senator Feinstein's language. But I think the material aspect of it, in my perspective, answers the concerns and provides you with enough guidance for that.

And I apologize for not being able to continue to dialogue with you, but let me move on to the questions that I had for Ms. Wilkinson, particularly in her experience in Oklahoma City, which most of certainly have at least media exposure to, and some closer than that.

What is the ultimate importance or the level or degree of importance that you would attribute to competent counsel? How important is that, for it to be included in this legislation?

Ms. WILKINSON. Well, I think along with a fair and independent judge, it's the most important thing for the ultimate fairness and faith in the verdict.

As you may recall, in Oklahoma City, the tragedy was of such a magnitude that even some victims were concerned that the Federal Government had been involved, for example, in the bombing. I mean, allegations that shocked those of us that have been public servants.

But after you get over the shock, you realize that you have to be able to address all of those issues, so that everyone, not just the prosecutors who are working closely with the agents and the law enforcement personnel, believe that the defendants are guilty of the crime, that everyone who may not have access to all the information you do as a prosecutor believes so.

And the way that's done, even though it's very frustrating at times when you're a prosecutor, and all of us who have been prosecutors have sat across a table and listened to what we believe are frivolous motions from defense counsel. But in the end, when you're experienced, like my colleagues are here at the table, you realize that that is very beneficial in the end, airing the concerns that the defendant may have or the public may have, and leading to the final correctness and belief in the fairness of the verdict.

Ms. JACKSON LEE. May I, since we're not going to have—I think this is the second round, and we're not going to have a third round, may I just ask, what did you do to ensure that there was at least the competency of counsel issue taken care of in that case? The Nichols case is at what status right now?

Ms. WILKINSON. The State prosecution in the Nichols case is trying to proceed, although there are some issues about the funds that the State has for the prosecution as well as the defense in that case.

In our case, in particular, Judge Matsch was a very strong judge, and he didn't give us much say. He immediately granted all of the defense's requests for the counsel they needed, investigative resources, experts that they needed. But we also adopted a virtual open-file policy in discovery, allowing the defense to have access to 30,000 witness reports, 550 laboratory reports, and all of the other evidence that we had collected. Much of it was useless in the end, but it provided the defense with some fodder for defending their clients.

And I always tell the story that some of the John Doe 2 sightings, for example, when we turned them over, the defense was surprised, because they were often an ex-wife who said, "You know, my husband looks a lot like John Doe 2." [Laughter.]

But in some of those frivolous reports were some useful items for a defense counsel. And by turning those over to very competent counsel, as we saw in the Nichols case, where Mr. Tigar and his colleagues were able to return at least a life sentence for Mr. Nichols, they provided a zealous defense for their client.

Ms. JACKSON LEE. And it helped you get through the FBI citing of additional documentation?

Ms. WILKINSON. Absolutely. And then post-conviction challenges we faced over the last few years.

Ms. JACKSON LEE. Mr. Chairman—

Mr. SMITH. Thank you, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, one quick question—

Mr. SMITH. Ms. Jackson Lee, you're welcome, along with other Members, to submit questions in writing.

Ms. JACKSON LEE. Well, may I raise a question and then I will ask the question, and hopefully you'll give it to me in writing, which I usually never receive.

Mr. SMITH. Okay.

Ms. JACKSON LEE. But in any event, let me just simply say that Mr. Graci mentioned the question of burden. And it was somewhat answered by Mr. Neufeld, and I wanted to get from him a more defined definition of what he considered a burden of having to retain, as I understand, the various evidence that would come into question through the DNA. And I think that's very important for us to know.

Mr. SMITH. I would hope the witnesses will answer the question without necessarily receiving it in writing. And If you will respond—

Ms. JACKSON LEE. Pardon me?

Mr. SMITH [continuing]. To what the gentlewoman has suggested—

Ms. JACKSON LEE. Pardon me?

Mr. SMITH. I was saying, I hope they will respond without necessarily receiving the question in writing, but just respond to your verbal question.

Ms. JACKSON LEE. I would hope so. That's a very important question.

I'll conclude by simply saying thank you. And Martin Luther King wrote a book, "Why We Can't Wait," and I don't think we can wait in this instance. We need to pass this legislation.

Mr. SMITH. Thank you, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you.

Mr. SMITH. We will end with questions by Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

And just let me make an observation. This has truly been an outstanding panel. All of you have made a real contribution here today. And I'd like to just make one observation, and then pose two different questions.

And the observation is directed to the comments and the concerns that Mr. Graci I think stated well in terms of federalism. And when I arrived here, I was shocked to learn that federalism is not alive and well in Washington. And I think it's important to remember that we literally appropriate tens of billions of dollars on an annual basis that is returned to the States and to political subdivisions that are conditioned on the States complying with certain Federal standards, particularly in law enforcement. As a former prosecutor, I benefited from many of those grant applications.

And that's really what we're talking about, in terms of these particular issues. This is, believe me, not an aberration. You know that the Chair was very much involved in the legislation dealing with truth in sentencing. And if the States did not adjust their own

sentencing practices, there were penalties to pay. And, I would daresay, this is an analogous situation.

Having said that, I also want to go to the issue of burdensome and finality. Within the bill, particularly as it relates to DNA, there's a provision that if the Government notices a defendant and/or his or her counsel, that there's 180 days. There are 180 days for an application to be filed. If it is not filed, the State has a right to destroy that evidence.

Now, all of you are seasoned practitioners. I think—I would hope that you would agree with what I'm going to state, which is that, in 180 days, in a State court proceeding, it's a relatively short period of time. And I daresay, if this legislation passed as-is, there would be a protocol, which in the case of State's Attorney Logli and you, Mr. Graci, as far as the attorney general's office, there would be a protocol that as soon as there was a conviction and an incarceration, there would be a notice, to protect the interests of the State, so that the defendant would be compelled to make those decisions within a 6-month period.

I believe that addresses the issue of finality as well as the burden that you referred to, Mr. Graci. I truly believe that.

Now that I've made that observation, let me ask—I have a real problem with actual innocence. You know, what is the standard? Is it moral certainty? Beyond a reasonable doubt? To a mathematical conclusion? You know, actual innocence, to establish it is almost beyond the capacity, if you will, of human beings to determine. I mean, maybe someplace else outside of this planet that can be done. But you know, actual innocence, as opposed to the use of DNA and its probative value in determining whether an individual is innocent of a crime, is what I believe to be important.

And why don't I conclude by asking Mr. Neufeld to reiterate for us the second case of Mr. Godschalk. And in that particular case, what would the actual innocence mean in terms of the conclusion that was reached?

Mr. NEUFELD. By the way, Mr. Logli's definition of actual innocence was terrific if it was applied by prosecutors all over the country. The problem is that everybody, as you said, has their own definition.

And the problem is, for instance, for Mr. Krone, he would not meet that definition of actual innocence because the prosecutors had theories of the case which would explain the saliva and the blood consistent with guilt. But he got the test, and then they ran it against the database, and that's what gave them, to a moral certainty, the fact that he was innocent.

In the Godschalk case in Pennsylvania, two women were raped about a month apart at a housing complex outside of Philadelphia. They gave identical descriptions of the assailant. And it seemed to the police that one person was responsible.

Mr. Godschalk was picked up after a composite sketch was put on the television, on a tip, and he was interrogated for several hours, after which he made a full confession.

He was convicted. And after he was convicted, he requested DNA testing. The prosecutor took the position that he was not entitled to DNA testing, because it could not prove his actual innocence

and, frankly, because identity was not an issue because he had given a confession.

He sought that DNA testing through the State courts and went up to the highest courts in Pennsylvania. And they said this is not a case of actual innocence. This is not a case where ID was an issue, because it was a full, detailed confession. Therefore, he is not entitled to DNA testing.

Subsequently, a Federal judge found a constitutional right to DNA testing, ordered it, and the laboratories found that the police were right, one person had, in fact, committed both rapes. And they got a profile, airtight, on the sperm recovered from both victims.

There was just one problem. It didn't match Bruce Godschalk. And he then became exonerated. The conviction was vacated and the charges dismissed.

The point is that, at each step of the way, the prosecutor said he's not entitled to testing because the standard has to be actual innocence.

Many of you know of the case of Earl Washington. Earl Washington was a black man convicted of raping a young, white housewife in Virginia. And what happened is, she said, "I was attacked by a lone black man." Eventually, years later, after he was on death row, the DNA testing not only proved that he didn't do it but also identified another perpetrator who was serving time in the Virginia State prisons.

He got a pardon, but no one would apologize to him. No one would admit that he was actually innocent. All they would say is, "We don't have enough evidence to re-prosecute him beyond a reasonable doubt."

So the problem we have—and by the way, when I testified before the Virginia Crime Commission on their bill, and the Republican Chairman of that Committee asked the then-attorney general, "Why do you want actual innocence?" And, he said, "That's the standard we need." The Republican Chairman then turned to the attorney general and said, "Would Earl Washington get testing under your standard?" And he said, "Absolutely not." And the Republican Chairman of the Committee said, "Fine, then that's not going to be the standard." Because the whole—

Mr. DELAHUNT. I think we'll conclude there— [Laughter.]

—Mr. Neufeld, with my gratitude to the panel, my gratitude to the Republican Chairman of the Crime Subcommittee. [Laughter.]

And let me say this, Mr. Chairman, again, I really do think we have an opportunity. I really think that we can work together and hopefully produce a product that we're all proud of, because, as Ms. Wilkinson I think eloquently said, this is not about doing the minimum; this is about America, this is about our system of justice, this is about the truth.

Mr. SMITH. Thank you, Mr. Delahunt.

And I'd like to thank the witnesses for their testimony today. It's been very useful, very valuable, and we appreciate their time.

With that, the Subcommittee stands adjourned.

[Whereupon, at 6:01 p.m., the Subcommittee was adjourned.]

# A P P E N D I X

## MATERIAL SUBMITTED FOR THE HEARING RECORD



**U.S. House of Representatives Judiciary Committee  
Subcommittee on Crime, Terrorism and Homeland Security  
"The Innocence Protection Act -H.R. 912"**

**Statement by Alexandra Arriaga  
Director of Government Relations, Amnesty International USA  
June 18, 2002**

The House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security House of Representatives today will consider the Innocence Protection Act (IP A -HR 912/ S. 486), legislation that is crucial to remove innocent people from death row. Congress should act decisively on this issue, the outcome of which could literally determine life or death for the innocent. Amnesty International believes the IP A is an important step toward securing a fair system of justice for all and for safeguarding against the execution of innocent people.

This year the 101 st person was exonerated of capital charges in the US and the Supreme Court has considered five cases that affect the administration of the death penalty during the 2001-2002 session. The Department of Justice in 2001 launched its own study of the federal death penalty to determine whether the system is racially and ethnically biased, leads to arbitrariness and discrimination in its application, and could result in taking the life of an innocent person. Congress must respond to the growing tide of concern about the fallibility of the death penalty system and the possibility of executing innocent people.

Increasingly, inmates have been released because of DNA evidence. Unfortunately not all of those whose cases might have been reversed by DNA evidence will benefit from such developments --they have already been put to death. While it is too late to save those wrongfully executed, we can ensure that DNA evidence is made available in current death penalty cases. Contrary to arguments by death penalty proponents, the releases due to exonerations are not an indication that the system is working: many of those released were able to prove their innocence only because of the tireless efforts of unpaid lawyers or activists who investigated their case.

The Innocence Protection Act is a matter of fairness. It is a bill to ensure that America's system of justice does not create victims. It is a bill meant to address a broken system that can lead to the execution of innocent people by providing vitally important safeguards to every person accused of a capital crime, including access to competent, experienced counsel, juries that are informed of alternative sentencing options, and the right to DNA testing of available evidence.

The Congress should act quickly to pass the IP A so that all who come before American courts receive a just trial and so that truth may prevail.

*Amnesty International is a worldwide grassroots movement that promotes and defends human rights, with over 300,000 members in the United States and one million worldwide. For information, contact Ms. Alex Arriaga, Director of Government Relations, 202-544-0200, or visit [www.amnestyusa.org](http://www.amnestyusa.org).*

## INNOCENCE PROTECTION ACT (S.486 / H.R. 912)

### Endorsements from National Civic, Religious and Professional Organizations<sup>1</sup> (As of June 28, 2002)

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American Association of University Women  
 American Baptist Churches USA  
 American Bar Association  
 American Civil Liberties Union  
 American Conservative Union  
 American Federation of Teachers  
 Amnesty International USA  
 Arab American Institute  
 Central Conference of American Rabbis  
 Church of the Brethren  
 Church Women United  
 Common Cause  
 Disability Rights Education and Defense Fund  
 Episcopal Church  
 Equal Justice USA/Quixote Center  
 Evangelical Lutheran Church in America  
 Family Violence Prevention Fund  
 Friends Committee on National Legislation  
 General Board of Church and Society of the United Methodist Church  
 International Human Rights Law Group  
 Journey of Hope . . . From Violence to Healing  
 The Justice Project  
 Lawyers' Committee for Civil Rights Under Law  
 Lawyers Committee for Human Rights  
 Leadership Conference on Civil Rights  
 MacArthur Justice Center  
 Maryknoll Office for Global Concern  
 Mexican American Legal Defense and Educational Fund  
 Murder Victims' Families for Reconciliation  
 NAACP  
 NAACP Legal Defense and Educational Fund  
 National Association of Criminal Defense Lawyers  
 National Coalition Against Domestic Violence  
 National Council of Churches of Christ in the USA  
 National Legal Aid & Defender Association  
 National Urban League  
 People for the American Way  
 Physicians for Human Rights  
 Presbyterian Church (USA), Washington Office  
 Purple Berets Advocacy & Education Project  
 Rainbow Sisters Project  
 Religious Action Center for Reform Judaism  
 Rutherford Institute  
 United Church of Christ  
 Union of American Hebrew Congregations  
 Union of Orthodox Jewish Congregations  
 Unitarian Universalist Association of Congregations  
 United States Catholic Conference

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<sup>1</sup>As of June 28, 2002.

Dear Member of Congress:

The undersigned individuals are current and former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels. Some of us support capital punishment and others of us oppose it. But we are united in our support for the federal Innocence Protection Act 2001 (S 486 / HR 912).

Capital cases present unique challenges to our judicial system. The stakes are higher than in other criminal trials and the legal issues are often more complex. When the government seeks a death sentence, it must afford the defendant every procedural safeguard to assure the reliability of the fact-finding process. As prosecutors, we feel a special obligation to ensure that the capital punishment system is fair and accurate.

The Innocence Protection Act seeks to improve the administration of justice by ensuring the availability of post-conviction DNA testing in appropriate cases, and would establish standards for the appointment of capital defense attorneys. The interests of prosecutors are served if defendants have access to evidence that may establish innocence, even after conviction, and if they are represented by competent lawyers.

For these reasons, we are pleased to endorse the Innocence Protection Act. Please feel free to contact any of us to discuss this matter.

**William Aronwald**

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Florida Supreme Court  
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Former Director  
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Former Special Attorney for the Attorney General  
U.S. Department of Justice

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For these reasons, we are pleased to endorse the Innocence Protection Act. Please feel free to contact any of us to discuss this matter.

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Member, Constitution Project Death Penalty Initiative

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State of Tennessee  
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Former Asst. US Attorney  
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June 17, 2002

**VICTIM and SURVIVOR SUPPORT FOR THE INNOCENCE PROTECTION ACT**

Dear Member of Congress:

**The undersigned survivors of violent crimes, victims' families, and organizations for persons affected by violent crimes write to voice our support for the Innocence Protection Act of 2001.** Neither society nor victims benefit when innocent persons remain imprisoned and the actual perpetrators go free. The Innocence Protection Act's twin objectives — improving access to DNA testing and the quality of defense counsel in capital cases — would benefit crime victims by enhancing the truth-seeking function of our criminal justice system and increasing confidence in its outcomes.

DNA testing — the most powerful identification technique ever developed — should be available if it could produce new evidence material to an inmate's claim of innocence. If such testing produces an inculpatory result, this may remove nagging questions and reassure the victim that the perpetrator has been convicted and incarcerated. If, on the other hand, the result is exculpatory, it can be run against the appropriate database, and the actual perpetrator can be brought to justice.

For those whose lives have been touched by crime, as for society, certainty that the right person is behind bars, when possible, is a more compelling interest than finality. Therefore, we believe that procedural obstacles to adjudicating a claim of innocence must give way when doubts regarding guilt might be resolved by DNA testing.

Finally, we recognize that a vitally important protection against wrongful convictions and unsolved crimes is a strong adversarial system in which both sides have adequate resources and qualifications. Neglecting the defense function not only imperils innocent defendants, it potentially exacerbates the suffering of those who have lost a loved one to violent crime by generating needless appeals and retrials and undermining confidence in outcomes. We therefore urge you to pass the strongest possible measures to ensure the right to effective assistance of counsel in capital cases.

In taking important steps to improve the accuracy of our criminal justice system, the Innocence Protection Act would protect the victims and survivors of crime. It would help bring peace to victims and their loved ones, enhance public safety and increase public confidence in our criminal justice system. We hope that Congress will act swiftly to pass this important legislation. Thank you for considering our views.

Karen R. Pomer  
Founder, Rainbow Sisters Project (national organization of rape survivors)  
Los Angeles, California  
Rape survivor  
(310) 463-7025

Aba Gayle  
Catherine Blount Foundation, Silverton, Oregon  
Mother of Catherine Blount, murdered in California

Kiersten Stewart, Director of Public Policy  
Family Violence Prevention Fund  
Washington, DC

Bill Pelke, President  
 Journey of Hope...From Violence to Healing  
 Grandmother Ruth was murdered in Gary, Indiana

Mary Lee Perry, Staff Attorney  
 Kentucky Association of Sexual Assault Programs (KASAP)  
 Survivor of never reported interpersonal violence

Maria Hines, Director  
 Kentucky Murder Victims Families for Reconciliation  
 Sister of Virginia State Trooper Jerry Lynn Hines, murdered in the line of duty in 1989.

Judy Benitez, M.Ed., Executive Director  
 Louisiana Foundation Against Sexual Assault

Jennifer Bishop, National Board Chair  
 Murder Victims Families for Reconciliation  
 Sister of Nancy Bishop Langert, murdered along with her husband Richard and their unborn child in 1990 by a teenager in Winnetka, Illinois

Juley Fulcher, Public Policy Director  
 National Coalition Against Domestic Violence

Rita Lasar  
 September 11th Families for Peaceful Tomorrows, New York, New York  
 Sister of Abe Zelmanowitz, World Trade Center bombing victim

Tanya Brannan, Director  
 Purple Berets Advocacy & Education Project, Santa Rosa, California

Deborah Andrews, Former Executive Director  
 Rape, Abuse & Incest National Network (RAINN)  
 Mary L. Smith, Executive Director  
 REAL Crisis Intervention Inc., Greenville, NC

Ryan Amundson  
 Springfield, Missouri  
 Brother of September 11th Pentagon victim Craig Amundson

Joanne Archambault, Training Director  
 SATI, Inc. Sexual Assault Training and Investigations, El Cajon, California  
 (Former Sgt., San Diego Police Department)

Arwen Bird, Director  
 Survivors Advocating For an Effective System  
 Survivor of DUI crash

Annette Burrhus-Clay, Executive Director  
 Texas Association Against Sexual Assault

Yvonne Rivera-Huitron, Coordinator  
 Victims Ministry for the Archdiocese of Los Angeles

Charlotte Pierce-Baker, author of "Surviving the Silence: Black Women's Stories of Rape" Durham, North Carolina  
Rape survivor

Nellie Hester Bailey  
New York, New York  
Husband tenant organizer Bruce Bailey, brutally murdered over ten years ago

Hector & Susie Black  
Parents of Patricia Nuckles, raped and murdered in Atlanta, Georgia Nov 20th, 2000

Dorothy Welch Blackwood  
Family member of Oklahoma City bombing victim

Kelly Conway  
Sacramento, CA  
Rape survivor

Jeri Elster  
Member of Rainbow Sisters  
Rape survivor and activist, Los Angeles, California (Rapist was identified through DNA testing after the CA statute of limitations had lapsed)

Barbara M. Farr  
Survivor of rape, child abuse and domestic violence from 1955-1973

Karalee Fenske  
Rape survivor

Michelle Giger  
Daughter of Phil Bovee, murdered in Santa Rosa, New Mexico in August of 1984

Kate Lowenstein, National Organizer  
Murder Victims Families for Reconciliation

Sue Norton  
Daughter of Richard and Virginia Denney, murdered in their rural farmhouse in Tonkawa, Oklahoma

Phyllis Pautrat, MSW  
Rape survivor and family member of a rape survivor  
Mt. Laurel, New Jersey

Sherry Price  
New York, New York  
Rape survivor

Jennifer Thompson  
North Carolina  
Rape survivor (mistakenly identified innocent man of rape, DNA evidence exonerated him after 11 years in prison)

Wanda Valdes  
Widow of Frank J. Valdes, murdered in Florida on July 17, 1999

Bud Welch  
Oklahoma City, Oklahoma

Father of Oklahoma City bombing victim Julie Welch

Linda L. White  
Magnolia, Texas  
Mother of Cathy Lyn O'Daniel, 26, raped and murdered in 1986

Earlene Yeazell  
California  
Rape survivor



Robert E. Hinshon  
President

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June 18, 2002

Honorable William Delahunt  
U.S. House of Representatives  
Washington, DC 20515

Honorable Ray LaHood  
U.S. House of Representatives  
Washington, DC 20515

Dear Representatives Delahunt and LaHood:

On behalf of the American Bar Association, I write to commend you for your leadership in introducing the Innocence Protection Act of 2001, H.R. 912, legislation that will help ensure that the system of capital punishment in this country is administered fairly and minimizes the risk that innocent people may be executed.

With the exception of our opposition to the imposition of the death penalty on the mentally retarded and individuals who committed their crimes while juveniles, the Association has taken no position either for or against capital punishment. However, the ABA House of Delegates in February 1997 overwhelmingly adopted a resolution calling upon jurisdictions that authorize capital punishment not to implement death sentences until they can ensure that all capital cases are handled fairly and in accordance with due process.

Four years after the adoption of the moratorium resolution, the administration of the death penalty remains deeply flawed, and is actually deteriorating in many jurisdictions. Numerous procedural barriers exist that prevent or truncate meaningful judicial review; and racial bias and poverty often play a role in determining who is sentenced to death. The ABA is particularly concerned that many jurisdictions have failed to establish the kind of legal services system necessary to ensure that defendants receive competent counsel at all stages of a capital case.

A key title of the Innocence Protection Act would encourage and assist states to provide competent legal services at every stage of a capital prosecution. The bill would establish a National Commission to develop standards for providing adequate legal representation for indigents facing a death sentence and would provide grants to help states implement these standards. By helping to ensure that all capital defendants are represented by competent counsel, H.R. 912 would reduce the risk of wrongful convictions and executions in capital cases, thus maintaining public confidence in our justice system.

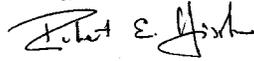
Another important title of H.R. 912 would provide federal inmates who have credible claims of innocence with access to DNA testing and would prevent the government from destroying biological evidence without notice to the inmate. The legislation also encourages the states to adopt similar provisions, to ensure that state inmates have a meaningful opportunity to prove their innocence using DNA testing. The ABA House of Delegates adopted a resolution

essentially consistent with this title in July 2000. The Association believes advances in DNA testing present a significant opportunity to improve the reliability of the criminal justice system and should be made available notwithstanding otherwise applicable procedural bars.

While Association policy does not address all elements of H.R.912, the provisions of this bill relating to provision of competent counsel and DNA testing are critically important to safeguard the two most important functions of the criminal justice system: punishment of the guilty and protection of the innocent.

We commend you for your leadership on this issue and look forward to working with you to secure the prompt passage of this important legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Hirshon". The signature is fluid and cursive, with the first name "Robert" being the most prominent.

Robert E. Hirshon

cc: Members of the Committee on the Judiciary

## THE RUTHERFORD INSTITUTE

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Founder and President

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INTERNATIONAL OFFICE  
CENTRAL AND EASTERN EUROPE  
Budapest, Hungary

June 21, 2002

Dear Member of Congress:

Regardless of one's moral view of the death penalty, there can be no disagreement on the need to carry it out with extreme care. When the government seeks to execute an individual, it must afford that individual effective procedural safeguards that ensure reliable adjudication of the facts. Yet since the U.S. Supreme Court reinstated capital punishment in 1976, 101 men and women have been released from death row based on newly discovered evidence of innocence, including scientifically irrefutable DNA testing of biological evidence.

Over half of the members of the House of Representatives and 26 members of the Senate have endorsed the bipartisan Innocence Protection Act (S. 486 / H.R. 912). This legislation seeks to improve the reliability of capital punishment by ensuring the availability of post-conviction DNA testing for inmates who establish a threshold showing of innocence. The bill would also establish procedures to improve the competence of defense attorneys in death penalty cases.

As founder and president of The Rutherford Institute, an organization dedicated to the defending constitutional and human rights, I am in full support of the Innocence Protection Act. It is vitally important that individuals facing the death penalty be represented by competent lawyers at trial and that they have access to evidence that may establish their innocence, even after conviction.

Please feel free to contact me should you wish to discuss this matter further.

Sincerely yours,

John W. Whitehead  
President

The Rutherford Institute



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Christian Josi

Dear Member of Congress:

As a conservative who supports the death penalty, I believe that as a society we must be certain that those forced to pay this maximum of all penalties are, in fact, guilty of the crimes for which they have been convicted.

Our criminal justice system may well be the best in the world, but the police who apprehend criminals, the attorneys who prosecute and defend them and the judges and juries before whom their cases are argued are all human. As such, they make mistakes and sometimes those mistakes lead to the taking of innocent lives in the name of justice. This is a tragedy that no society that believes in justice should tolerate.

When the death penalty is imposed, it should be done with great care to avoid the kinds of mistakes that can result in the execution of the innocent. When government seeks to execute an individual, it goes without saying that it should provide the accused effective procedural safeguards that ensure reliable adjudication of the facts. Yet since the Supreme Court reinstated capital punishment in 1976, 101 men and women have been released from death row because of newly discovered evidence that they had not, in fact, committed the crimes for which they were sentenced to death.

In an earlier age, these men and women might well have been executed, but today technology has provided the means to in some cases irrefutably prove guilt or innocence by, for example, DNA testing of biological evidence. That some prosecutors and courts have resisted utilizing this technology strikes me as simply wrong.

Over half of the members of the House of Representatives and 26 members of the Senate have endorsed the bipartisan Innocence Protection Act (S. 486 / H.R. 912). This legislation seeks to improve the reliability of capital punishment by ensuring the availability of post-conviction DNA testing for inmates who establish a threshold showing of innocence. The bill would at the same time establish procedures to improve the competence of defense attorneys in death penalty cases.

I support this legislation and urge its adoption. Conservative values are served if individuals facing the death penalty are represented by competent lawyers at trial and have access to evidence that may definitively establish their innocence ... even after conviction.

There can be no question that capital punishment deters certain kinds of crimes and should be preserved, but we must impose this ultimate sanction only when we are as certain as humanly possible that those sentenced to pay it are, in fact, guilty.

Sincerely,

David A. Keene  
Chairman



## Leadership Conference on Civil Rights

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Phone: 202-466-3311  
Fax: 202-466-3135  
www.civilrights.org

June 21, 2002

Dear Representative:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest and largest civil and human rights coalition representing people of color, women, children, older Americans, persons with disabilities, gays and lesbians, major religious organizations, labor unions, and civil and human rights groups, we write to urge your support for the Innocence Protection Act of 2001 (HR 912).

The LCCR has a longstanding policy in opposition to the death penalty. However, we strongly believe that the Innocence Protection Act is a necessary step in preserving the rights of persons accused of capital offenses.

Capital cases present unique challenges to our judicial system. The stakes involve matters of life and death and thus are higher than in other criminal trials. As a result, the legal issues are often more complex. It is our strong view that when the government seeks a death sentence, it must afford the defendant every procedural safeguard to assure the fairness and reliability of the process. The flaws in our nation's capital punishment system are clear: more than 100 innocent people on death row have been exonerated and 68% of all death penalty appeals are reversed due to serious error.

The Innocence Protection Act seeks to improve the administration of justice by ensuring the availability of post-conviction DNA testing in appropriate cases; currently, many defendants are denied the opportunity for testing or are prevented from using the resulting evidence in their defense. In addition, the bill would encourage states to establish standards for the appointment of legal counsel for defendants facing the death penalty. The interests of all Americans are served if capital defendants have access to evidence that may establish innocence and if they are represented by competent lawyers.

Currently, this bill has 232 cosponsors, including 171 Democrats and 61 Republicans. While this bill will not fix every problem in the administration of the death penalty, it will go a long way toward improving the fairness and reliability of capital trials, and in so doing will help restore confidence in the integrity of our criminal justice system.

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Wade Henderson

(\*Deceased)

*"Equality in a Free, Plural, Democratic Society"*

HUBERT H. HUMPHREY CIVIL RIGHTS AWARD DINNER - MAY 6, 2002



We look forward to working with you and thank you in advance for your support.

Sincerely,

Wade Henderson  
Leadership Conference on Civil Rights

William Spriggs  
National Urban League

Elaine R. Jones  
NAACP Legal Defense and  
Educational Fund

Barbara Arnwine  
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Religious Action Center for Reform Judaism

Laura Murphy  
American Civil Liberties Union

Ralph Neas  
People for the American Way

Gay McDougall  
International Human Rights Law Group

*"Equality in a Free, Plural, Democratic Society"*

HUBERT H. HUMPHREY CIVIL RIGHTS AWARD DINNER - MAY 6, 2002

**Congress of the United States**  
Washington, DC 20515

June 12, 2002

Dear Colleague:

Next week, the House and Senate Judiciary Committees will hold hearings on the Innocence Protection Act, a bipartisan effort to help reduce the risk that innocent persons will be put to death—and that the guilty will remain at large. As of this writing, the bill is cosponsored by 235 members of the House.

In anticipation of those hearings, we wanted to share with you the enclosed report, *Mandatory Justice: Eighteen Reforms to the Death Penalty*, issued last June by the Constitution Project, a public policy center that works to develop bipartisan solutions to contemporary legal and constitutional problems.

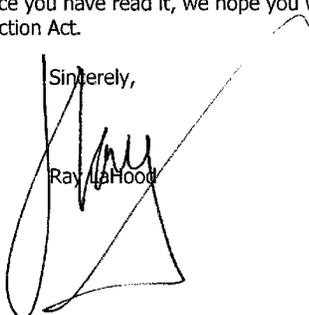
The report was crafted by a blue-ribbon committee of distinguished experts, including former judges, state attorneys general, prosecutors, defense attorneys, corrections officials, victims' rights advocates, and religious leaders.

The committee brought together Republicans and Democrats, conservatives and liberals, death penalty supporters and opponents, in an effort to address the serious flaws in our criminal justice system that have allowed scores of innocent people to be sentenced to death for crimes they did not commit.

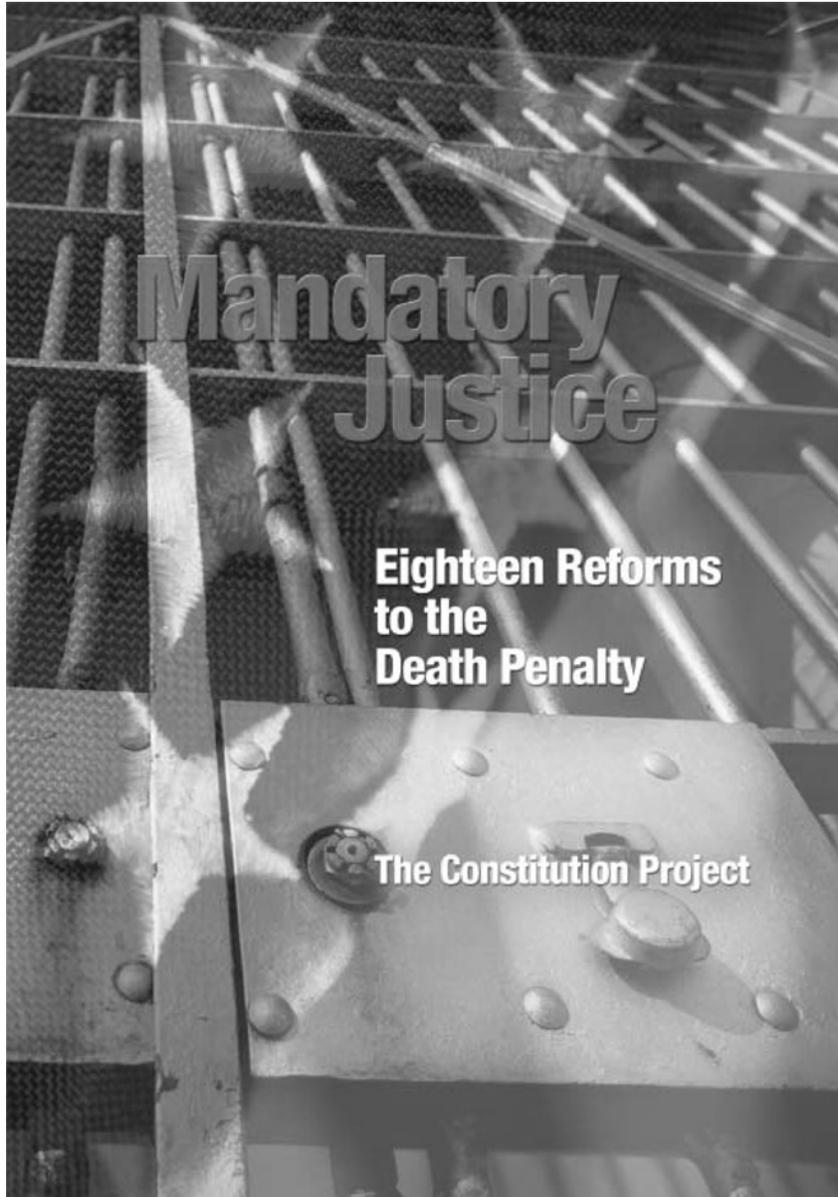
We believe that *Mandatory Justice* should be mandatory reading for everyone interested in learning more about this issue. And once you have read it, we hope you will join with us in supporting the Innocence Protection Act.

  
Bill Delahunt

Sincerely,

  
Ray LaHood

Enclosure



# Mandatory Justice

**Eighteen Reforms  
to the  
Death Penalty**

**The Constitution Project**

The Constitution Project



## **MANDATORY JUSTICE**

Eighteen Reforms to the Death Penalty

A publication of

**The Constitution Project**

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## Preface

The Constitution Project, housed at Georgetown University in Washington, DC, seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education. In May 2000, the Constitution Project created a death penalty initiative to address the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death. The Constitution Project convened the thirty members of the death penalty initiative's blue-ribbon committee to examine our country's present course, and to recommend ways to ensure that fundamental fairness is guaranteed for all.

The committee's members are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. They are former judges, prosecutors, and other public officials, as well as victim advocates, defense lawyers, journalists, scholars, and other concerned Americans. They have extensive and varied experience in the criminal justice system. They may disagree on much, including whether abolition of the death penalty is warranted, but they are united in their profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed.

The members of the committee have brought a wide variety of philosophies, experiences, and perspectives to their work. They have deliberated long and hard about the recommendations presented here, seeking consensus because they recognized the need to overcome past divisions. For too long, society has cast the death penalty debate as one between "liberals" and "conservatives," those who are "soft on crime" and those who "care about victims of crime," or "abolitionists" and hard-line death penalty proponents. If we ever could, we can no longer afford to carry on the debate in this manner. Much is riding on our country's ability to put these stereotypes aside.

The committee's mission statement says that individuals who commit violent crimes deserve swift and certain punishment. Some of the members of the committee believe that the range of punishment may include death; others do not. But they all agree that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial, and full judicial review of the conviction and sentence. The denial of such protections heightens the danger of wrongful conviction and sentence.

In the months since the initiative was created, there has been a dramatic increase in the number of those released from death row because they have been shown—often at nearly the last minute—to be innocent. This is deeply disturbing to all of the committee's members, as it should be to all Americans. Committee members continue to be greatly troubled, as well, by executions of persons with mental retardation and those who committed crimes as juveniles. While some states are considering reforms to narrow the application of capital punishment, especially with regard to persons with mental retardation, others are enacting new laws that would actually increase its application.

Too often, cases of wrongful conviction involve defense lawyers who lacked the appropriate experience and resources. Sometimes, capital defense lawyers were also under the influence of alcohol or drugs, or slept through parts of a trial. The number of capital defense lawyers

who were subsequently disbarred or otherwise cited for serious ethical violations is shockingly high.

The problems with the current process are perhaps best evidenced by the explosion of DNA evidence on the criminal justice scene. Changes in technology permit individuals accused or convicted of capital crimes to develop and present important evidence that was not available earlier, or could not be reliably tested. Frequently, however, these individuals are unable even to have the evidence tested and face procedural barriers to presenting the results to any court.

DNA evidence has illuminated some of our criminal justice system's failings, but it by no means reveals them all. Many cases do not involve biological evidence, and in other cases, evidence is destroyed after trials. As a result, DNA evidence is unavailable in the vast majority of criminal cases. If so many individuals have been exonerated by DNA evidence, what about these cases where there is no DNA evidence to be tested? Society cannot be reassured that the system can catch and correct its errors simply because DNA testing is now much more sophisticated and widely available.

One major goal of these recommendations is to create additional safeguards against the endemic tendency of decision-makers in the criminal justice system to "pass the buck." The system is far too lax in catching errors and injustices in part because many of those who might catch these errors and injustices do not fully understand their own duty to ensure that a death sentence is the appropriate punishment. Several of these recommendations are addressed to those who occupy critical roles in the capital punishment system, including the defense attorney, the prosecutor, the jury, the trial judge, and the reviewing courts. They emphasize that each, individually, has the responsibility to ensure, to the best of his or her ability, that justice is done.

Some federal and state legislatures are enacting new restrictions that include short filing deadlines, limits on evidentiary hearings that may preclude defendants from presenting new evidence, and other procedural hurdles that prevent prompt, if any, consideration of the merits of cases. It is especially difficult for inmates to obtain judicial consideration of new facts that may support a claim of innocence. Access to the courts to protect individual rights is a fundamental tenet of our democracy, and all Americans should be concerned by its erosion.

The courts' inability to promptly consider the merits of a case, along with the inadequacies of our capital representation system and a host of other problems discussed in these recommendations, increases the number of appeals and causes delays that thwart society's interest in finality and certainty of punishment.

Many of the committee's members have served as judges, prosecutors, and defense lawyers. They, along with all of the members, greatly admire the work of the hard-working, conscientious participants in the criminal justice system who strive to do their best, often under the most difficult of circumstances. The criminal justice system often suffers from misallocated, misdirected, and, in some instances, inadequate resources, and, as a result, those working within the system may have to struggle to do their jobs in a thorough and professional manner. This also means that those the system is designed to protect instead frequently feel victimized by it.

**MANDATORY JUSTICE:** Eighteen Reforms to the Death Penalty

The committee members' own experiences have led them to conclude that the current system serves none of us adequately—not victims, not defendants, and not society. The system is replete with delays and mistakes that prevent victims from experiencing finality and that cost unjustly accused or convicted individuals years of their lives.

Committee members stress that their concern is not only for those who are wrongfully convicted. When we convict the innocent, we also fail to bring to justice those who are actually guilty, thus creating a continued threat to public safety and an enduring tragedy for the family of the murder victim. Members strongly share concerns about crime victims' needs for finality and closure. At the same time, society cannot ignore a concern for the truth and for the Constitution.

No matter what their individual views about the death penalty, the committee's members do not in these recommendations seek its abolition. They understand that implementing these reforms will be difficult, but they believe such basic changes are essential to a death penalty system that has a claim on fairness and justice. The committee's members have broad experience in all aspects of this nation's justice system. It is this experience that leads them to state with confidence that the state and federal legislatures or courts, bar associations, and other appropriate authorities must take these recommendations seriously and consider them expeditiously. At long last, these authorities must acknowledge the need to provide sufficient resources for the capital punishment system. They can and must recognize that access to the courts is a fundamental right that protects the liberty of all of us, not just those who are accused or convicted of heinous crimes.

The committee members generously committed their time and energy to this undertaking. It is their own, hands-on experiences with the system that dictated the subjects, and the reforms, addressed in these recommendations. They were also informed by the thorough and thoughtful advice of four leading scholars—DePaul University Law School professor Susan Bandes, Northeastern University professor William Bowers, Duke University Law School professor Robert Mosteller, and George Washington Law School professor Stephen Saltzburg. We are especially indebted to Professors Bandes and Mosteller, who conducted an extensive review of the relevant literature and case law and drafted the recommendations with great skill and attention to detail. The law firm of Latham & Watkins, through a generous *pro bono* commitment of time and resources, studied hundreds of capital cases to support the committee's work. Professors Samuel Gross of the University of Michigan Law School and James Liebman of the Columbia Law School supplied invaluable advice, and Thomas Kerner and Marlaine Williams of the law firm of Wilmer Cutler & Pickering provided cite-checking and other much-needed assistance. The Constitution Project and members of the committee are deeply grateful for these contributions. Finally, none of this work would have been possible without the generous support of the Open Society Institute, Deer Creek Foundation, Arca Foundation, Columbia Foundation and Vietnam Veterans of America Foundation. In the end, though, it was the committee members themselves who set the course of this review and who sought and attained the extraordinary consensus that underlies these recommendations.

The recommendations included here were arrived at through a variety of meetings, conference and other telephone calls, and electronic and other communications. They do not, as some state commissions do, examine specific cases. Rather, they are a broad nationwide

view, and an important compilation of the accumulated experience with and wisdom of the members of the committee about the current flawed death penalty system. These recommendations should not, however, be considered the final word. Capital punishment is an extraordinarily complex area of the law, and our nation's understanding of it and its problems has evolved with the accumulation of experience. The committee issues these recommendations because its members are confident of their wisdom and because a crisis in the death penalty system exists now and must be addressed as expeditiously as possible. Future recommendations may be expected as additional experience, study, and reflection bring to further consensus.

The philosopher Albert Camus, in Reflections on the Guillotine, wrote of a Burton Abbott, executed in California in 1957. "Today, as yesterday, the chance of error remains. Tomorrow another expert testimony will declare the innocence of some Abbott or other. But Abbott will be dead, scientifically dead, and the science that claims to prove innocence as well as guilt has not yet reached the point of resuscitating those it kills... . If justice admits that it is frail, would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?" Camus' statement, written in 1957, is as true today as it was then. No matter whether we support or oppose the death penalty, we must admit that the system is still fallible. The Committee took this fallibility into account in crafting these recommendations.

Committee members present these recommendations for reforms because they are urgently needed. In the name of justice, fairness, efficiency, and common sense, the recommendations should command the support of all Americans, no matter what their views about capital punishment.

Virginia E. Sloan  
Executive Director  
The Constitution Project

## Summary of Recommendations

### I. Effective Counsel

Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance. An existing public defender system may comply if it implements the proper standards and procedures.

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

The current Supreme Court standard for effective assistance of counsel (*Strickland v. Washington*) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

### II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

Persons with mental retardation should not be eligible for the death penalty.

Persons under the age of eighteen at the time the crime was committed should not be eligible for the death penalty.

Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty.

### III. Expanding and Explaining Life without Parole (LWOP)

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

The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as "truth in sentencing."

### IV. Safeguarding Racial Fairness

All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

### V. Proportionality Review

Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, 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.

#### **VI. Protection against Wrongful Conviction and Sentence**

DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.

All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

#### **VII. Duty of Judge and Role of Jury**

If a jury imposes a life sentence, the judge in the case should not be allowed to “override” the jury’s recommendation and replace it with a sentence of death.

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

The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

#### **VIII. Role of Prosecutors**

Prosecutors should provide “open-file discovery” to the defense in death penalty cases. Prosecutors’ offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (*Brady* material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.

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

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

## Black Letter Recommendations

### I. Effective Counsel

#### A. *Creation of Independent Appointing Authorities*

Each state should create or maintain a central, independent appointing authority whose role is to “recruit, select, train, monitor, support, and assist” attorneys who represent capital clients (ABA Report). The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and *certiorari*. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures

#### B. *Provision of Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services*

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal 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” (ABA Report). Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

#### C. *Replacement of the Strickland v. Washington Standard for Effective Assistance of Counsel at Capital Sentencing*

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare (NLADA Standards). Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney’s incompetence. Moreover, there should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence.

## II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation, (2) persons under the age of eighteen at the time of the crimes for which they were convicted, and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

## III. Expanding and Explaining Life without Parole (LWOP)

### A. *Availability of Life Sentence without Parole*

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

### B. *Meaning of Life Sentence without Parole (Truth in Sentencing)*

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

## IV. Safeguarding Racial Fairness

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component—perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

## V. Proportionality Review

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

## VI. Protection against Wrongful Conviction and Sentence

### A. *Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution*

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

### B. *Lifting Procedural Barriers to Introduction of Exculpatory Evidence*

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

## VII. Duty of Judge and Role of Jury

### A. *Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death*

Judicial override of a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

### B. *Lingering (Residual) Doubt*

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the

crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant.”

*C. Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors*

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror’s sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror’s sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury’s obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury’s hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant’s mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge’s obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

## **VIII. Role of Prosecutors**

*A. Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense*

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full “open-file” discovery should be required in capital cases. However, discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only

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when the prosecution clearly demonstrates that restrictions are required to protect witnesses' safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory (*Brady*) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance, (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing, and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for in camera review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

*B. Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed*

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

*C. Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution*

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

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\*Formerly known as the National Committee to Prevent Wrongful Executions.

\*\*Review of recommendations pending.

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Eighteen Reforms to the Death Penalty

## I. EFFECTIVE COUNSEL

### Summary

- 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.
- Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.
- The current Supreme Court standard for effective assistance of counsel (*Strickland v. Washington*) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

### Introduction

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.

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. AMERICAN BAR ASSOCIATION, *Criminal Justice Section Report*, reprinted in 40 AMERICAN UNIVERSITY LAW REVIEW 1, 69 (1990). 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 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.” Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARVARD LAW REVIEW 355, 398 (1995).

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 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.

#### A. *Creation of Independent Appointing Authorities*

##### RECOMMENDATION

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. 1990 ABA Criminal Justice Section Report at 9. 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

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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 of 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 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. See, e.g., *Texas Civil Rights Project, The Death Penalty in Texas: Due Process and Equal Justice or Rush to Execution?*, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS (Sept. 2000) (finding that fully a third of those recently executed were represented by lawyers who were later disbarred, suspended, or otherwise sanctioned). 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.

**B. Provision of Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services**

**RECOMMENDATION**

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." 1990 ABA Criminal Justice Section Report at 22. 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 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 (1) the lead attorney have at least five years of criminal litigation experience, as well as experience as lead or co-counsel in at least one capital case, (2) co-counsel have at least three years of criminal litigation experience, (3) each counsel have significant experience in jury trials of serious felony cases, (4) each attorney have had recent training in death penalty litigation, and (5) each attorney 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. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFFALO LAW REVIEW* 329 (1995). 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. See, e.g., Alabama, which sets an hourly rate of \$20 to \$40 and a maximum of \$2,000 per case, meaning that an attorney devoting 600 hours to pretrial preparation in Alabama would earn \$3.33 an hour. See also Tennessee, which sets an hourly rate of \$20 to \$30, and Mississippi,

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which imposes a \$1,000 cap per case. 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. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* 47 (December 1, 1987). 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 (NLADA Standards). The hourly rate should reflect the extraordinary responsibilities and commitment required of counsel in death penalty cases (1990 ABA Criminal Justice Section Report, NLADA Standards). 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.

*C. Replacement of the Strickland v. Washington Standard for Effective Assistance of Counsel at Capital Sentencing*

**RECOMMENDATION**

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare (NLADA Standards). Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney’s incompetence. Moreover, there should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence.

**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. See, e.g., *State v. Davis*, 561 A.2d 1082, 1089 (N.J. 1989), in which the New Jersey Supreme

Court held that competence in the capital context should be measured with reference to the special expertise required in capital cases. The current Supreme Court standard for effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), 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. Randall Coyne and Lyn Entzerth 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.” Randall Coyne & Lyn Entzerth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEORGETOWN JOURNAL ON FIGHTING POVERTY 3, 18 (1996).

*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 *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.

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*. See, e.g., *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985). See also *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001), in which the federal appeals court found that trial counsel for a death row inmate with mental retardation was ineffective in failing to present mitigation evidence, and that the failure was prejudicial, but that the court would nevertheless defer to the state supreme court’s interpretation of *Strickland* and uphold the sentence of death. Yet mitigation evidence is an absolutely essential part of the punishment phase. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). As capital litigation expert Welsh White has observed, “the failure to present mitigation evidence is a virtual invitation to impose the death penalty.” Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 UNIVERSITY OF ILLINOIS LAW REVIEW 323, 341 (1993). 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

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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.” *Id.* at 342. 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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## II. PROHIBITING EXECUTION IN CASES INVOLVING QUESTIONABLE CATEGORIES OF DEFENDANTS AND HOMICIDES

### Summary

- Persons with mental retardation should not be eligible for the death penalty.
- Persons under the age of eighteen at the time the crime was committed should not be eligible for the death penalty.
- Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty.

### ***Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides***

#### RECOMMENDATION

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation, (2) persons under the age of eighteen at the time of the crimes for which they are convicted, and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

#### COMMENTARY

Executing persons with mental retardation; those who were juveniles at the time of the crimes for which they were convicted; or those convicted of felony murder who did not kill, attempt to kill, or intend that a killing occur creates an unacceptably high likelihood of singling out for the death penalty those who do not deserve this most serious and final punishment. At the same time, allowing the execution of these classes of defendants does little to advance the goals of capital punishment.

As the Supreme Court has repeatedly emphasized since it permitted the reinstatement of capital punishment in *Gregg v. Georgia*, 428 U.S. 153 (1976), statutory schemes regulating the death penalty, in order to be constitutional, must guide the states so that the penalty is not meted out in an arbitrary and capricious manner, and so that it is reserved for the most heinous and serious crimes. See *Zant v. Stephens*, 462 U.S. 862 (1983). For certain categories of defendants, such guidance must come, in the first instance, in the form of statutory rules meaningfully narrowing the class of death-eligible offenders. The risk of arbitrary and capricious results cannot be adequately addressed once such categories of defendants are charged with a capital crime.

Persons with mental retardation; those who were juveniles at the time of the crimes for which they were convicted; and those convicted of felony murder who did not kill, attempt to kill, or intend that a killing occur are three such categories of defendants. For defendants who fall within these categories, the usual approach, which permits the jury to consider defendants' arguments in mitigation, fails to address the serious risk of error. For both

persons with mental retardation and those who were juveniles at the time the crimes were committed, the integrity of the system is threatened by the defendants' difficulties in navigating the system and assisting in their own defense. For all three categories of defendants, asking the jury to weigh the defendant's membership in the particular category against the severity of his or her crime and other factors does not sufficiently address the problem of arbitrariness. That problem is best addressed in advance, by statute. These recommendations are not intended to bar imposition of any sentence except death, and they contemplate that every state will offer the sentencing option of life imprisonment without parole.

#### *Persons with Mental Retardation*

Approximately two-and-a-half percent of the U.S. population has mental retardation, and there is no evidence that persons with mental retardation commit crimes more frequently than do those in the general population. Yet these individuals make up between twelve and twenty percent of those on death row. Emily Fabrycki Reed, *THE PENRY PENALTY* (1993). Since the death penalty was reinstated in 1976, at least thirty-five people with mental retardation have been executed in the United States. Human Rights Watch, *Beyond Reason: The Death Penalty And Offenders With Mental Retardation* (March 2001). The Supreme Court, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), found insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a categorical rule prohibiting such executions. The Court believed that such decisions could be made by juries on a case-by-case basis. The Court will reconsider the issue shortly in *McCarver v. North Carolina*, and it is arguable that such a consensus now exists. Sixteen states and the federal government now prohibit executing persons with mental retardation, with other states considering doing so. In addition, the United States is one of only three countries permitting such executions. Nevertheless, the argument for a categorical rule does not rest on the existence of a national consensus that executing persons with mental retardation constitutes cruel and unusual punishment.

The death penalty is meant to be reserved for the most morally culpable offenders. Culpability is defined as personal responsibility or moral guilt. The overwhelming number of persons with mental retardation do not fall into the "most morally culpable" category, due to their impairment. Persons with mental retardation suffer from substantial disabilities affecting moral reasoning, cognitive functioning, control of impulsivity, and understanding of the basic relationship between cause and effect. These disabilities severely hamper their ability to act with the level of moral culpability that would justify imposition of a death sentence. These concerns are not likely to be given due consideration by juries in mitigation, for a variety of reasons, including inadequate representation, lack of resources for expert testimony on the effects of mental retardation, jury fear of dangerousness, and jury misunderstanding of the true meaning of a life sentence. The unfortunate experience in Texas, whose courts have twice failed to instruct juries properly on the role of mental retardation in their sentencing of Johnny Paul Penry, illustrates the difficulty of leaving this decision to juries on a case-by-case basis.

Therefore, the risk of executing defendants with mental retardation who do not possess the required level of moral culpability is unacceptably high. State statutes ought to exclude all defendants with mental retardation from eligibility for the death penalty to help ensure that all who are sentenced to death deserve such a sentence. Carol Steiker & Jordan Steiker,

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The most commonly articulated goals of capital punishment are deterrence and retribution. The deterrence goal of the death penalty is unlikely to be served by executing persons with mental retardation, due to the effects of their disabilities, as mentioned above. Persons with mental retardation are unlikely to deliberate, premeditate, weigh consequences, or even understand cause and effect (Reed). As for retribution (or just deserts), this purpose is also poorly served by executing those incapable of moral culpability or understanding.

On a practical level, convictions and sentences against persons with mental retardation have a high chance of being unreliable. Defendants with mental retardation may accept responsibility for an act with which they had little or nothing to do. They are likely to confess out of a desire to please or out of an inability either to understand or to knowingly waive their rights. They will likely find it difficult to participate meaningfully in their own defense. Ronald Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA OF LOS ANGELES LAW REVIEW 59 (1989). The recent exoneration of Earl Washington, Jr., in Virginia is a stark example of these problems. Washington, a man with mental retardation, confessed to a crime he did not commit because he did not understand the proceedings and wanted to please his accusers. He spent almost seventeen years in prison, including ten on death row, before he was released. Even more recently, a man with mental retardation spent twenty-two years behind bars in Florida for six murders was ordered freed on June 15, 2001, after DNA evidence exonerated him. He had confessed to the crimes in order to please police and prosecutors. As the ABA said in recommending against executing persons with mental retardation, the integrity of the criminal justice system is eroded by executing a defendant who cannot understand the penalty to be imposed and who cannot communicate information relevant to the decision whether to execute him or her.\*

*Persons under the Age of Eighteen at the Time of the Crimes for Which They Were Convicted*

There is a strong and growing consensus that executing juveniles serves no acceptable purpose. In addition to the ABA, which in 1983 recommended against executing those who were juveniles at the time of the crimes for which they were convicted, and the American Law Institute (ALI), which wrote such a prohibition into the Model Penal Code, over three-fourths of the nations that permit capital punishment have set age eighteen as a minimum for execution. The United Nations took this position in 1976. AMERICAN BAR ASSOCIATION, *House of Delegates Proceedings*, REPORTS OF THE AMERICAN BAR ASSOCIATION 814 (1983). Yet twenty-three states currently permit the execution of persons who were under the age of eighteen at the time of the crimes for which they were convicted, and approximately eighty juvenile offenders are currently on death row. Kari Haskell, *One Step Further from Death*, NEW YORK TIMES, August 27, 2000, § 4, at 3. The Supreme Court has declined to exempt sixteen-year-olds from execution because of the absence of a discernible national consensus against their execution. See *Stanford v. Kentucky*, 492 U.S. 361 (1989). Yet, again, the arguments for a categorical exemption against executing defendants for crimes committed as juveniles do not rest on the existence of a national consensus.

\*See appendix for additional statement of Cardinal William H. Keeler.

Many of the arguments against executing defendants for crimes committed as juveniles are similar to those against executing persons with mental retardation. A child or adolescent generally does not possess the level of moral responsibility and culpability that society expects of an adult. Juveniles are particularly unlikely to be deterred by the specter of punishment. As the American Bar Association has noted: "We know even less about death as a deterrent for adolescents than we do about death as a deterrent for adults. Most would agree that adolescents live for today with little thought of the future consequences of their actions. [Any] deterrent effect probably loses any power it once may have had when translated into an adolescent's world." AMERICAN BAR ASSOCIATION, *Report of the Section of Criminal Justice*, reprinted in REPORTS OF THE AMERICAN BAR ASSOCIATION 990 (1983). We recognize the public safety concerns raised by the possibility that gangs will recruit juveniles to commit crimes. However, to the extent that juveniles are deterred by the specter of punishment, we believe that such concerns are adequately addressed by the life imprisonment without parole option.

As to retribution, or just deserts, a sentence of death for a crime committed as a juvenile is, in the overwhelming number of cases, excessive retribution. Here, too, the American Bar Association language articulates this point well: "[S]uch irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems." *Id.* The risks of executing those undeserving of death, and of cutting short a life that could hold promise, are simply too great, and outweigh the possibility that some juveniles may be among the most heinous and depraved murderers.

In addition, the risk of error in cases involving juveniles is high. Juveniles are likely to have difficulty participating in their defense and are less able to understand and assert their rights. In Illinois, for example, the recent widely-publicized false confessions of Ryan Harris and several other juveniles illustrate the pitfalls of assuming that juveniles can understand or assert their rights. As discussed above in regard to persons with mental retardation, allowing juries to weigh age as a mitigating factor against aggravating factors such as the seriousness of the crime does not adequately address the risk of an erroneous sentence.

***Persons Convicted of Felony Murder but Who Have Not Killed, Intended to Kill, or Intended for a Killing to Occur***

"Support for the death penalty apparently rests on the assumption that the worst murderers are the ones selected to be executed. However, the capital punishment system does not necessarily execute the worst killers. In fact, people who never killed at all are sometimes sentenced to death and executed." Tabak & Lane, 23 LOYOLA OF LOS ANGELES LAW REVIEW at 96. The felony murder rule provides that any participant in a specified felony that results in a death shall be punished as a murderer, no matter how accidental or unforeseeable the death, or how attenuated the defendant's connection to the death. Therefore, it permits defendants to be convicted of murder though they did not kill, did not intend to kill, and did not intend for a killing to occur.

This rule, when applied in capital cases, means that the punishment of death will not be limited to the most deserving defendants. Because the rule allows a conviction for murder without necessarily inquiring into the intent or blameworthiness of the defendant, it permits the imposition of a death sentence on a defendant who did not in fact kill, attempt to kill,

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or intend that a killing take place. For example, Beauford White was executed in Florida in 1987, though he did not kill or intend to kill, and had objected to any killing before his accomplices started shooting. See *White v. Wainwright*, 809 F.2d 1478 (11th Cir. 1987).

Although at one time the Supreme Court prohibited the execution of a defendant who did not possess the requisite intent, see *Enmund v. Florida*, 458 U.S. 782 (1982), it has since abandoned this categorical prohibition in favor of a case-by-case analysis of whether a particular result is disproportionate. See *Tison v. Arizona*, 481 U.S. 137 (1987). Unfortunately, the standards set for this case-by-case analysis (reckless indifference to the value of human life, which may be inferred from participation in the felony) permit the execution of defendants based on vague, highly subjective judgments about culpability. The vagueness of the standard is a special problem in the capital context. "It tells the states that some felony murder accomplices should not be executed, but it provides little meaningful guidance in identifying these accomplices." Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 BOSTON COLLEGE LAW REVIEW 1103, 1163 (1990). It therefore does not provide reliable guidance for the constitutionally mandated effort to reserve the death penalty for the most heinous crimes. See *Gregg*, 428 U.S. 153. Such guidance is best provided by a categorical rule excluding felony murder defendants from eligibility for capital punishment. Anything less than categorical exclusion provides too great an opportunity for the unconstitutionally overbroad, random, arbitrary, and capricious application of the death penalty.

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### III. EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

#### Summary

- Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.
- The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as “truth in sentencing.”

#### A. *Availability of Life Sentence without Parole*

#### RECOMMENDATION

**In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.**

#### COMMENTARY

At sentencing in a capital case, whether the sentence is to be determined by the jury or the court, the option of a sentence of life in prison without the possibility of parole (LWOP) should be available. Although a minority of jurisdictions permit the court to decide the sentence, this recommendation will focus on the jury as the sentencing authority. The points made should be generally applicable to judicial sentencing, although the empirical research has involved jurors.

Many legislatures have recognized the merits of providing this appropriate sentencing option. Over the last decade, most jurisdictions have authorized a sentence of LWOP in capital cases. Indeed, today only three of the thirty-eight states that authorize the death penalty fail to provide the LWOP option. It should be available in all states and for all offenses for which a death sentence may be imposed.

Because it acts on behalf of the community and makes the difficult judgment about the appropriate sentence to satisfy the goals of retribution, incapacitation, and deterrence, the jury should have the LWOP option available. Without that option, a sentence of death by the jury may be the consequence of a “false and forced choice” that is both an irrational and an erroneous response to its judgment about what justice demands and what constitutes an appropriate sentence in the case. The jury’s reasoned judgment may be that death is not appropriate, but absent the LWOP option, it may be the best of several bad alternatives. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEXAS LAW REVIEW 605 (1999).

Empirical evidence demonstrates that the absence of the LWOP option produces pernicious results because juries fear that the availability of parole will subvert any non-death sentence they recommend. In the absence of the LWOP option, a desire to incapacitate the defendant can result in a death sentence to protect society from future potential dangerousness upon release, particularly for youthful defendants, even though LWOP would have better fit the jury’s reasoned judgment as to the correct sentence in the case. Indeed, when incapacitation is the jury’s goal, not having the option of LWOP pushes the jury into a

decision to sentence the defendant to death by default because the sentence that the jury finds appropriate cannot be imposed.

While the impact of the absence of LWOP is less stark when retribution is the issue, jurors' judgments about appropriate retribution may also require imprisonment for the perpetrator's entire life. Here, too, the absence of LWOP requires that they impose a death sentence that, in their judgment, would otherwise be unnecessary and inappropriate. Artificially increasing the number of death sentences should not be a goal of any statutory system, but requiring jurors to make this "false and forced choice" can have that effect. It effectively takes from the jury the opportunity to speak accurately and effectively as the conscience of the community and improperly tilts the balance in favor of a sentence that the jury may believe to be excessive.

Imposing death sentences is not an independent goal of our system, and coercing juries into imposing such a sentence should not be the design of any legislative scheme. Instead, appropriate sentences that meet the facts of the case and the demands of society, as determined by jury or judge, are the goal. In this light, it is notable that when Indiana, Georgia, and Virginia introduced LWOP during the past decade, the number of death sentences imposed declined sharply in each state. Peter Finn, *Given Choice, Va. Juries Vote for Life: Death Sentences Fall Sharply When Parole Is Not an Option*, WASHINGTON POST, Feb. 3, 1997, at A1.

LWOP will also give the survivors finality at an earlier point than will a death sentence. Sentences of death are overturned with substantial frequency, and even when affirmed on appeal, they are not carried out for some years. Any reasonably foreseeable change in death penalty law, no matter how restrictive it is, will in all likelihood not eliminate delays and reversals because of errors in imposition of the death sentence. By contrast, except in the relatively rare situation that the conviction itself is reversed, LWOP sentences are virtually immune from attack on appeal, and therefore become final with greater certainty and speed than do sentences of death.

In enacting legislation that permits imposition of LWOP, the legislature should be attentive to a large body of empirical research that reveals societal skepticism that murderers, even capital murderers, will in fact serve long prison sentences. Actual sentencing practices demonstrate that such skepticism is unfounded, but we must confront this attitude, which seeps into juror expectations. To the extent possible, legislatures should remove all possible avenues for early release from the LWOP alternative. The executive's authority to pardon or commute sentences is generally constitutionally based, and typically may not be eliminated by legislation. However, all other possible avenues of early release should be eliminated so that juror skepticism can be reduced to the greatest extent possible.

Even more important, because juries operate under deeply ingrained misapprehensions that the time served on any non-death sentence will be relatively short, they should be provided with authoritative data on the time served by death-eligible murderers not sentenced to death, and by persons sentenced to life without parole. (Such data, when provided to the jury, should help to dispel pernicious and powerful myths surrounding the true length of a life in prison sentence.) Speaking to and correcting these attitudes is at the base of our separate truth in sentencing recommendation.

*B. Meaning of Life Sentence without Parole (Truth in Sentencing)*

**RECOMMENDATION**

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

**COMMENTARY**

By far one of the most powerful influences on a capital sentencing jury's decision about whether the defendant should be sentenced to death or imprisonment is its perception of whether, if imprisonment is chosen, the defendant will be released from prison, and if so, how soon. Empirical data demonstrate that, in the absence of information on this issue, juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released. This confusion operates against the defendant. In both "life without parole" situations and all other sentencing situations, jurors significantly underestimate the amount of time defendants will remain in prison. Their mistaken beliefs about how long defendants will remain in prison lead them to impose death sentences in many cases in which they would opt for life sentences if they were better informed. Bowers and Steiner; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL LAW REVIEW 1 (1993).

Not only does confusion about sentencing options tend to increase the number of death sentences, it also exacerbates an already existing tilt toward imposition of death. Empirical evidence documents that jurors at the beginning of the penalty phase, and before hearing any penalty phase evidence at all, show a significant imbalance in favor of imposing a death sentence. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 INDIANA LAW JOURNAL 1043, 1100-01 (1995).

Capital defendants must be permitted to counteract misconceptions that further exacerbate the tilt toward imposing death. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (noting that the Eighth Amendment gives more latitude to the capital defendant than to the government, in that it permits the defendant to introduce unlimited mitigation evidence so that a jury can choose to be merciful for any reason or no reason at all).

The jury's concern with the issue of sentencing options is entirely appropriate under current law. The Supreme Court has approved the jury's consideration, during the penalty phase, of the defendant's future dangerousness to society. See *Jurek v. Texas*, 428 U.S. 262, 275 (1976). In addition, the question of the length or nature of a defendant's sentence is highly relevant to the jury's consideration of which punishment provides sufficient retribution under the particular circumstances before it. See *California v. Brown*, 479 U.S. 538, 545 (1987). In *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994), the Supreme Court recognized that a jury that incorrectly believed that a defendant could be released on parole if not executed might premise its sentencing decision on a false choice. The majority opinion addressed this problem only in the limited circumstances in which the prosecutor argued for a death sentence based on future dangerousness, holding that the due process clause

required the jury to be informed of a defendant's parole ineligibility in such circumstances. See also *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001), reaffirming *Simmons*.

In circumstances not covered by *Simmons* (those in which the prosecutor does not explicitly rest an argument on the defendant's future dangerousness), some states continue to bar jury instructions regarding parole in capital cases. *California v. Ramos*, 463 U.S. 992, 1026-27 (1983). Even those that permit such instructions do not mandate them, and generally do not ensure that juries are provided with full and understandable information. Yet jurors are greatly concerned about and influenced by parole issues even in cases in which the prosecutor does not explicitly argue the defendant's dangerousness. Without accurate information on the issue, jurors simply tend to make unsupported and inaccurate assumptions, often based on misleading media portrayals or other unreliable sources.

There is no good reason to deny jurors accurate information on this germane and crucial issue. In the past, refusals to tell juries about parole have often been justified as a way of protecting defendants (on the assumption that juries may give greater sentences if they know about the possibility of parole). In the capital context, ignorance of parole not only generally does not protect defendants, but it also increases their chances of being sentenced to death based on a false choice. Many states provide such information in non-capital cases, and there is no evidence that the task is unduly difficult. Capital juries have a constitutional duty to make a reasoned moral decision on whether a death sentence is appropriate; this decision must be unencumbered by ignorance and supported by information sufficient and relevant for reliable and rational decision-making. *Perry v. Lynaugh*, 492 U.S. 302, 319 (1989). Full disclosure on the available parole options will help them discharge this duty. However, statements that tend to relieve jurors of their sense of responsibility for their verdict will instead deflect the jury from its duty. See James S. Liebman, *The Overproduction of Death*, 100 COLUMBIA LAW REVIEW 2030 (2000).

Similarly, statements involving speculative or highly unlikely sentencing outcomes, such as grants of clemency, will defeat the purpose of properly and accurately educating the jury.

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*Simmons v. South Carolina*, 512 U.S. 154 (1994)



#### IV. SAFEGUARDING RACIAL FAIRNESS

##### Summary

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.

##### *Safeguarding Racial Fairness*

##### RECOMMENDATION

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component—perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

##### COMMENTARY

While the precise facts are in dispute, what cannot be disputed is that racial disparities and the potential for racial discrimination hang over our nation's capital punishment system and raise questions about its fairness. On the one hand, we have the 1990 report of the independent General Accounting Office that consistently found racial disparities in study after study of the death penalty in various jurisdictions. On the other hand, we have the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that found statistics from a study conducted by Professor David Baldus (used to demonstrate the operation of racial discrimination in Georgia's system) insufficient to prove a constitutional claim of intentional discrimination against McCleskey. Yet the Baldus study did show that statewide racial disparities in sentencing could not plausibly be explained by any of more than 200 legally relevant variables, and that systemic racial bias cannot be addressed adequately on a case-by-case basis. To some, the certainty of racial discrimination is the most obvious reason that our nation's capital punishment system is inherently flawed, indeed, illegitimate. To others, racial discrimination is either an unproven feature of the capital punishment system or a feature that could be corrected by the odd remedy, that no one supports, of executing more defendants who killed African Americans.

We believe the problem is both serious and obvious from the point of view of the public and its growing lack of confidence in the fairness of the death penalty system, as indicated by numerous recent polls. For example, a September 2000 poll showed that sixty-four percent of Americans supported a moratorium on executions until the issue of the fairness of capital punishment could be resolved, while a June 2000 poll indicated that eighty percent of the public believed that an innocent person has been executed in the United States in the past five years.

See Poll, *America's Views on the Death Penalty*, Peter D. Hart/American Viewpoints, Sept. 14, 2000; see also Poll Analysis, *Slim Majority of Americans Think Death Penalty Applied Fairly in the Country*, Gallup Organization, June 30, 2000. If executions are to be part of our justice system, they must be undertaken in an even-handed fashion. Moreover,

the public must be assured that race is never the deciding factor in who will live and who will die.

While we believe the problem is of unmistakable importance, we acknowledge that a recommendation that sets forth a single remedy to this complex problem is not in view. Instead, we recommend vigilance and experimentation. Specifically, we recommend two general approaches to guide this experimentation in combating the possibility of racial discrimination. Our federal system, with its often-noted “laboratory” aspects, holds promise for developing and confirming effective solutions.

The first, and we believe the most important, of these remedial steps is the rigorous gathering of data on the operation of the jurisdiction’s capital punishment system and the role or potential role of racial discrimination in it. The country, led by Attorney General John Ashcroft and a number of state governments, is engaged in a similar process with regard to the racial profiling of motorists. We do not wish to dictate what data each jurisdiction should gather; many of the required elements of data-gathering are clear. How one gets at and ferrets out racial discrimination takes skill, judgment, and know-how. Each jurisdiction should assemble its best team of experts, to include prosecutors, defense counsel, and neutral experts. The goal is the best and most complete data possible, and, ultimately, the elimination of the specter of possible racial discrimination. Thus, breadth of expertise and neutrality should be guides to developing research teams and their protocols. The work of such teams in New York and New Jersey are promising guides to how such data-gathering systems should be developed.

For those untutored in criminal justice studies, the call for the gathering of data may seem unnecessary. However, issues of race often are not obvious and are outside the record. The race of a motorist stopped on a highway is not part of the police report if no arrest was made. The race of the jurors dismissed by prosecutors and defense counsel are not shown on the record unless a specific effort is made. The race of defendants whose cases are chosen or not chosen for capital punishment throughout a state and across jurisdictions does not pop up on a computer screen upon a simple request for information. All of this information will exist only because of a call that it be collected, and, in most situations, it will be unavailable unless specific steps are taken for its collection. We cannot eliminate racial discrimination unless we have detailed data, particularly in the modern day when it most likely operates at an unconscious rather than a purposeful level.

Once the data are gathered, jurisdictions should carefully consider and act on the results. If the data show no evidence of racial disparities, then the public can place greater confidence in the fairness and integrity of the jurisdiction’s death penalty mechanisms. Conversely, if that data support a conclusion or demonstrate a high likelihood that racial discrimination is affecting the operation of the death penalty system, the legislature should consider enacting appropriate remedial measures. See *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (“Legislatures ... are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts’... .”)

Our second general recommendation is that jurisdictions seek to ensure that racial minorities are part of every decision-making process within the criminal justice system. For example, efforts should be redoubled, through vigorously enforcing *Batson v. Kentucky*, 476 U.S. 79 (1986), and through effective application of fair cross-section requirements to ensure that members of all races are part of grand juries (where grand juries exist) that indict and petit juries that decide guilt and punishment. Racially mixed defense teams are likely to

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appreciate aspects of the case that single-race teams will not, as are racially mixed prosecutorial teams. Those who decide which cases are to be prosecuted capitally should be racially diverse. Finally, although this cure is generally beyond the scope of any particular entity, a racially diverse judiciary is an important component of the public's perception of racial fairness in the death penalty system.

The process of safeguarding racial fairness in the application of the death penalty and assuring the public that the system operates without racial discrimination is admittedly very challenging. We do not claim that our proposals will accomplish these critical tasks, but we believe they are a reasonable place to begin. Moreover, we believe that it is critical to address the issues of racial neutrality, fairness, and public confidence that racial discrimination plays no role in the decisions on who should live and who should die through capital punishment. These issues are among the most important confronting the death penalty system, and any set of meaningful reform efforts must confront these questions as forthrightly as possible.\*

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\*See appendix for dissent of Timothy Lynch.

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## V. PROPORTIONALITY REVIEW

### Summary

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.

### ***Adopting Procedures for Ensuring Proportionality in Sentencing***

#### RECOMMENDATION

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

#### COMMENTARY

The central concerns that inspired the Supreme Court to embark, in *Furman v. Georgia*, 408 U.S. 238 (1972), on its effort to regulate capital cases were concerns about the arbitrary and unequal application of the death penalty, arising in part from vesting broad discretion in decision-makers without providing sufficient guidelines. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld an amended Georgia death penalty statute in large part because it provided for mandatory proportionality review. That is, it provided that the Supreme Court of Georgia should compare each death sentence with sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. It emphasized the positive effect an appellate review containing a mandatory proportionality check would have on the faulty system, finding that it “serves as a check against the random or arbitrary imposition of the death penalty and substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.” Unfortunately, the Court, in its 1984 decision in *Pulley v. Harris*, 465 U.S. 37 (1984), backed away from requiring proportionality review under the Eighth Amendment (although it emphasized that capital sentencing systems are still constitutionally required to provide checks on arbitrariness), and most states have ceased to perform it. We are now faced with state systems that vary vastly from one another, but most of which pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in *Furman v. Georgia*. Adopting some form of proportionality review would go a long way toward addressing this problem, which goes to the heart of the death penalty’s fairness and efficacy.

Proposing a system to ensure proportional sentencing is fraught with problems, as this committee well recognizes. Such proposals may raise concerns about impeding the exercise of prosecutorial discretion, or about intruding on state prerogatives to shape and enforce local law enforcement priorities and values. The more basic problem is simply in finding the difficult balance between treating like cases alike and also treating each case individually.

These are two often-conflicting goals of the Supreme Court's death penalty jurisprudence. Even in the face of these problems, the goal of eradicating arbitrary death sentencing is critically important to the constitutionality and the basic fairness of the death penalty, and should be undertaken in every state with a death penalty.

There are a number of possible ways to institute proportionality review, several of them currently in use in various states.

- One method is for the state supreme court to perform a review that compares the case to other cases in which the death penalty was imposed. For example, the New Jersey Supreme Court addresses the question of whether the penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime.
- Another way, which some commentators, including the National Center for State Courts, have argued is more effective, is for the state supreme court to compare each case, not just with other cases in which the death penalty has been imposed, but with the entire pool of death-eligible cases, including those in which the death penalty was not sought. New York, for example, has directed its highest court to develop a comprehensive database of information for all cases involving indictment for first-degree murder and has directed the clerk of the trial court to fill out a capital case data report in each first-degree murder case, to facilitate such comparisons. Comparison of each case to the pool of all death-eligible cases is also the method employed in Georgia and Washington.
- A third approach, advocated by Ninth Circuit Court of Appeals judge Alex Kozinski, among others, would be for states to make a concerted effort to narrow by statute the universe of death-eligible cases to those that are especially heinous, premeditated, and unmitigated. Too often, it has been politically expedient for states to keep adding to the list of categories of cases in which the death penalty may be imposed, arguably well beyond those sorts of cases for which the penalty was originally intended. The wide availability of a death-sentencing option leaves too much opportunity for arbitrariness in charging and sentencing.

States may well develop additional approaches, suited to their own particular priorities, circumstances, and resources. What is crucial is that each state develop an effective method, designed to address and, in the best of circumstances, eradicate arbitrary and discriminatory imposition of death sentences.\*

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## VI. PROTECTION AGAINST WRONGFUL CONVICTION AND SENTENCE

### Summary

- DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.
- All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

#### A. *Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution*

### RECOMMENDATION

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing that may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

### COMMENTARY

Over the past two decades, DNA testing has been developed and substantial advances in its sophistication and effectiveness have occurred. This technology now frequently makes possible the effective testing of biological materials that were left at crime scenes, as well as comparison with the accused or convicted defendant's DNA. The evidence produced can be extraordinarily powerful in either incriminating or exculpating the suspected or convicted defendant. Sometimes the results of such testing are decisive. The effort to use DNA evidence effectively to prove guilt and to establish innocence should be continued along lines set out in the DNA Identification Act of 1994 and related legislation.

Prior to the mid-1990s, DNA testing was not widely available, and, as a result, biological materials relevant to guilt or innocence were not tested for use at trial. Subsequent examination of cases using this new forensic technique has resulted in the exoneration of

more than eighty innocent men and women of the crimes for which they had been convicted. In at least ten of these cases, the defendant had been sentenced to death but had not yet been executed. In approximately a dozen of the cases, the tests resulted in the identification of another individual as the true perpetrator of the offense. In addition, recent advances in DNA testing technology may now produce usable evidence where no results could be obtained with earlier methods. Even in those instances where earlier technology provided some results, new technology may generate substantially more powerful and probative evidence.

In most jurisdictions, the legal structure is not adequate to take proper advantage of the advances in scientific testing of evidence. Legislation should be enacted to cure a number of deficiencies in the legal structure.

First, legislation should require the preservation of biological samples in all pending death penalty cases, and should require testing upon defense request in cases that have not yet been tried. In some instances, the failure of current law to mandate preservation has resulted in the tragic destruction of potentially critical evidence, typically without any meaningful remedy. To help ensure access to justice, jurisdictions should immediately enact legislation requiring the preservation of all existing biological samples until affected defendants can be notified and given an opportunity to exercise their statutory rights.

Second, the legislation should, in appropriate circumstances, grant a convicted defendant the right to secure testing. A showing by the defendant that the results of the test would be relevant to the correctness of the determination of guilt or the sentence of death should be sufficient to secure testing. Testing should be available where the results would bear only on the correctness of the death sentence and should not be restricted to circumstances where actual innocence is alleged. Similarly, testing should not be restricted to cases where exclusion of the evidence would necessarily exonerate the defendant; a showing that the results would be relevant or helpful to establishing an erroneous conviction or sentence should be sufficient.

DNA testing should be made available if testing was not conducted or not available at the time of trial. Moreover, if DNA testing has previously been conducted, new testing should be ordered if advances in DNA technology present a reasonable possibility that new exculpatory evidence may now be produced.

Jurisdictions have a legitimate interest in ensuring the fairness of testing and the integrity and, to the extent possible, the preservation of biological samples. They can accordingly impose restrictions and requirements on the laboratories used and the testing mechanisms employed to satisfy these legitimate concerns.

Third, because the vast majority of those sentenced to death are indigent, legislation should provide for public financing of testing when such testing is shown to be appropriate. Likewise, it should provide for appointment of counsel for defendants seeking testing, if the defendant is not already represented by counsel and is indigent.

Fourth, ordinary rules regarding time limitations on introduction of newly discovered evidence and for the treatment of evidence showing a wrongful conviction or death sentence are inadequate to deal with this new type of evidence of innocence, which is based on analysis or re-analysis of evidence that has long been known to exist. To be effective, statutes must create clear exceptions within existing procedural frameworks for newly developed DNA evidence. The statutes must permit the introduction of the new evidence despite otherwise disqualifying time limitations and other procedural bars. Specifically, such a proceeding should not be considered as a petition under 28 U.S.C. §§ 2254-55, or under

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the Antiterrorism and Effective Death Penalty Act. Considering it as such a petition would raise the problem that, ordinarily, successor petitions are barred from being considered, or, if the petition were allowed despite being considered a successor petition, would create the potential problem of fostering new exceptions to the general rule barring such petitions.

Current law does not readily allow admissions of new discoveries of exculpatory evidence long after trial because of the development of new scientific tests. It also does not easily accommodate showings of innocence unless the failure to make such proof at trial was the result of some procedural restriction. Existing law is perhaps attuned to the fear that human witnesses can invent new stories and that their lies are difficult to detect or to distinguish from long-delayed disclosures of the truth. A new scientific examination of existing evidence that can be conclusive is highly unusual, if not entirely unprecedented, in modern law. Not only must the law permit the introduction of new DNA evidence showing innocence, but it must also authorize the court to order a new trial or new sentencing if the defendant shows that the conviction or sentence was erroneous.

Details about the operation of these statutes should be left to individual jurisdictions. Despite the advances of science, certainty in the outcome sometimes will be unclear because the interpretation of the relationship between the biological evidence and the crime is problematic. However, the development of DNA testing has given us a unique view into the inaccuracies of the determinations of guilt in a sizeable number of cases that have moved through our criminal justice system and have passed reviews by juries and appellate judges. The easiest part of the lesson of DNA should be creating procedures to right the wrongs that can be documented.

Moreover, experience with DNA testing technology and its revelations of error should demonstrate to the criminal justice system the imperative to establish systems to preserve physical evidence, where reasonable prospects exist that subsequent scientific advances may draw new evidentiary significance from it. The criminal justice system should also take note of and learn an appropriate level of humility from the large number of cases where innocence has been proven. Criminal trials and the ensuing convictions have unmistakably been shown to be fallible, even when our criminal justice system operates in good faith and apparent good order. Innocence and unjust conviction are real possibilities, and, with due regard to the interest of finality, the system should be open to additional demonstrations of its errors when those errors stem from the most basic denials of justice—substantive errors in the conviction and sentencing of defendants, including errors in cases that, unless corrected, would have resulted in wrongfully taking a human being's life.

Likewise, the experience with DNA has demonstrated the inadequacy of our legal procedures for dealing properly with newly developed evidence of innocence. General reforms should be enacted to expand time limitations to permit introduction of evidence of innocence, and to authorize a new trial and a new sentencing hearing where the evidence establishes that the conviction or death sentence was erroneous. The recommendation immediately following specifically deals with procedural and substantive reforms that apply to newly discovered or developed evidence, outside the field of DNA evidence, that shows innocence or an unjust sentence.

*B. Lifting Procedural Barriers to Introduction of Exculpatory Evidence*

**RECOMMENDATION**

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

**COMMENTARY**

The increasingly convoluted, technical, and time-consuming process of appealing a death sentence understandably concerns members of the public, lawyers, and scholars alike. Ironically, the increasing technicality of *habeas corpus* and other avenues for reviewing a death sentence has not made it any easier to address the central question our justice system should ask in such cases: whether the defendant was wrongly convicted or wrongly sentenced to death.

The public is becoming increasingly aware of this defect in our current procedures, in light of the growing use of DNA evidence to exonerate death row inmates, the recent series of exonerations of over a dozen death row inmates in Illinois, and rules like Virginia's "twenty-one-day rule," barring introduction of newly discovered evidence beyond twenty-one days of the final court decision in a criminal case. This rule was recently amended to lift the time limit for introduction of DNA evidence, but not to address introduction of other forms of potentially exculpatory evidence.

The inability to introduce DNA evidence has prompted introduction of several bills in Congress. It is important to understand, however, that DNA evidence is only one type of newly discovered evidence that can undermine the reliability of a capital verdict. Even under the best of circumstances, new and exculpatory evidence may come to light late in the process. In the Rolando Cruz case in Illinois, for example, it took years before it became clear that another man had confessed to the murder for which Cruz was on death row, and that investigators had perjured themselves when claiming that Cruz himself had confessed. Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 *BUFFALO LAW REVIEW* 501 (1996). Confessions by the actual perpetrator, other physical evidence, new eyewitnesses, and recantations by existing eyewitnesses are just some of the types of evidence that can materialize late in the process, despite the due diligence of the defense.

Some commentators have argued that the law has been developing in exactly the wrong direction, encouraging the proliferation of procedural arguments but failing to provide adequate means of raising the central questions of wrongful conviction and sentence, and thus of the ultimate fairness and justice of the outcome. See, e.g., Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 *TEXAS LAW REVIEW* 1771 (2000). In plain English, current law permits a defendant who is innocent of a crime or unworthy of a death sentence to be convicted and sentenced to death, with no opportunity to introduce newly discovered evidence that could change the verdict in the case (See Hoffman; Bandes).

Each state has a different set of rules and procedures regarding time limits for introducing new evidence. Virginia is one of the most stringent, with its requirement that any

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new evidence (other than DNA evidence) be introduced within twenty-one days of the final court decision. VIRGINIA SUPREME COURT RULES 1.1 recently amended to lift the time limit for introduction of DNA evidence. Though other states are somewhat less stringent, finding a forum in which to raise a claim of innocence based on newly discovered evidence is often difficult or impossible. See Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death Sentenced Prisoners Leads Nowhere*, 35 WILLIAM & MARY LAW REVIEW 943 (1994). Nor does federal *habeas corpus* provide a reliable forum for defendants who were unable to raise their claims in state court. Such claims are very difficult to raise unless coupled with an independent claim of constitutional error.

It is crucial for each capital defendant to have the opportunity to introduce relevant newly discovered evidence bearing on his or her guilt or sentence. Jurisdictions may certainly impose a requirement that the evidence be introduced within a specified time period after it is discovered, as well as require a showing that it could not have been discovered earlier with due diligence. However, statutes of limitations should not bar introduction of such evidence, whenever it is discovered, if the evidence would more likely than not change the verdict or if it would undermine confidence in the reliability of the sentence. The “more likely than not” standard for introduction of evidence bearing on the verdict strikes an appropriate balance between the interests in preserving the finality of the verdict and in ensuring that convictions are accurate and just. The “undermine confidence in the reliability of the sentence” standard for introduction of evidence bearing on the capital sentence is identical to the standard employed by *Strickland v. Washington*, 466 U.S. 668 (1984), for determining prejudice arising from ineffective assistance of counsel. It recognizes that due to the many complex variables that affect capital sentencing, it would be unworkable to require a defendant to demonstrate that newly discovered evidence, however relevant and exculpatory, would be likely to change a capital sentence. As current practice under these standards has shown, they are likely to permit introduction of otherwise time-barred evidence only rarely, when the probative value of the evidence clearly outweighs the interest in finality.

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VIRGINIA SUPREME COURT RULE 1.1



## VII. DUTY OF JUDGE AND ROLE OF JURY

### Summary

- If a jury imposes a life sentence, the judge in the case should not be allowed to “override” the jury’s recommendation and replace it with a sentence of death.
  - The judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant’s guilt, that doubt may be considered as a “mitigating” circumstance that weighs against a death sentence.
  - The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.
- A. *Eliminating Authorization for Judicial Override of a Jury’s Recommendation of a Life Sentence to Impose a Sentence of Death*

### RECOMMENDATION

**Judicial override of a jury’s recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury’s recommendation of death.**

### COMMENTARY

Although the Supreme Court has determined that judicial override of a jury’s recommendation that the defendant not be sentenced to death is constitutional (see, e.g., *Spaziano v. Florida*, 468 U.S. 447 (1984)), the jury is uniquely equipped to make the judgments that are understood to be critical to the imposition of the death sentence. The jury, which is comprised of members, and serves as the representative, of the community, is best positioned to “express the conscience of the community on the ultimate question of life or death.” *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). It can properly express the community’s outrage, indicating by its sentencing recommendation that the perpetrator has lost his or her moral entitlement to live. Because the decision whether to impose death remains substantially a moral decision despite efforts to impose legal precision on it, a jury determination is particularly appropriate. The jury, as opposed to a single government official, may be most likely to avoid the danger of an excessive response to the always horrible act of intentional homicide. *Spaziano*, 468 U.S. at 469-70 (Stevens, J., dissenting). Indeed, in states where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.

Of the thirty-eight states that have the death penalty, only four—Alabama, Delaware, Florida, and Indiana—permit judicial override of jury recommendations. Supporters cite two justifications for permitting judicial override of jury recommendations—ensuring

consistency in sentencing and correcting sentence recommendations by juries that are excessively harsh or based on emotion or desires for vengeance. In those states that have employed judicial override extensively, there is no evidence that consistency in results has been achieved. More troubling, the predominant use of jury override, although differing among states, has been for courts to impose death after juries recommend a life sentence. In Florida and Alabama, the vast majority of overrides have been to impose death, an outcome that has occurred over 165 times in Florida, and over sixty-five times in Alabama. In Indiana, although slightly favoring death, judicial overrides have been almost equally split between death and life in prison. Delaware's experience is unique in that overrides have been used only to reduce death sentences to life in prison.

While the reasons that judges have predominantly overridden life sentences to impose death cannot be clearly established, the apparent cause is clear: It is political survival. When judges in states that elect their trial judges have the power to override jury sentences in capital punishment cases to impose either life or death, that discretionary judgment provides a ready focus for political pressures. It appears to result primarily in an inclination to impose death.

Consistent with the practice in Delaware, asymmetry in judicial authority to override a jury determination is appropriate. The American experience with the death penalty demonstrates that no rule of law requires the imposition of the death penalty on any set of facts. Thus, a determination by the jury to impose death will often be appropriate under the facts but will never be required as a matter of law. On the other hand, the imposition of death may, in some instances, not only be inappropriate but also be legally or morally improper, may be disproportionate or excessive, or may simply be contrary to the weight of the evidence. Thus, states may appropriately authorize their trial courts to correct juries' sentencing recommendations of death, when the court judges such a sentence to be excessive, at the same time that they prohibit those same trial courts from overriding a jury recommendation of life imprisonment to impose death.

This recommendation does not speak to states that entrust death penalty sentencing to judges in the first instance. For reasons discussed above, the wisdom of having such a structure may be questioned, given the reality of judicial electoral politics. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far, far more difficult to justify under the values of our system than is an initial determination, entrusted to the judiciary, that the appropriate sentence is death.

### *B. Lingering (Residual) Doubt*

#### RECOMMENDATION

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant."

## COMMENTARY

In *Lockhart v. McCree*, 476 U.S. 162, 181 (1986), the Supreme Court recognized that jurors who vote to convict may nevertheless entertain “residual doubts” about the defendant’s guilt that would “bend them to decide against the death penalty.” Residual doubt is defined as any remaining or lingering doubt a jury has concerning the defendant’s guilt, despite having been satisfied beyond a reasonable doubt. Jurors who are confident enough of the defendant’s guilt to convict may still conclude that their level of confidence falls short of the complete moral certainty needed to take a person’s life. The reasonable doubt standard permits a conviction despite the presence of genuine doubts, or the absence of absolute certainty, about the defendant’s guilt of the crime. Given the irrevocable nature of the penalty of death, a decision to impose the penalty requires a greater degree of reliability than is required for imposition of other penalties. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Jurors should not vote for the death penalty if they entertain doubts as to the defendant’s factual guilt. Yet many jurors will be unaware of the continuing relevance of their doubts about guilt, in the absence of a jury instruction informing them.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), a plurality of the Supreme Court ruled that the Eighth Amendment does not mandate the giving of a residual doubt instruction. As one commentator observed, however, a majority of the members of the Court found that “regardless of whether residual doubt is an Eighth Amendment right, there was no violation in [the particular] case because Texas had not interfered with the defendant’s ability to argue the issue to the jury.” Jennifer R. Treadway, Note, “*Residual Doubt*” in *Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 CASE WESTERN RESERVE LAW REVIEW 215, 222 (1992). In the wake of the decision, several states have barred, through judicial decision, the giving of a residual doubt instruction, and in other states the issue is dealt with inconsistently. (See Treadway). This recommendation addresses the issue left open in *Franklin v. Lynaugh* by making it clear that states should not bar the giving of residual doubt instructions. It also goes further and, as a matter of common sense and fundamental fairness, encourages states to adopt rules mandating the giving of such instructions in cases in which the presiding judge deems them appropriate. The recommendation contemplates that the universe of such cases will be quite small, since in most cases that proceed to the capital sentencing phase, jurors will not maintain any doubt of the defendant’s guilt of the crime charged.

C. *Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors*

## RECOMMENDATION

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror’s sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror’s

sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

#### COMMENTARY

Empirical evidence shows that capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. Research indicates that many jurors wrongly approach the sentencing decision in the same manner as they do the guilt decision, that is, without fully understanding that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. This confusion can make it significantly more likely that these juries will sentence a defendant to death than it would have been had they understood their obligations more clearly. Standard (pattern) jury instructions that give jurors complex criteria, including lists of aggravating and mitigating factors, often leave jurors with the erroneous impression that their moral duty will be discharged if they simply tally up the number of aggravating and mitigating factors and weigh them against each other. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 INDIANA LAW JOURNAL 1043, 1090-93 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 INDIANA LAW JOURNAL 1161, 1164-67 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICHIGAN LAW REVIEW 2590, 2596-99 (1996).

Juries often do not understand that they are not confined to considering enumerated aggravating factors, but may also consider non-enumerated and non-statutory mitigating factors. Indeed, juries are often seriously confused about what mitigation is and how it must be proved. See Steiker; see also Craig Haney, *Taking Capital Jurors Seriously*, 70 INDIANA LAW JOURNAL 1223 (1995). Moreover, they often believe that the factors can be weighed or tallied according to a pre-existing formula (Bowers), whereas in fact they must be considered in light of each juror's ultimate duty to decide whether the particular defendant, in light of all the circumstances before the jury, deserves to die. *Woodson v. North Carolina*, 428 U.S. 280 (1976). These erroneous beliefs tend to tilt juries toward a death sentence for a variety of reasons. First, enumerated aggravating factors tend numerically to outnumber enumerated mitigating factors. Secondly, any attempt to weigh these factors is difficult and mis-

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guided because the factors are not comparable, and because such an attempt obscures the true issue: whether the jurors conclude in light of all the evidence that the defendant deserves to die. Finally, the statutes encourage jurors to rely on the appearance of mathematical certainty rather than exercise their own judgment and take responsibility for its consequences (Steiker).

The Supreme Court has upheld standard (pattern) jury instructions that, as has been empirically demonstrated, are apt to give jurors incorrect impressions about their duties. See, e.g., *Weeks v. Angelone*, 528 U.S. 225 (2000) (upholding an instruction that arguably left the jury with the impression that it was required to sentence the defendant to death if it found the requisite aggravating factors existed). See also *Weeks*, 528 U.S. at 237-39 (Stevens, J., dissenting); Stephen Garvey, Sheri Lynn Johnson, & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL LAW REVIEW 627 (2000); see also Bowers. Such decisions should not relieve capital sentencing judges of their duty to ensure that the instructions given in their courts are as clear and accurate as possible. For example, Professor Jordan Steiker suggests the following instruction:

“The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty, and the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factors that suggest whether the defendant is or is not among the small group of “worst” offenders; and in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant’s character, background, and capabilities that bear on his culpability for the crime.” Steiker, 94 MICHIGAN LAW REVIEW at 2622 n.134.

Furthermore, judges often respond to jury requests for clarification of their obligations simply by referring the jurors back to reread the instructions. This practice, not surprisingly, is ineffective at clearing up juror confusion. Indeed, one study concluded that this practice increased the already strong likelihood that jurors would sentence the defendant to death based on misapprehension about their duties. Garvey, *et al.*, 85 CORNELL LAW REVIEW AT 635. A judge confronted with juror confusion should take affirmative steps to dispel that confusion. Simple answers to jury questions, in plain English, can significantly improve the odds that jurors will decide on a sentence based on accurate understandings of the law. For example, Professors Steven Garvey, Sheri Lynn Johnson, and Paul Marcus found the following simple clarification to significantly improve juror comprehension:

Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison. *Id.*

As to both the original instructions and the means of clarifying juror confusion, no one formula can ensure that juries understand their duties. The important point is that the judge should not assume, particularly in light of all the evidence to the contrary, that reliance on pattern jury instructions and refusal to clarify will be sufficient. Judges must stay constantly vigilant to ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.

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## VIII. ROLE OF PROSECUTORS

### Summary

- Prosecutors should provide “open-file discovery” to the defense in death penalty cases. Prosecutors’ offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (Brady material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.
  - Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.
  - Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced.
- A. *Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense*

### RECOMMENDATION

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full “open-file” discovery should be required in capital cases. However, discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses’ safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory evidence to the defense. See *Brady v. Maryland*, 373 U.S. 83 (1963). In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for *in*

*camera* review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

#### COMMENTARY

##### *Requiring Full Open-File Discovery in Death Cases*

Because, as the Supreme Court noted in *Gregg v. Georgia*, 428 U.S. 153 (1976), “death is different,” discovery from the prosecution in death penalty cases should not be conducted as business-as-usual, which in criminal litigation typically means quite limited disclosure of information. The extreme nature and finality of death provides a strong basis for treating discovery in death penalty cases differently than in ordinary criminal litigation. Restricting discovery effectively withholds disclosure of relevant information, creating the real risk that the truth will be hidden, and, as a result, increasing the likelihood of executing an innocent person. These considerations strongly support broad discovery in capital cases.

Criminal trials may be a competitive process filled with sharp practices and gamesmanship. Whether such practices are consistent with justice in ordinary cases may be debated; certainly, however, such practices should cease when the imposition of a death sentence is at stake. Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

Expanding discovery in criminal cases has long been advocated by the American Bar Association and other groups supporting reform. Whatever the merits of such proposals across the full range of criminal litigation, the case for broad discovery is very strong—indeed imperative—in capital cases. In capital cases, avoiding the ultimate horror of executing an innocent person makes expanded discovery essential. The availability of more information will help the jury perform its task more accurately, and, undeniably, it will reduce the chances that the truth will be hidden and an innocent person will be executed. Full disclosure by the prosecution should be understood to be an aspect of the openness that we increasingly associate with good government. Moreover, such disclosures should not be feared, since jurisdictions such as Florida continue to be able to prosecute death penalty cases effectively while providing disclosures that are extraordinary by the standards employed in criminal prosecutions in many jurisdictions. See FLA. REV. CRIM. PROC. 3.220.

Although involving unfamiliar practices that, in some jurisdictions, challenge accepted norms, we believe that the provision of full open-file discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate most questions about whether all favorable information has been supplied, thus vastly decreasing the opportunity for litigation with the frequent resulting delays and reversals.

Accordingly, regardless of whether a particular jurisdiction provides open-file discovery in ordinary criminal litigation, discovery should be full and open in capital cases. If necessary, separate discovery statutes should be enacted to cover death penalty cases. In all jurisdictions, the rule in capital cases should be full, open-file discovery under which, at an early stage, all documents, information, and materials available to the prosecution are automatically and routinely made available to the defense.

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Allowing the defense to examine a prosecutor's file is of little benefit, however, if the information in the file is incomplete, either through inadvertence or intentional practice. Indeed, the fact that information available to investigative sources is not in the file may mislead and deceive the defense in an ostensibly open-file system. Accordingly, to make any open-file system meaningful and effective, investigators should be given the express duty to retain and organize all information and materials obtained during the investigation. The prosecutor should have the express responsibility of assembling all relevant information by requesting all agencies that participated in investigating the case or examining evidence to provide all relevant documents, information, and materials to the prosecutor for inclusion in the file. Practices of investigators and investigative agencies that encourage reports not to be prepared in written form to avoid disclosure should be explicitly prohibited, and instead, requirements that significant results and facts be made in writing and preserved should be enacted.

Limitations may be placed upon discovery from the prosecution for compelling interests, such as threats to witness safety. Consequently, even an open-file discovery system should provide opportunities for the granting of protective orders. However, to avoid routine erosion of the completeness of discovery, withholding information should require specific judicial approval. An exacting standard should be required before a protective order is granted. Such an order should not be granted unless withholding discovery is necessary to protect the safety of the witness, to protect other specified individuals, or to achieve similarly specific and compelling justifications in support of public safety.

We acknowledge that emergency situations and the unique problems of national security and protecting witnesses from threats of death or serious physical harm, which are most frequently encountered in terrorism and organized crime prosecutions, may require limited, tightly drawn exceptions to the ordinary practices of automatic required disclosure. Relief from those requirements should be solely by court order. These special situations are largely confined to federal prosecutions and will be very rarely encountered in typical death penalty litigation. Even in special situations, jurisdictions must have in place procedures that require contemporaneous recording of the prosecution's justification for departure from standard practice.

The reforms described above will constitute a major change in discovery practices in many jurisdictions. They will also require special efforts and procedures that entail costs to the system. Where general application of this new system would constitute the greatest change from the existing practice in criminal cases, the impact and costs can be drastically limited by creating a separate discovery system that applies only to death penalty cases. The number of capital cases is relatively small in every jurisdiction, and they are already a special focus for the courts. As discussed above, creating a new system in death penalty cases is both manageable and clearly justifiable.

*Disclosing Exculpatory (Brady) Evidence*

Under long-standing Supreme Court authority, the Due Process Clauses of the Fifth and Fourteenth Amendments require the prosecution to provide the defense with all information helpful to the defense that is material to the determination of guilt or punishment. This information has come to be referred to as "*Brady*" material, after the Supreme Court case called *Brady v. Maryland*, 373 U.S. 83 (1963). The Constitution is violated if the information is not disclosed, regardless of the bad or good faith of the prosecutor. Moreover,

a violation occurs even where failure to disclose is not the direct responsibility of the prosecutor, and the information or evidence remains in the hands of police officials and never makes its way to the prosecutor.

Although causation is often difficult to determine, many—perhaps the majority—of the failures of the prosecution to provide *Brady* material are the result either of the prosecutor's never seeing the exculpatory information or of the prosecutor's seeing it but not recognizing its exculpatory nature. Moreover, these inadvertent failures to disclose are likely to be remedied more easily than are purposeful decisions to hide or destroy information that has been recognized to be exculpatory.

We suspect that a large number of the breakdowns in the system occur because of the failure of investigators outside the prosecutor's office who have not been educated in, or pay insufficient attention to, their institutional duties to provide all potentially exculpatory information to the prosecution for its assessment under *Brady*. We believe that because of prosecutors' legal and ethical training, they are uniquely equipped to assist investigative agencies in appreciating their responsibilities under *Brady*, and we encourage prosecutors to assume that role.

A program of public and institutional instruction has an important role in the success of this effort. Instruction will cover the benefits of full disclosure and the components and requirements of *Brady*. The message must be received by all law enforcement and investigative agencies of the importance of full and candid disclosure to the prosecution of all information potentially helpful to the defense.

Because of the paramount importance of fairness in death penalty cases, systems should be established to help minimize inadvertent failures to disclose. Such systems would have three components. First, the prosecutor should have an obligation to request delivery of all documents, information, and materials relevant to the case from every agency that was involved in investigating the case or analyzing materials, and to require a response from these agencies. Failures to seek information, as well as failures to respond, would thus be eliminated or vastly reduced. Under such a system, information not secured would be more likely to be the result of purposeful misconduct, which we believe is rare.

Second, an accountable and named prosecutor or prosecutors should be charged with reviewing all the information received to determine whether it is exculpatory. Again, the opportunity for inadvertent failures to produce would be reduced since some responsible officer would be charged with conducting the review and would know that he or she may be held accountable for failures to disclose.

Third, if arguably exculpatory evidence is unearthed, it should be delivered either to the defense or to a neutral judicial officer, who would inspect it to determine whether disclosure is required. Prosecutors, who have determined on the basis of all available evidence that the defendant is guilty, are likely to have a difficult time viewing information as exculpatory. From the prosecutor's perspective, any exculpatory evidence must not be truly exculpatory, for otherwise the prosecution would be dismissed. In the prosecutor's mind, each piece of arguably exculpatory information must have some explanation consistent with guilt. Even a judicial officer may not understand the significance of evidence in the same way that an advocate for the defense would. However, the judge's neutral position should make somewhat easier any recognition that the information may be helpful to the defense.

While disclosure of all *Brady* information is important, a special responsibility exists where the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony. Jurisdictions should consider

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prohibiting vague and uncertain inducements, which are sometimes made in that apparently weaker form so that disclosure arguably can be avoided because not clearly required by the Constitution. In any case, all such inducements should be disclosed to the defense and should be admissible regardless of whether the inducement was offered directly by the prosecutor, by officials in other jurisdictions, or by law enforcement officials. See *Jackson v. State*, 770 A.2d 506, 514 (Del. 2001) (requiring disclosure of an implicit promise of leniency, which the court labeled a “troubling practice,” and which was used by the state in an effort to avoid disclosure and the undermining of a witness’s credibility). The prosecutor in charge of the case should be charged with a duty to gather information about possible deals with witnesses from all officials who have been in a position to offer such inducements.

Willful failures to disclose *Brady* material in death penalty cases are always wrong. While we trust such failures are relatively rare, they threaten the execution of the innocent. Jurisdictions should enact meaningful punishments that are effective and enforced when a court determines that a willful violation has occurred. The penalties should include monetary sanctions, demotions, and sanctions affecting professional licenses, where appropriate. Based on past experience, it is very likely that courts will be reticent to find willful violations, and so the possibility of sanction should not concern prosecutors and law enforcement officials who fight very hard but fairly. The existence of the penalty is, however, potentially important to deter those who purposefully cross clear lines, particularly in capital cases where the consequence of a violation may be death.

**B. *Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed***

**RECOMMENDATION**

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

**COMMENTARY**

Throughout time and without regard to political ideology, those knowledgeable about criminal prosecutions have worried about certain types of evidence that, due to human frailties, predictably will produce evidence of questionable validity.

One area of concern is with eyewitness identification, specifically stranger identification. History is replete with injustices that were the result of sincere but mistaken identifications. See *United States v. Wade*, 388 U.S. 218 (1967). Human perception and memory are fallible.

Another source of concern that has been recognized throughout our judicial history is the testimony of co-defendants, who frequently will shift blame in the self-interested quest to avoid the consequences of their own actions. Human nature often discourages individuals

from acknowledging their unique responsibility for taking another's life when that acknowledgment might lead to their own execution. The normal human instinct in support of self-preservation is to shift blame and to name another as the truly reprehensible individual. And even where clear lies are not told, subtle shifts of role are extraordinarily likely among those facing the possibility of execution.

A third clear category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony.

In noting serious questions about the value of these three classes of evidence, we break no new ground. As noted earlier, their inherent weaknesses have been long recognized and the injustices caused by their use have been frequently documented. The real difficulty is in limiting the abuses without excessively hampering law enforcement in protecting society.

Categorically prohibiting prosecutors from using all such questionable evidence in criminal prosecutions is not justifiable. A single eyewitness may be correct; the co-defendant who first cooperates may, in fact, be the least guilty; and a jailhouse informant trusted by the defendant may have heard an accurate admission of guilt. The particularly high probability of erroneous evidence in these three circumstances is not sufficient reason to produce a rule excluding all such evidence in any criminal case.

Indeed, the difficulty of policing the evidence without excluding it is probably the major reason that reforms have not progressed in any of these three categories. The decision whether to seek the death penalty, with its awesome impact and finality, provides a unique mechanism for imposing a limited but necessary control on questionable evidence.

A prosecutor should never seek a conviction unless he or she is convinced by all the evidence that the defendant is guilty. If, after careful inspection and critical examination of all the evidence in the case, the prosecutor is morally certain of guilt, it would be a dereliction of duty to fail to prosecute. Such a decision to prosecute can, conceivably, depend critically on one of these classes of particularly questionable evidence. If the prosecutor still believes guilt is established to a moral certainty despite informed skepticism, the prosecutor should move forward to convict the defendant for the good of society. However, seeking the death penalty is and should be different.

In making this recommendation, we assume that jurisdictions will make the option of life without parole available. See Recommendation at Section III A *supra*. With that sentencing option, community safety can be protected without seeking the death penalty. Not seeking death allows for the possibility that an error in the eyewitness's identification or the co-defendant's or jailhouse informant's testimony will ultimately be recognized. This correction of error may be admitted by the witness; may be established by independent evidence; or may result from the operation of human conscience, the progress of science, or pure luck. Execution needlessly prevents such errors from being corrected.

The committee therefore recommends that prosecutors, employing appropriate skepticism, have the discretion to seek convictions based on any or all of these classes of questionable evidence, but that they create protocols or guidelines that constrain when to seek the death penalty. Unless independent evidence establishes the guilt or, where appropriate, the critical role of the defendant in the taking of human life, prosecutors should not seek the death penalty. What is sufficient independent corroboration will frequently be debatable. However, it is clear that corroboration should not be a *pro forma* requirement or

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structured to be too easily found. The reason a rigorous demand for corroboration can and should be imposed is that its absence will still mean that the defendant may be confined for the remainder of his or her life. By contrast, an easy decision that corroboration exists, when in fact independent proof is lacking, may mean that errors will only be unearthed after the defendant has been executed.

*C. Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution*

**RECOMMENDATION**

**Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.**

**COMMENTARY**

All murders are horrible crimes. As a result, a decision by the prosecution to seek the ultimate penalty—death—may very frequently appear the right response in the immediate aftermath of any murder. However, death penalty prosecutions should be undertaken only in the worst of murder cases. Moreover, the decision to prosecute capitally should, insofar as possible, be free of the pressure of media attention and political considerations.

Because of the horror and notoriety of many murders, a local prosecutor's public commitment that the case will be prosecuted capitally may seem to be the humane and correct response for the victim's family and friends and for a concerned public, particularly when the apparent perpetrator is quickly apprehended. Unfortunately, unwarranted commitments to seek the death penalty made during the immediate aftermath of the crime will be exceedingly difficult to retract unless the decision was entirely unwarranted.

The immediate reaction may, however, not be the appropriate one if significant factors are left out of the initial analysis and if important facts are not yet known. Haste to make and announce decisions to prosecute capitally can contribute to an erroneous decision on the question of guilt by limiting the scope of the investigation and putting pressure on investigative authorities to build a case rather than to investigate it. Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMPORARY PROBLEMS (1998).

Rushing to judgment may even more frequently have a negative impact on making the appropriate decision whether to seek death, skewing a decision to prosecute capitally. Determining how a particular murder relates to others in the jurisdiction that were and were not prosecuted as death penalty cases requires careful analysis that is typically not possible on the basis of the factual details and other types of information available in the immediate aftermath of the crime. The decision to seek the death penalty should also be based on the characteristics of the offender as well as the crime, and information relating to the offender—particularly the salient features that might render the defendant's execution unwarranted—are often neither obvious nor quickly discovered. Moreover, the strength of the case and the certainty that the perpetrator is guilty should be a critical part of the analysis. However, many critical pieces of evidence, such as scientific analysis, will become available only over a period of weeks, not days. Such results may be critical to determining whether a

realistic possibility of innocence is present. Evidence of guilt that is good enough to warrant prosecution may not be certain enough to justify the irrevocable act of executing the apparent offender. If made without careful consideration and full information, the decision to seek the death penalty may be unwise, and, once made, it may lead to a jury imposing a death sentence that is disproportionate.

For all these reasons, a period of time should be built into the charging process when analysis and consultation can take place. Obviously, there is nothing magic in any particular period of time. However, the 120-day period specified in the death penalty law of New York appears both reasonable and workable. See N.Y. CRIM. PROC. LAW § 250.40.

This period when reflection and analysis takes place provides an opportunity for jurisdictions to develop consultative systems that will help to ensure that the most accurate and reasonable decision possible is made. As an important method of guaranteeing that the death penalty is reserved for the most heinous offenders, each jurisdiction should mandate or encourage a system of consultation to help ensure equal application of the laws across jurisdictions. For example, in New Jersey, the supreme court established a very promising proportionality review project, which supplements judicial precedent with a comprehensive database to determine how each death-eligible case compares to all other cases in the relevant pool. David Baldus & George Woodworth, *Proportionality: The View of the Special Master*, 6 CHANCE MAGAZINE 1 (1993).

Criminal cases are generally handled by locally elected officials who are given broad legal authority to determine who is to be prosecuted and for what offenses. Within the limits of the death penalty statutes and constitutional constraints, these officials also are invested with authority to determine when to seek the death penalty. We do not challenge existing legal structures that give such authority to local prosecutors. What we do recommend is that a consultation system be mandated for the decision to prosecute capitally where existing legal structures make such a requirement feasible, and that a system of consultation be encouraged where not mandated.

In either situation, local officials should consult with prosecutors in other locations and with other knowledgeable officials, such as the staff of the attorney general's office. Model procedures are available in a number of jurisdictions, including the federal system, where United States Attorneys are required to receive approval from the Attorney General before seeking a death sentence. Comparisons made in this consultation process regarding charging practices in other jurisdictions and the analysis of the facts of the case at hand by multiple prosecutors may provide important benefits in reducing disparities between regions and political divisions in seeking the death penalty. We recognize that this may be difficult in some jurisdictions, but there is value in not having greatly disparate approaches in different parts of the same state when dealing with the same set of facts. Alternatively, a body of retired prosecutors could be established to provide such consultation; such a body might do much to remove political concerns and competition from the process.

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***Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed******Testimony***

Testimony of Professor Lawrence C. Marshall before the Ryan Commission (Sept. 15, 1999) (on file with the Constitution Project)

***Case***

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***Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution***

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***Statute***

N.Y. CRIM. PROC. LAW. § 250.40

**APPENDIX****II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides***Additional Statement of Cardinal William H. Keeler*

I congratulate the work of the blue-ribbon committee and staff for the Death Penalty Initiative. These recommendations contribute to the current national debate about the death penalty and, if implemented, will go a long way toward preventing wrongful convictions and the execution of innocent persons—a laudable goal irrespective of one’s position on the death penalty.

I respectfully submit one additional comment on the report.

While I agree with the Project’s recommendation that persons with mental retardation not be subject to the death penalty, my reasons differ somewhat from those given by the Project. Recently the United States Conference of Catholic Bishops, joined by nearly a dozen other religious organizations, asked our nation’s highest court in *McCarver v. North Carolina* to end the practice of executing persons with mental retardation. We believe, as stated in our *amicus* brief, that such executions violate contemporary standards of decency of American society and cannot be reconciled with the Eighth Amendment guarantee against cruel and unusual punishment. It is our hope that the Court will act to end this practice.

**IV. Safeguarding Racial Fairness***Dissenting Statement of Timothy Lynch*

I dissent from this recommendation because I believe it is misguided. There is an important difference between racial prejudice and racial disparities. Racial prejudice is wrong and has no place in the American criminal justice system. Under our law, any capital defendant that can present evidence specific to his or her own case that would support an inference that racial considerations played a part in his or her sentence will have that sentence set aside. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). This is a proper and just principle.

Statistical racial disparities among capital defendants are another matter. The population of murderers (detected and undetected) in our multiracial society is not proportionately distributed across the various demographic groups. And there are a host of factors other than race that can influence the outcome of a trial and the defendant’s ultimate sentence. Some of those other factors may be correlated with race thereby creating the misleading impression that racial discrimination is at work when it isn’t. Indeed, the most notable study to be introduced into evidence, the “Baldus” study, tried to take into account more than 200 variables that could have explained disparities in capital case sentencing. Collecting racial statistics and other initiatives designed to “correct” disparities will only produce work for lawyers and statisticians. The debate over the “proper” statistical methodology and “proper” legal remedies and procedures will be unending.

## V. Proportionality Review

### *Additional Statement of William G. Broaddus, Esq.*

I fully concur in the recommendation set forth in bold type pertaining to proportionality. While the Supreme Court of the United States has declined to include a proportionality review as a constitutional mandate, such a review is essential to obtain the objectives articulated in the recommendation.

My disagreement is with that portion of the comment which suggests, in the first bullet point, that a proportionality review may be adequately carried out by comparing the case under review with other cases in which the death penalty was imposed. Such a limited review is inadequate and, in all likelihood, of little utility.

For example, in Virginia, the state Supreme Court, until recently, compared the case under review with the records of all capital murder convictions appealed to that Court. Because a very small number of the capital murder convictions in which life sentences were imposed were appealed to the Supreme Court, the pool for comparison was heavily weighted to cases in which the death penalty was handed down. Because there is such a wide range of factual circumstances in which the death penalty has been meted out in Virginia, such a comparison was of little utility. Conversely, there are a number of cases resulting in a conviction of capital murder in which a life sentence was given in which the facts show that the murder was more "vile" and the defendant more likely to "future dangerousness" than in those cases in which the death penalty was handed down. In other words, a review of all capital murder convictions demonstrates that there is no rational way to distinguish between those cases in which the death penalty is deemed appropriate from those in which a life sentence is given.

As an example, several years ago in Chesterfield County four women were charged with capital murder of a fifth woman. The facts surrounding the murder were vile. Because several of the victim's personal effects were taken, thereby constituting a robbery, the prosecution sought convictions of capital murder. The four women were tried separately. The first three were convicted of capital murder, but given life sentences. The fourth, the only African American in the group, was convicted of capital murder and sentenced to death. All trials went to a jury. In the fourth case, the judge set aside the death penalty, noting that he could not fairly impose the death penalty in one case when three co-defendants were given life. Hypothetically, change the order of trial. If the African American had been tried first, under Virginia's stringent twenty-one day rule, the trial court would have lost jurisdiction and not have been able to set aside the death penalty. If the Supreme Court had limited its proportionality review only to cases in which the death penalty was imposed, there would be no basis for setting aside the death penalty for the African American because there are other cases in which robbery of a person and murder have resulted in the death penalty.

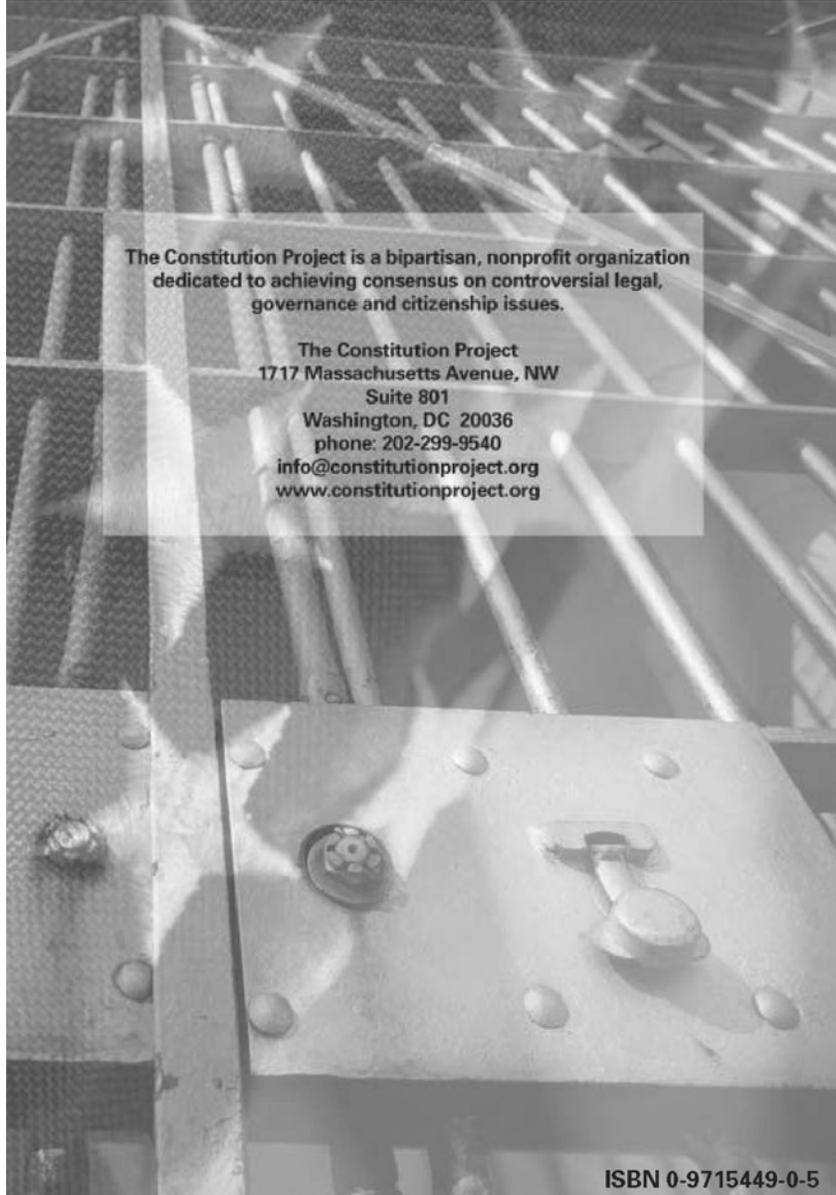
The only way to accomplish the objectives set forth in the recommendation is to follow the suggestion of the National Center for State Courts that the pool of comparison be that of all death-eligible cases.

On a second, perhaps more personal note, I observed that on a number of occasions the text makes reference to "those who deserve the death penalty." If that phraseology could be changed to something along the lines of "those who meet the requirements imposed for the death penalty," I would certainly appreciate such a change. Personally, and I suspect that

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there are others on the Committee who share this view, I do not believe that anyone deserves the death penalty. That is born of a moral viewpoint and not of the law.

I have enjoyed my opportunity to participate on this Project and applaud the staff and other members of the Committee who have worked long and hard on this important undertaking.



The Constitution Project is a bipartisan, nonprofit organization dedicated to achieving consensus on controversial legal, governance and citizenship issues.

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WASHINGTON - Criminal suspects would have greater access to DNA testing if legislation in Congress passes and recommendations of a death-penalty report released this week in Illinois are adopted.

Representative William D. Delahunt, Democrat of Quincy, has collected 217 signatures on a bill that would provide grants to prosecutors for DNA testing in death-penalty cases.

Delahunt's bill, called the **Innocence Protection Act**, would also seek to make sure that suspects facing the death penalty have better legal representation.

Despite increasing support, the bill has not had a hearing in the House Judiciary Committee in this Congress. A Republican member of the committee's staff said yesterday that its chairman - Representative F. James Sensenbrenner Jr., Republican of Wisconsin - has not taken a position on the bill. It was unclear whether it will be scheduled for committee hearings.

John Fechery, spokesman for House Speaker Dennis Hastert, said the speaker would schedule the bill for a floor vote "if it works its way through the regular order."

Delahunt said he will not approach the Republican leadership in the House to schedule hearings until he has 218 signatures, signifying enough support to pass it on the floor if it gets that far. A similar bill in the US Senate - sponsored by Senator Patrick Leahy, Democrat of Vermont - has 25 co sponsors, 35 short of the number needed to prevent its death by filibuster if it makes it to the floor.

Hopes for death-penalty changes were bolstered this week by release of the Illinois report and by the exoneration of the 100th person who had been sentenced to death. Reformers see the stream of exonerations and the report, ordered by Governor George Ryan of Illinois after he began to worry that his state might execute innocent people, as signs that momentum is gathering for sweeping changes in how the death penalty is applied or even for outright abolition.

The report recommends such changes as the use of DNA evidence to limitations on the use of testimony from eyewitnesses and jailhouse informers.

Delahunt said the debate on the death penalty should involve more than how tough politicians can be on crime. "I think this is the year we can have some hope," he said.

Ryan's stand in Illinois has provided the biggest boost for changes in the death penalty, Delahunt said.

The Illinois governor, a Republican who has supported capital punishment, ordered a moratorium on executions in his state two years ago, after a death-row inmate was released because journalism students obtained a confession from the real killer. Ryan later set up a commission to study the death penalty in Illinois.

But when the commission issued its report Monday, critics blasted its recommendations as unrealistic and said its goal was to severely limit or halt executions.

Joshua Marquis, an Oregon prosecutor who sits on the board of the National District Attorneys Association, was particularly displeased by the recommended restrictions on the use of single eyewitness testimony in death-penalty cases.

"There goes all of your organized crime death-penalty prosecutions," he said. "It's very hard to make those cases. They're professional killers. They don't leave a lot of witnesses. They don't leave physical evidence. Sometimes the only way you can get a conviction in one of these cases is if someone turns on them."

Marquis said that single-eyewitness testimony is almost never enough to get a jury to convict a criminal suspect. He also criticized some recommendations of the Illinois report as an insult to juries.

In addition to limiting single-eyewitness testimony in death-penalty cases, the report calls for expanded use of DNA evidence, as does Delahunt's bill.

Lawrence Marshall, executive director of the Center on Wrongful Convictions at Northwestern University, said the spate of releases of death-row inmates because of DNA evidence shows an alarmingly high rate of error in the prosecution of capital cases.

"What does that tell us about the other cases where DNA is not available?" Marshall asked. "We need to learn the lessons of the DNA cases."

Delahunt said that using DNA evidence is about more than offering the wrongly convicted a chance to go free.

"If there's a lack of confidence in the justice system, that translates into a diminished democracy," he said.

GRAPHIC: PHOTO, WILLIAM D. DELAHUNT

2. **"Death Penalty Foes Celebrate Exoneration Of Death Row Inmate,"** *The Bulletin's Frontrunner*. April 10, 2002; Washington News.

The Los Angeles Times (4/10, Weinstein) reports, "A former letter carrier who originally was sentenced to death for the 1991 murder of a cocktail waitress in Phoenix has been exonerated by DNA testing and freed from prison. Ray Krone, 44, walked out of prison in Yuma, Ariz., late Monday after being incarcerated for a decade." Although Krone "was no longer on death row, a bevy of capital punishment foes -- including Sen. Patrick J. Leahy (D-Vt.), the American Civil Liberties Union and the Justice Project -- described Krone on Tuesday as the 100th person in this country who had been sentenced to death but eventually exonerated since executions resumed in the mid-1970s." For "every seven people executed in the US in the last quarter century, one has been exonerated -- an error rate that death penalty critics say is unacceptably high." Sen. Leahy said, "Our nation this week reached an infamous milestone: 100 known--and goodness only knows how many unknown -- cases of people being sentenced to death, since the reinstatement of capital punishment, for crimes they did not commit."

More Commentary.

The New York Times (4/10) wrote in an editorial, "The Supreme Court has long professed the principle that 'death is different,' that in order to deprive someone of his life, the state must be punctilious about providing him every procedural protection. Because the court has failed to live up to that standard, it is vital that bills currently before both houses on Capitol Hill gain the support they need to become law." The bipartisan **Innocence Protection Act** "would establish national standards for the representation of capital defendants and provide resources to meet them. The act would also require the preservation of biological evidence that may later prove crucial on appeal and ensure death row inmates access to DNA testing." This week's "discomforting milestone, as calculated by the Death Penalty Information Center, is further evidence of deep unfairness in the death penalty system and of the urgent need for a law reducing its inequities."

The Washington Post (4/10) wrote in an editorial, "The debate over DNA testing has tended to break down along liberal-conservative lines. There is no good reason for this. Making sure that guilty people -- and not innocent ones -- are punished is the universally acknowledged goal of the criminal justice system." And "providing some retroactive check, to the extent that science now permits it, ought to be an easy call, irrespective of one's politics. The interests of all sides -- convicts, prosecutors and the judicial system generally -- would be served by relatively routine DNA testing in situations where old, previously untested evidence could shed light on the accuracy of a conviction. Unfortunately, however, many conservatives have reflexively opposed reform efforts or have sought to make testing available only in the narrowest of circumstances. Some prosecutors, meanwhile, have fiercely resisted convicts' requests to test material."

3. Weinstein, Henry. "**Death Penalty Foes Mark a Milestone; Crime: Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed,**" *Los Angeles Times*. April 10, 2002; Pg. 16.

A former letter carrier who originally was sentenced to death for the 1991 murder of a cocktail waitress in Phoenix has been exonerated by DNA testing and freed from prison.

Ray Krone, 44, walked out of prison in Yuma, Ariz., late Monday after being incarcerated for a decade.

Krone has always maintained his innocence, despite being convicted twice of stabbing Kim Ancona to death on Dec. 29, 1991. Krone was initially sentenced to death in 1992. That sentence was overturned in 1995, but he was convicted again the following year and sentenced to life.

Although Krone was no longer on death row, a bevy of capital punishment foes--including Sen. Patrick J. Leahy (D-Vt.), the American Civil Liberties Union and the Justice Project--described Krone on Tuesday as the 100th person in this country who had been sentenced to death but eventually exonerated since executions resumed in the mid-1970s.

For every seven people executed in the U.S. in the last quarter century, one has been exonerated--an error rate that death penalty critics say is unacceptably high.

"Our nation this week reached an infamous milestone: 100 known--and goodness only knows how many unknown--cases of people being sentenced to death, since the reinstatement of capital punishment, for crimes they did not commit," Leahy said.

"The time for denial is over. . . . Ray Krone lost 10 years of his life while Arizona's women were endangered because the wrong man was in jail," said Leahy, the chief sponsor of the **Innocence Protection Act**, a package of death penalty reforms.

"Justice has finally come," Krone said in a telephone interview Tuesday. "The strength of knowing you are innocent" helped him get through 10 years in prison.

"And there was the strength I got from my friends and family. They never doubted I was innocent. They did everything they could to help me not get down."

Krone said his cousin Jim Rix, a Lake Tahoe businessman whom he had never met before his murder conviction, came to visit him in prison and soon thereafter launched efforts that ultimately led to his exoneration.

Krone, an Air Force veteran who was working as a letter carrier at the time of his arrest, had no criminal record.

But Phoenix police focused on him within hours after Ancona's naked, blood-spattered body with 11 stab wounds was found in a bathroom of the ABC Lounge on the morning of Dec. 29, when the bar owner went there for a meeting.

Krone lived just a few blocks from the bar and his phone number was in Ancona's address book. Another woman who worked at the bar testified that Ancona told her that a man named "Ray" was

coming late the night of Dec. 28 to help her close up.

Krone said he was home that night. His roommate confirmed that Krone had gone to bed about 10 p.m. but said he could not say for sure whether Krone had gone out later.

Krone frequently came to ABC Lounge to play darts. He testified that he was acquainted with Ancona but did not know her well.

A bite mark was found on the victim's left breast and on her neck. Krone agreed to give police a dental impression by biting down on a plastic foam cup. Because of an earlier accident, Krone had a distinct bite pattern and a dentist helping police at the crime scene said Krone's bite mark strongly resembled the one found on Ancona. Krone was later referred to as the "snaggletooth killer."

The bite mark was the critical evidence at the trial. There were no fingerprints and there was no semen on Ancona, although there was evidence she had been sexually assaulted. All the blood at the crime scene was type O--the same type as Ancona and Krone and that of millions of other Americans. No DNA testing was done.

The key testimony in the case was presented by odontologist Ray Rawson, who testified that Krone's bite mark matched the ones found on the victim. A jury convicted Krone of murdering Ancona in 1992 but acquitted him of sexual assault. A judge sentenced Krone to death, saying that the murder had been committed in an especially "heinous or depraved manner."

Christopher Plourd, a San Diego attorney who specializes in cases involving complicated forensics, filed an appeal. It contended that the prosecutors had failed to turn over exculpatory evidence--a test done by another forensic odontologist that concluded Krone's bite mark was not consistent with the one found on the victim.

The Arizona Supreme Court did not rule on that issue. Rather, in 1995, the state's highest court reversed the conviction, saying that prosecutors had failed to turn over critical information--a videotape on the bite mark evidence prepared by Rawson that played a key role in the trial--until right before the trial began.

Krone was retried. Rawson testified for the prosecution again. Plourd presented contradictory testimony from other bite mark specialists, but Krone was convicted again in 1996. That time he got a life sentence.

Two years ago, Krone's family hired another attorney, Alan M. Simpson of Phoenix, to work with Plourd. They requested DNA tests using sophisticated new technology. The initial tests conducted on saliva found on the victim's tank top concluded that Krone could not have been the source.

Then, further tests were done, seeking to match the DNA found on the tank top with material in a state database of convicted sex offenders.

Those tests pointed strongly to Kenneth Phillips, 36, who already was in prison in Florence, Ariz., convicted of attempted child molestation.

On Monday, an attorney for the Maricopa County attorney's office told a judge in Phoenix that the odds were 1.3 quadrillion to 1 that the DNA came from Phillips. In addition, prosecutors have found that Phillips, like the victim, has type O blood and that a dental expert has said he "cannot eliminate Phillips" as the person who left the bite mark, according to William Fitzgerald, a

spokesman for the Maricopa County attorney's office.

Maricopa County Superior Court Judge Alfred Frenzel released Krone, subject to a hearing scheduled for April 29 after police and prosecutors finish other testing. But Richard M. Romley, the Maricopa County attorney, indicated that he strongly believes the wrong man was convicted.

"Modern technology that was not available at the time of Mr. Krone's convictions has provided new scientific evidence, which raise a serious question regarding Mr. Krone's guilt," Romley said.

Krone, who was a proponent of the death penalty before he was sent to prison, said he hopes his case will prompt people to reexamine the way the criminal justice system operates.

"I'm not the only one," Krone said. "To make a mistake is one thing. It's another thing how you correct it afterward."

There are more than 100 people on death row in Arizona, and a special commission has been examining capital punishment there for more than a year.

Of the 100 death penalty exonerations around the country, six came from Arizona, according to a report by the Death Penalty Information Center in Washington, D.C., a group that opposes the death penalty.

And of the 100 exonerations, 12 came as a result of DNA testing. The Innocence Project at Cardozo Law School, co-founded by New York attorneys Peter Neufeld and Barry Scheck, played a key role in numerous DNA exonerations. Neufeld and Scheck said the Krone case showed both the power of DNA testing and the faulty nature of bite mark evidence.

Michael J. Saks, a professor at Arizona State University Law School, who coauthored a book on forensic evidence, said bite mark testimony is "classic junk science." He said a recent study by the American Board of Forensic Odontologists found that 63.5% of bite mark analyses generated "false positives" and that another 22% turned out to be false negatives.

"At an absolute minimum," Saks said, "jurors should be informed of the relative accuracy or inaccuracy of these tests so they don't think there is more to them than there is."

GRAPHIC: PHOTO: Ray Krone, right, walks out of Yuma, Ariz., prison after being incarcerated for a decade. With him is his lawyer Christopher Plourd. PHOTOGRAPHER: Associated Press

4. "Death is Different," *The New York Times*. April 10, 2002; EDITORIAL, Pg. A26.

Ray Krone, who spent 10 years in prison for sexual assault and murder, including time on Arizona's death row, was freed on Monday after a DNA test exonerated him and cast suspicion on another prisoner. According to the Death Penalty Information Center, Mr. Krone was the 100th innocent man nearly put to death in this country since 1973. Given the way death-penalty crimes are prosecuted, as the wrongful-conviction scandals in Illinois a few years back showed, a certain number of mistaken convictions are essentially built into the process.

A sad reality of the criminal justice system is that in all too many cases, defendants are convicted of serious crimes on the flimsiest of evidence. Juries often hang guilty verdicts on the word of a single witness, despite numerous academic studies showing that witnesses are frequently unreliable. Courts admit evidence of dubious quality at trial, and send defendants to prison -- or to death -- on the basis of it. The case against Mr. Krone was largely circumstantial, including expert but apparently inaccurate testimony that his teeth matched bite marks on the victim.

In the face of this powerful evidence that the system is broken, the courts should be chastened -- and they should be working hard to build in protections against executing the wrongfully convicted. Sadly, however, the Supreme Court appeared unconcerned about the fairness of the death penalty in its ruling in a case two weeks ago involving effective assistance of counsel.

In the case, the court ruled that the conviction of a death row inmate, Walter Mickens Jr., did not violate the Sixth Amendment's right to counsel even though the lawyer who was appointed to represent Mr. Mickens had previously represented the 17-year-old boy he was charged with killing. It is shocking that the Supreme Court would consider that this arrangement meets the constitutional standard of effective assistance of counsel. "A rule that allows the State to foist a murder victim's lawyer onto his accused killer is not only capricious," Justice John Paul Stevens noted in dissent, "it poisons the integrity of our adversary system of justice."

The Supreme Court has long professed the principle that "death is different," that in order to deprive someone of his life, the state must be punctilious about providing him every procedural protection.

Because the court has failed to live up to that standard, it is vital that bills currently before both houses on Capitol Hill gain the support they need to become law. The bipartisan **Innocence Protection Act** would establish national standards for the representation of capital defendants and provide resources to meet them. The act would also require the preservation of biological evidence that may later prove crucial on appeal and ensure death row inmates access to DNA testing.

This week's discomfiting milestone, as calculated by the Death Penalty Information Center, is further evidence of deep unfairness in the death penalty system and of the urgent need for a law reducing its inequities.

5. **"Support Still Strong; Death penalty increasingly under microscope,"** *The Columbus Dispatch*. February 25, 2002.

Last week, John W. Byrd Jr. became the third condemned murderer to be executed in Ohio since the death penalty was reinstated.

Although executions still are front-page news, each one seems less precedent-setting than the one before. Yet Ohio's growing experience in carrying out the ultimate punishment comes at a time when the death penalty is in a state of ferment nationally.

For at least two years now, the institution of capital punishment has been challenged on a number of fronts, in both the courts of law and public opinion.

A majority of Americans still tell pollsters that they support the death penalty, but their numbers are declining.

The Gallup Poll shows that support has fallen from 80 percent in 1994 to 65 percent last year. A Hart Poll taken last year found 60 percent support for capital punishment but 72 percent in favor of a suspension of executions until questions about their fairness can be studied further.

In Ohio in August, a Buckeye State Poll showed death-penalty support at 62 percent.

Much of the slippage has been because of a string of cases where prisoners on Death Row were found to have been wrongly convicted.

Things may be changing in the courts, as well.

In May, Ohio executed Jay D. Scott, a double murderer from Cleveland, who had argued that the "evolving standards of decency" should forbid the execution of inmates, like himself, who suffer from severe mental illness. Scott, a schizophrenic, argued that to execute him would violate the Eighth Amendment's protection against cruel and unusual punishment.

But the courts did not agree. Scott's mental illness was not so severe that he did not understand why he was being punished, they ruled. That is the standard that the U.S. Supreme Court has set in determining when an inmate lacks mental competency to be executed. In the same opinion, the courts acknowledged that standards for what is considered cruel and unusual can and do "evolve."

If Scott were to be executed today, however, the result likely would be the same. Standards do not change that rapidly.

Moreover, there are signs of evolution in how the courts and the political system view capital punishment. For example:

\* Later this year, the U.S. Supreme Court will decide whether executing the mentally retarded is unconstitutionally cruel and unusual. Since 1989, when the court last considered the issue, execution of the retarded has become less likely: Then, only two states that imposed the death penalty had an exemption for inmates who are mentally retarded. Now, 18 of the 38 death-penalty states have an exemption, and the court has noticed the trend.

Last year, the justices decided to take up this issue through an appeal from a mentally retarded inmate in North Carolina. But before the case could be heard, the North Carolina Legislature banned

capital punishment for retarded inmates.

The issue instead will be taken up in a case from Virginia brought by Daryl Atkins; the Supreme Court heard oral arguments on Wednesday. When he was 18, Atkins and a friend were looking for beer money and forced a man at gunpoint to withdraw cash from an automated teller machine. They drove the victim in his own truck to a secluded place, where Atkins shot him eight times. Atkins has an IQ of 59; most states consider an IQ of 70 as the boundary line for mental retardation.

\* In Georgia last week, the state pardons board temporarily stayed the execution of Alexander Williams, a schizophrenic killer who has argued that he should not be executed because he was a juvenile when he committed the crime. In a variation on Scott's argument, Williams argues that his mental illness is so severe that the only way he can be considered sane enough to be put to death is if he is medicated against his will.

Williams, now 33, claims to think actress Sigourney Weaver is God and that she speaks to him. When he was 17, he raped and killed a 16-year-old girl. Although 23 states have laws allowing the execution of murderers who were minors at the time of the crime, only two states, Virginia and Texas, have carried out such executions. His stay of execution expires today, however, and his chances of winning Supreme Court review appear slim.

\* Earlier this month, the Supreme Court granted a stay of execution to Thomas Miller-El, a black inmate who is on Texas' Death Row for killing a hotel clerk during a robbery. The court plans to use his case to decide an issue involving how and when a defendant is allowed to produce evidence that his jury-selection process was unconstitutionally tainted by racial discrimination.

Previous Supreme Court rulings have made it simpler for defendants to challenge the racial composition of juries. A decision in this case is expected to determine how broad a context the trial judge may use in deciding whether racial discrimination has occurred in the selection of the jury. During Miller-El's 1986 trial in Dallas, prosecutors used peremptory challenges to strike 10 of the 11 blacks who were in the jury pool. At least through the early 1980s, prosecutors in Dallas had an official policy of striking as many black jurors as possible from trials of black defendants.

\* Also this year, the high court will hear an Arizona case that raises the question of whether judges, not juries, should be empowered to impose the death penalty. In Arizona, Florida and seven other states, judges make the final decision on capital punishment after a defendant is convicted of murder. A defendant has a constitutional right to a jury trial, and the argument is that this right extends to the decision between a life sentence and a death sentence.

The fate of about 800 Death Row inmates, almost half from Florida, rides on this case. If the court decides that judge-only sentencing schemes are unconstitutional, it's conceivable the death sentences in all nine states would have to be commuted to life.

There is movement on the political front as well:

In Ohio, for example, a bill calling for a study and possible changes in death-penalty procedure has been introduced in the Ohio House of Representatives, with support from Democrats and Republicans.

On the national level, the proposed **Innocence Protection Act** has been introduced in Congress with broad support from death-penalty proponents and opponents alike. The measure would encourage states to make DNA testing available to Death Row inmates who claim actual innocence.

DNA testing probably would not have helped Byrd with his actual-innocence claim. Byrd's conviction was based on circumstantial evidence.

The Dispatch supports the death penalty. But that support, and the support of people across the state, depends on making sure that the person strapped to the gurney is the right one. Lawmakers and the courts have a duty to make sure the process is as fair as humanly possible.

6. "The Death Penalty Re-examined," *The New York Times*. February 23, 2002; EDITORIAL, Pg. A14.

America's death penalty system is badly broken. Just how badly was underscored two years ago when a study of capital appeals by a team at Columbia University unearthed the fact that fully 68 percent of all death sentences reviewed by appellate courts between 1973 and 1995 had been reversed because of serious error.

A new follow-up study by the same researchers finds that states and counties that make most use of the death penalty -- applying it to a wide range of crimes instead of reserving it for "the worst of the worst" -- are also the most prone to flawed verdicts. When it comes to the death penalty, as Senator Patrick Leahy, the Vermont Democrat, has observed, practice does not make perfect.

These latest findings have landed at a moment of considerable churning over the death penalty. While the majority of the public still backs it, support is no longer overwhelming. On Wednesday the Supreme Court heard arguments in a case it could use to reverse its disgraceful 1989 decision allowing the execution of retarded people. A capital case on next term's docket will revisit the vexing issue of racial discrimination in jury selection.

On Capitol Hill, meanwhile, promising legislation is pending in both chambers that would reduce the risk of executing innocent people. In the past year many states have enacted death penalty reforms. You do not have to oppose the death penalty to support laws making it fairer.

The Columbia studies show that, far from mere "technicalities," the errors most often leading to reversal were incompetent legal counsel, suppression of evidence by police or prosecutors, and improper jury instructions by judges. Realistically, state and federal appeals judges cannot be relied upon to catch all the mistakes, especially given the limited availability of experienced volunteer lawyers to handle capital appeals, and stringent rules for reversing a death verdict that permit egregious errors to slip through.

The proposed legislation would establish national standards for the representation of capital defendants, and provide the resources to meet them -- a step Justice Sandra Day O'Connor appeared to endorse in recent comments. The measure, the bipartisan **Innocence Protection Act**, would also require preservation of biological evidence that may later prove crucial on appeal, and ensure federal and state death row inmates access to DNA testing if that could help exonerate them.

The House version, sponsored by Ray LaHood, a Republican, and Bill Delahunt, a Democrat, has 218 co-sponsors. That number, about half the House, reflects the growing unease across the country -- and across party lines -- about perpetuating a death-penalty system prone to unfairness and mistakes. Armed with the devastating findings of the Columbia researchers, the measure's backers need to press on.

<http://www.nytimes.com>

7. "A Slow Death for the Death Penalty," *Los Angeles Times*. February 21, 2002; EDITORIAL, Pg. 12.

The practical reasons you cite for supporting death penalty reform, wrongful convictions and high reversal rates, are compelling enough ("A Life-or-Death Reform," editorial, Feb. 14). But aside from contradictory scriptural arguments ("an eye for an eye" versus "vengeance is mine, sayeth the Lord"), there is also the moral and ethical question: How can the state denounce capital crime as abhorrent and simultaneously embrace murder in the role of executioner? Most other Western nations have long since answered that double-standard question--it can't.

Norman W. Nielsen

Highland Park

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The death penalty is an ugly issue that we often gloss over, yet one of such serious consequences that it should not disappear from our dialogue. The proposed **Innocence Protection Act**, introduced by Sen. Patrick J. Leahy (D-Vt.), would provide for a more compassionate response in helping to ensure that those given such a grave sentence are truly guilty.

Yet the bill does not go far enough: It does not repeal the death penalty. There is a mountain of evidence that shows that the death penalty does not deter crime. It also costs us all an incredible amount of money to enforce, which is money that I would prefer to spend on education or prevention. But most important, are we any better than a criminal if we kill as well?

Renee Dake Wilson

West Hollywood

8. Stapp, Katherine. "Rights-U.S.: Death Penalty Study Again Finds "Disturbing" Errors," *Inter Press Service*. February 14, 2002.

The U.S. states that execute the most people also have the highest death penalty reversal rates, a new study has revealed. The findings were released as capital punishment comes under increasing scrutiny in the United States.

The main factors driving heavy use of the death penalty are race, politics, and shoddy law enforcement, the study says.

"The evidence is clear: the more we seek the death penalty, the more we get it wrong," said Wayne Smith, executive director of the Washington-based Justice Project, a criminal justice reform group that posted the study on its website, <http://justice.policy.net>.

"If this continues, we will almost certainly execute an innocent person, if we haven't already," Smith said.

Compiled by Columbia University law professor James Liebman, "A Broken System" is the second installment of an in-depth analysis of capital punishment in the United States between 1973 - the year the death penalty was reinstated -- and 1995.

The first part, issued in June 2000, found that 68 percent of all death penalty cases were overturned by higher courts due to "serious error" -- primarily "egregiously incompetent" defense lawyers, suppression of exculpatory evidence by police and prosecutors, and faulty instructions to jurors.

In the new study, Liebman analyses the jurisdictions that rely most heavily on the death penalty - led by Florida, Georgia, and Texas. Every one had higher error rates than the national average of 68 percent.

What is more, "the higher proportion of African Americans in a state, the higher the rate of serious capital error," Liebman found.

"Other things being equal, reversal rates are twice as high where homicides are most heavily concentrated on whites compared to blacks, than where they are most heavily concentrated on blacks," according to the study.

"A Broken System" is being released as Texas prepares to execute Thomas Miller-El, an African-American man convicted of shooting two hotel workers during a robbery, killing one of them.

A death sentence must be unanimous, and Miller-El's lawyers say prosecutors deliberately excluded blacks from his jury -- a practice that is not only illegal but could have led to a harsher sentence.

According to former Dallas County prosecutors and evidence unearthed in the 1980s by the Dallas Morning News, this was long standard procedure in Texas.

A memorandum on jury selection written in 1963 directed Dallas County prosecutors to dismiss "Jews, Negroes, Dagoes and Mexicans." While the ethnic slurs were eventually abandoned, as late as

1980 training manuals asserted that "minorities usually empathize with the accused" and should be avoided.

The newspaper also found that between 1980 and 1986 -- the year Miller-El was convicted and sentenced to die -- Dallas County prosecutors used so-called "peremptory challenges," for which no explanation need be given, to eliminate nine out of 10 potential black jurors in capital murder cases.

In the Miller-El case, seven of 18 potential black jurors were dismissed using peremptory challenges, and just one of the remaining 11 made it onto the jury. That juror apparently said he believed execution was too "lenient" a punishment, and suggested that defendants should be coated with honey and staked to an anthill.

Miller-El's lawyers have filed a last-minute appeal for clemency with the U.S. Supreme Court, which is scheduled to rule on the petition tomorrow -- less than a week before he is scheduled to die by lethal injection. His case has gained support from the Texas branch of the National Association for the Advancement of Colored People and other civil rights groups.

Rights activists have long complained that the bias against African Americans and other minority communities when applying the death penalty is endemic in the U.S. justice system.

According to a report last month by Amnesty International, 80 percent of the more than 750 prisoners executed since 1977 were convicted of killing whites, even though blacks and whites are the victims of murder in almost equal numbers. Eighty percent were executed in the southern states, one-third in Texas alone.

Echoing Miller-El's charges, Amnesty says "dozens of African Americans (have been) convicted by all-white juries in cases which show a pattern of prosecutors removing prospective black jurors during jury selection."

In light of recent exposes like Liebman's, Congress is considering a bill called the **Innocence Protection Act**, which calls for expanded DNA testing, greater oversight of lawyers in capital cases, and a guarantee that juries are properly instructed in alternative sentences, such as life in prison without the possibility of parole.

"In parts of the country, it is often better to be rich and guilty than poor and innocent," said Vermont Senator Patrick Leahy, the chief Senate sponsor of the bill, noting that 95 death row inmates have been exonerated so far.

"If we had a series of close calls in air traffic, we would be rushing to fix the problem," he said. "These close calls on death row should concentrate our minds, and focus our will, to act."

9. "A Life-or-Death Reform," *Los Angeles Times*. February 14, 2002; EDITORIAL, Pg. 16.

Not long ago, Americans' support for capital punishment was rock-solid. That was before they knew how many people on death row were wrongly convicted. In recent years, 99 across the United States have been exonerated and released, some just hours before a state executioner would have killed them with gas, electricity or an injection.

Support for the death penalty has always been based on the belief that defendants are guilty and got a fair trial. What happens when facts shake that confidence? Public support has dropped nationally, from 77% five years ago in one poll to just over 63% last year, the lowest level in 20 years. Support drops to 46% when pollsters list life without parole as an alternative to death.

Now comes Columbia Law School professor James S. Liebman with data showing that mistakes in death penalty cases occur with horrifying frequency. His measure is the reversal rate--the frequency with which death sentences are thrown out on appeal for grave errors (which does not necessarily mean that a defendant was exonerated).

In a study released this week, Liebman reviewed more than 5,000 cases over 23 years and found that in the states that most often handed out the death penalty, nearly 70% of those sentences were ultimately reversed. Mississippi led the pack with a staggering reversal rate of 92%. In other words, Liebman concluded, "heavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur ... including execution of the innocent."

California, which has the most people on death row--602--is not among Liebman's top 10. But just in the past two weeks, California judges reversed death sentences in two separate cases. In one case the court ruled that the defendant's Miranda rights were violated, and in the other an appeals panel cited the "egregious failure" of the defense lawyer to competently represent his client.

Liebman found such mistakes over and over as he examined data from other states. The major causes for the high reversal rate include mistaken identification, post-conviction discovery of exculpatory evidence, including evidence from DNA tests, misconduct on the part of the prosecutor or incompetence of the defendant's attorney.

That's where legislation would help. The proposed **Innocence Protection Act**, introduced by Sen. Patrick J. Leahy (D-Vt.), would encourage states to set higher standards for lawyers who represent death penalty defendants, increase compensation for defense lawyers in state and federal capital cases and establish national guidelines for the preservation and testing of DNA evidence.

Leahy's worthy measure has more than two dozen co-sponsors, but nearly a year after its introduction the bill still awaits its first hearing. Envision those 99 wrongly convicted individuals being led into prison death chambers and the importance of such reform becomes clear.

10. "Make More Use of DNA Testing," *The Seattle Post-Intelligencer*. December 13, 2001; EDITORIAL, Pg. B8.

Considering the discomfoting reality that the Green River killings represent the nation's worst unsolved serial murder case, it would not be expecting too much of a sophisticated metropolitan sheriff's office such as King County's to seek out advanced DNA testing in an attempt to solve the crimes.

After all, investigators had enough foresight in 1987 to make suspect (now defendant) Gary Ridgway bite down on gauze to provide a saliva sample, evidence that was preserved with care and that eventually provided the break in the case.

But an unacceptable amount of time elapsed between when the specific test used on the Ridgway evidence became widely available and when the county decided to use it.

Attributing the lapse of several years to a heavy caseload at the underfunded state crime lab (upon which King County primarily relies) is only partially accurate.

As the sheriff's office spokesman acknowledged, dispatching the evidence to a private lab, as some other counties have done in important criminal investigations, "just wasn't on our radar" until the state crime lab received a federal grant allowing it to re-investigate old cases. It should have been.

These aren't just any old cases. For close to 20 years, the slayings of almost 50 women have gnawed at the consciousness of the entire region, including the many law enforcement officers who worked them; Sheriff Dave Reichert himself was the lead investigator for eight years.

This type of oversight must not be repeated. Indeed, as with any new investigatory technique, growing pains are inevitable. By now, though, DNA has more than proved itself an indispensable tool in the arsenal of forensic police work. Its value cuts both ways; DNA just as precisely exonerates the falsely accused as it seals the case against the guilty.

That is why this newspaper has endorsed federal legislation that would prohibit states from denying applications from inmates for DNA testing if the testing has the scientific potential to produce new evidence material to a claim of innocence. Under the **Innocence Protection Act** - now stalemated like most every bill that doesn't deal with terrorism - inmates would also be assured a "meaningful opportunity" to use DNA evidence to prove their claim and be able to sue to enforce the testing provision. Just as important, federal grants would be given states that aid, not hinder, inmates requesting the testing.

#### NOTES:

##### P-J OPINION

The lone detective working on the Green River case in the past decade had a lot on his plate. It seems reasonable that staying current with developments in DNA testing and how they might apply to the almost 50 unsolved serial killings would be one of the priorities.

11. Williams, Michael Paul. "Sen. Warner Tells NAACP of Journey," *The Richmond Times-Dispatch*. October 27, 2001

U.S. Sen. John W. Warner recited a personal journey that began with his witnessing of the "I Have a Dream" speech and culminated with the ascension of two black federal judges from Virginia.

Warner, a Republican in his fourth term, spoke yesterday at the 66th Annual Convention of the Virginia State Conference NAACP, which convened Thursday night at the Richmond Marriott.

As a young man in Washington, an intrigued Warner attended the 1963 March on Washington and heard the famous oration by Dr. Martin Luther King Jr. "It was almost as if the hand of Providence reached down and touched me and said, 'Go and see young man, and learn.' "

As a senator decades later, he would discover that Virginia had never sent a black to the federal bench prior to his recommendation of Judge James Spencer in 1986.

"Can you believe that?" he asked an audience of about 200.

Judging from the affirmative murmur, they could believe it.

"Well," Warner quipped, "you're always on a learning curve."

He said another nomination - that of Roger Gregory to the Fourth Circuit of the U.S. Court of Appeals - was probably the most difficult he'd ever had to push through.

"You've got to find those opportunities and step forward and see that they get done," he said. "And that's the importance of this organization."

Warner, a self-described moderate-conservative with a maverick streak, recognized the challenges faced by the civil rights organization.

"When times are good, people tend to drift away," he said.

Warner received his loudest applause when he noted his introduction of a \$1,000 teacher tax credit in recognition of the out-of-pocket expenses teachers incur.

He also said he is supporting legislation called the **Innocence Protection Act**, which will make DNA testing more available in circumstances in which it can prove innocence.

"Our judicial system has many safeguards in place to help protect against wrongful convictions," he said. "But you know and I know they occur."

He also received applause for introducing a bill this year that he said would strengthen existing laws protecting federal employees from discrimination, harassment and retaliation in the workplace.

The conference continues through tomorrow and will include speeches by Rep. Robert C. Scott, D-3rd, and Dr. Yvonne Scruggs-Leftwich, executive director and chief executive officer of the Black Leadership Forum in Washington.

LOAD-DATE: October 30, 2001

12. "Using DNA to Prove Innocence," *The Hartford Courant*. September 24, 2001; Editorial; Pg. A8.

DNA testing is fast becoming the gold standard in many criminal trials -- both to prove guilt and, in some cases, establish innocence.

It also has become a liberating test in freeing wrongly convicted inmates. Ninety-four prisoners, including 10 on death row, have been set free in the past decade after DNA tests proved their innocence.

The latest beneficiary of this modern science is Charles I. Fain, who was released last month after serving 17 years on Idaho's death row for the rape and murder of a 9-year-old girl in 1982.

From the beginning, Mr. Fain said he knew nothing of the crime. He passed a state lie detector test. Nevertheless, he was convicted, partly on the basis of microscopic examination of hair samples, a questionable technique sometimes described as junk science. The FBI estimates that up to 10 percent of its traditional hair analyses are proved wrong by DNA testing.

As Mr. Fain's case illustrates, DNA testing should be available to every inmate on death row.

Legislation is pending in Congress that would guarantee broader access to DNA testing by convicted offenders. The measure, known as the **Innocence Protection Act**, also would bar the premature destruction of biological evidence, such as hair, blood and semen, that could be crucial in clearing an innocent person or identifying the real perpetrator.

Sen. Patrick Leahy of Vermont, the bill's primary sponsor, has scheduled hearings. Connecticut Sens. Christopher J. Dodd and Joseph I. Lieberman are co-sponsors.

Backing the **Innocence Protection Act** should have nothing to do with support or opposition to the death penalty. Both sides can agree that it would be a tragedy if a state were to execute a convict, only to learn later through DNA testing that the person was innocent.

Let modern science serve the cause of justice.

**13. Miller, Jeff. "U.S. Has Doubts Over Death Row \*\* Even Lawmakers Who Back Executions Want To Do More To Avert Mistakes," *The Morning Call* (Allentown). September 9, 2001; Pg. A1.**

Questions about the administration of the death penalty have led several states, including Pennsylvania, to consider giving more support to defendants in capital cases.

Now, momentum appears to be growing in Washington for federal legislation to improve legal representation for capital defendants and guarantee access to DNA evidence that has enabled several condemned prisoners to walk free.

The aim is not to abolish the death penalty but to cut down on serious errors that could lead to innocent people being executed.

Initially introduced last year, the **Innocence Protection Act** has gained broad bipartisan support in the House and Senate even among death penalty proponents, including Rep. Pat Toomey.

Toomey, R-15th District, said he supports capital punishment but "the thought of government taking an innocent life is such a horrendous tragedy that we should go to great lengths to avoid it."

Nearly half the House and one quarter of the Senate are co-sponsoring the bills (S.486 and H.R. 912), including Reps. Joe Hoeffel, D-13th, Paul Kanjorski, D-11th, and Toomey.

Pennsylvania death penalty opponents said Sen. Arlen Specter pledged during two town hall meetings in August to become a co-sponsor this fall. Specter could not be reached for comment. The former Philadelphia prosecutor would be the first Republican on the Senate Judiciary Committee to add his name to the bill.

Opponents of the bill argue that Congress is overreaching its authority to dictate how states and local jurisdictions administer justice. Rural jurisdictions may be unable to meet all the standards, creating a formidable roadblock to capital punishment.

They also argue that the appellate process has more than enough safeguards to protect defendants from bad lawyering.

"No legislative scheme we enact will be able to predict, prior to trial, whether a particular lawyer will fall asleep during a trial," Sen. Orrin Hatch, R-Utah, said at a hearing in June. "That is why our current system is designed the way that it is, to evaluate after the trial whether a lawyer has provided competent representation to his or her client."

Senate Judiciary Chairman Patrick Leahy, a primary cosponsor, said Congress "has a duty to act because the crisis is national in scope."

"Today in America there are people awaiting execution whose lawyers slept through part of their trials," said Leahy, D-Vt. "That's unjust. It's shocking. It ought to be unacceptable in this country."

Although most Americans still favor capital punishment, polls indicate that a majority have serious doubts about how the death penalty is administered.

According to The Justice Project, a nonprofit organization focused on improving fairness in the judicial system, 95 people on death row, including three in Pennsylvania, were exonerated between 1973 and 2000.

Prejudicial errors in death penalty cases are common according to a Columbia Law School study released last year. Courts considering appeals found serious, reversible errors in nearly 70 percent of more than 4,578 cases the study reviewed.

Pennsylvania's overall error rate was 57 percent, the study found. The state has the fourth-largest death row with 244 inmates and has executed three people since 1990.

The most common errors cited by the courts were incompetent defense lawyers and suppression of evidence by police or prosecutors.

The study found that 82 percent of people whose sentences were overturned later received lesser sentences, and 7 percent were found to be innocent.

In the last year, three death sentences from Lehigh County have been set aside.

Two weeks ago, a Lehigh County judge granted a new trial to Dennis Counterman, who was sentenced to death in 1990 after being convicted of setting fire to his home and killing his three children.

The judge ruled that the prosecution hid critical evidence from Counterman's public defenders that would have helped them argue the fire was set by one of the children. The judge also found that the public defenders didn't adequately prepare the case.

Lehigh County District Attorney James B. Martin plans to retry Counterman.

Jeff Garris, executive director of Pennsylvania Abolitionists United Against the Death Penalty, said the quality of defense varies from county to county and from defender to defender.

Public defenders, who have the most training, are usually the most successful in winning acquittals or sentences of less than death. Attorneys without criminal litigation experience usually do the worst.

For instance, the original attorney for a death row inmate who was later acquitted specialized in divorce cases.

"Statewide there are no standards for who can be appointed" [to represent defendants facing the death penalty], Garris said. "A lot of time, people are meeting their attorney on the day of the trial."

The federal legislation focuses on ensuring competent legal representation.

The bill would establish a national commission to establish standards for representing indigents charged with capital crimes and provide grants to states to meet the standards and improve capital case representation.

States that fail to comply would risk losing federal prison grants. Death row inmates in those states would confront fewer obstacles in bringing appeals in federal courts.

The bill would also make it easier for defendants and death row inmates to use DNA testing that might prove their innocence. Federal grants would be available for states to improve their DNA testing programs.

The legislation also encourages states to inform juries in capital cases of other sentencing options, including life in prison without the possibility of parole.

Pennsylvania is one of many states already considering ways to address some of the problems.

The state Senate has approved a bill giving capital defendants and death row inmates easier access to DNA testing.

"For the most part, it's very difficult to get courts to go back and approve testing for cases that are very old," said Ernie Preate, a former state attorney general who now lobbies for criminal justice reforms. "This would let courts know that they can do it, and that the state's going to pay for it."

The state Senate is also considering creating a training center for defense attorneys handling capital cases and increasing compensation for appointed attorneys, Preate said.

"They've recognized that the system is fundamentally flawed without effective lawyers," Preate said. "If you want to keep the death penalty, you have to provide effective counsel."

Northampton County District Attorney John Morganelli agrees.

Morganelli, as president of the state district attorneys association last year, testified in Harrisburg on behalf of the reforms.

"I don't think we can have a death penalty and at the same time not support having effective counsel for people facing capital crimes," Morganelli said. "We need to have competent counsel on both sides of the cases."

Ironically, many death penalty opponents have mixed feelings about the bill. They fear state and federal reforms could undermine public support for ending executions.

The reforms only scratch the surface of the problem, said Garris, the abolitionist leader. DNA evidence, for instance, is available in just a fraction of capital cases and has reversed only a handful of wrongful convictions.

Garris would rather have a moratorium on executions such as the one imposed in Illinois after 13 condemned prisoners were exonerated.

"I want to see the death penalty abolished," Garris said. "But I think we would be very misguided if we opposed something that dealt with some of the most outrageous aspects of the death penalty.

"Frankly, if it saves even one person's life on Pennsylvania's death row, that would be progress."

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GRAPHIC: PHOTO by UNKNOWN Dennis Counterman ... getting new trial

**14. Masters, Brooke A. "Executions Decrease For the 2nd Year; Va., Texas Show Sharp Drops Amid A National Trend," *The Washington Post*. September 06, 2001; Pg. A01**

Executions are down sharply across the country for the second year in a row, with dramatic declines in the leading death penalty states of Virginia and Texas, and if the trend continues, the United States would execute the fewest inmates since 1996.

Nationally, 48 people have been put to death in 2001, down 27 percent from this time last year. With 14 more executions scheduled, this year's total could be down a third from the 1999 high of 98.

The declines reflect the decade-long reduction in the crime rate and a public less enthusiastic about the death penalty. As discussion has grown about the fairness and reliability of capital convictions, judges and governors also have become more willing to stop executions and take a second look at questionable cases.

By far the most striking change has come in Texas, which executed a record 40 inmates last year. This year, 12 people have been put to death, and six more executions are scheduled. Virginia has executed one inmate this year -- compared with eight last year and 14 in 1999 -- and one execution is scheduled. In fact, executions are down in nine of the 11 states that historically have put the most inmates to death.

Though execution numbers often fluctuate, observers on both sides of the death penalty debate agree that the country may be on the cusp of changing the way the ultimate punishment is meted out. A Washington Post-ABC News poll found that public support for the death penalty is now at 63 percent, the lowest in two decades.

Twenty-one people have been released from death row in the past three years after DNA tests or other new evidence cast doubt on their convictions, and Texas cases involving underpaid, sleeping and incompetent lawyers gained widespread attention because of last year's presidential election.

This year, 23 of the 38 states that have capital punishment enacted reform measures. Congress is considering legislation, and Justice Sandra Day O'Connor, a swing vote on the U.S. Supreme Court, recently expressed "serious doubts" about the way the death penalty is applied.

"There is a growing acknowledgment generally that the death penalty should be reserved for the worst of the worst," said Oregon prosecutor Joshua Marquis, a board member of the National District Attorneys Association. "I think the degree of judicial scrutiny has increased and the political pressure on governors for clemency has increased . . . and juries and prosecutors are becoming more sophisticated about whom to put on death row."

Reasons for the decline in executions vary from state to state, but some broad similarities exist. The decade-long drop in crime and the mid-1990s decision to abolish parole in a number of big death penalty states have led to fewer people reaching death row and less public demand for executions. Federal legislation enacted in 1996 sped up death row appeals, leading to spikes in executions in 1998 and 1999 that couldn't be sustained.

"You had waves of cases that had backed up, and now the flood has gone through," said Jim

Marcus, executive director of the Texas Defender Service.

Courts and governors have played a vital role in the slowdown, as judges and politicians who once turned a deaf ear to inmate complaints have proved more willing to step in. Oklahoma Gov. Frank A. Keating (R) last month granted an unheard-of second 30-day stay of execution to immigrant Gerardo Valdez after personal pleas from Mexican President Vicente Fox.

In Virginia and Texas, the state courts have intervened in a significant number of capital cases for the first time in years. Last month, the Texas Court of Criminal Appeals stopped the execution of convicted carjacker Napoleon Beazley, the fifth such stay it has granted since October. And the Virginia Supreme Court overturned two death sentences in seven weeks this year.

"Increasing doubts about the reliability of verdicts have dampened the enthusiasm of public officials for executing people quickly," said University of Virginia law professor George Rutherglen.

It is not unusual for a state to see a major drop in executions in a single year, largely because of the way appeals courts operate.

When a court identifies a legal problem, judges often hold up similar cases until the issue is resolved. That happened in Texas in 1996 -- when three people were put to death -- and again this year. Several of the recent Texas stays appear to be related to the case of Anthony Graves, who argues that his state appeals lawyer was inadequate. Similarly, the Georgia high court has stopped executions while it considers whether the method the state uses -- electrocution -- violates the constitutional ban on cruel and unusual punishment. The U.S. Supreme Court is holding four cases while it decides whether it is unconstitutional to execute mentally retarded convicts.

But this year marks the first time since the death penalty was restored in 1976 that executions have dropped significantly nationwide for two years in a row. And five of the 10 states that have executed the most people -- Louisiana, South Carolina, Alabama, Arizona and Georgia -- have not executed anyone in 2001. In Alabama, all four scheduled executions were stopped by the state or federal courts. Maryland has not carried out an execution since 1998.

There are clear exceptions to the trend. This year, Tennessee and the federal government executed their first prisoners since the restoration of the death penalty. And Oklahoma, Missouri, Delaware and North Carolina are all executing more inmates this year than last.

Oklahoma Attorney General Drew Edmondson said his state is moving through its backlog of old cases a few years after most others -- the state has carried out 26 of its 45 modern executions in the past 20 months. "Most Oklahomans still support the death penalty and are gratified that cases are not getting bogged down on appeal," he said.

Conversely, Missouri Attorney General Jay Nixon said his state's execution totals have remained relatively stable, so the state missed both the late 1990s spike and the recent decline.

The growing concern about the death penalty has reached beyond execution totals, as state legislators tackled death penalty issues ranging from racial bias to bad lawyers. Fifteen states passed laws this year making it easier for inmates to get post-conviction DNA testing, and six banned, for the first time, executing retarded inmates.

The federal **Innocence Protection Act**, which would provide DNA testing and set minimum

standards for court-appointed defense lawyers, also continues to make progress. The House version has 210 sponsors, close to a majority. In the closely divided Senate, several moderate Republicans have recently come out for the bill.

"The number of cases of inmates being taken off death row says to the public that this system has faults and we've got to take greater steps to ensure guilt beyond a reasonable doubt," said Sen. John W. Warner of Virginia, one of two Republicans from a death penalty state to sign on. (Sen. Gordon Smith of Oregon is the other.)

The legislative ferment may lead to further reductions in executions as courts struggle to apply new laws to old cases, said Dudley Sharp, resource director for the crime victims group Justice for All. But he predicts that eventually the execution tallies will rebound. "It's naive to say that there's a new political reality," he said.

Others are not so sure.

"Once you are talking about executions in practice, support for the death penalty is broad but shallow," said Ohio State University law professor Douglas A. Berman. "We don't feel comfortable about loving the death penalty, so when there are reasons to go slow, all the institutional players do."

LOAD-DATE: September 06, 2001

15. Crooks, Gary (for the Editorial Board). "Legislation targets gaps in justice," *The Spokesman-Review* (Spokane, Wa.), September 3, 2001; OUR VIEW; Pg.A14.

Since 1990, 10 people have been freed from death row in the United States after DNA testing cast doubt on their guilt. The 10th was Charles Fain, who recently walked out of an Idaho penitentiary after 17 years.

It's chilling to think what would've happened to those men if not for breakthroughs in DNA technology. It's chilling to think what would've happened to Fain had the Idaho Legislature not passed a law just this year that allowed for post-conviction DNA testing.

Since the advent of new DNA testing, there has been a steady drumbeat of stories about people who were convicted by juries and exonerated by science. Since the pursuit of justice is about the pursuit of truth, this has been a good development for society.

But these miscarriages of justice reveal a system that is capable of putting innocent people in jail, while the guilty remain free to prey on others. The primary reason this happens is ineffective defense counsel funded by insufficient public funds.

A recent series in the Seattle Post-Intelligencer showed that since 1981, 22 percent of people on Washington's death row have gotten off because of ineffective defense counsel. One-fifth of the 84 people who have faced execution were represented by lawyers who had been or would be disbarred, suspended or arrested.

Too often, judges have bypassed experienced counsel to hire greener lawyers who work cheap. Some counties pay a flat fee to defense counsel, which encourages corner cutting, plea deals and negligence.

The problems in Washington state are being felt across the nation, which has prompted a bill in Congress that would help shore up the creaking credibility of the justice system by embracing DNA technology and providing grants to states to help pay for better defense counsel.

The **Innocence Protection Act** is a bipartisan effort authored in the U.S. Senate by Republican Gordon Smith of Oregon and Democrat Patrick Leahy of Vermont. Sen. Maria Cantwell is a co-sponsor. Rep. George Nethercutt is a co-sponsor of the House version.

Both bills would provide for the uniform handling of DNA samples that would replace the state-by-state mishmash; provide funding and training for law enforcement in DNA processing and analysis; and establish minimum qualifications for defense counsel and provide grants to help pay for better attorneys.

While some local control would be lost, the trade-off would be an improved system for arriving at truth and justice. The reality is that many states and counties simply can't afford to improve their criminal justice systems.

The beauty of the bill is that it not only protects the innocent, but it helps target the real culprits. It also helps law enforcement hold onto guilty parties, rather than setting them free because of poor defense counsel.

Too many times, justice on the cheap has produced injustice.

16. Sullivan, Walter F. "**Warner Supports Senate DNA Bill**," *The Richmond Times-Dispatch*.  
September 1, 2001.

Editor, Times-Dispatch:

Senator John Warner is to be commended for recently signing on as a co-sponsor to the **Innocence Protection Act**. This legislation, introduced by Democrats and Republicans, death-penalty supporters and opponents, in the U.S. House and Senate, takes important steps to decrease the chances of sending an innocent person to die. The bill's primary provisions are:

- \*To allow DNA testing to help reveal all the facts in a case; and
- \*To encourage states to establish minimum standards for attorneys defending those whose lives hang in the balance.

The United States Catholic Bishops have endorsed this federal legislation.

Virginians can count on Warner to support legislation that would ensure that all of Virginia's citizens have access to a judicial system that is just. Warner's support of the bill indicates a commitment to put good public policy and fairness first and last on his agenda.

# The New York Times

ON THE WEB

## Death Penalty Reform in the Spotlight

6/18/02

Amid intensifying national concern about unfairness and errors in administration of the death penalty, momentum is building on Capitol Hill to reduce the risk of executing innocent people. Today both the House and Senate are to hold hearings on the bipartisan Innocence Protection Act, marking the beginning of a concerted drive by its sponsors to achieve concrete reform before the Congressional session ends.

First introduced two years ago, the proposed measure would ensure federal and state death row inmates access to DNA testing, and improve the quality of legal representation provided to indigent capital defendants — a response to atrocities like the "sleeping lawyer" case in Texas. The sponsors of the House version, Ray LaHood, a Republican, and Bill Delahunt, a Democrat, have 236 co-sponsors. That number, more than half the House, should make it tough for the Republican leadership to deny the chamber a chance to vote on the measure.

In the Senate, Arlen Specter, the Pennsylvania Republican, has introduced a separate reform bill opening the door for bipartisan action with Patrick Leahy, chairman of the Judiciary Committee and the main Senate sponsor of the Innocence Protection Act.

Passage of the act would not solve all the problems with the death penalty, or obviate the Supreme Court's duty to recognize the ultimate unconstitutionality of capital punishment. But as a step against unfairness, its passage deserves prompt approval.

# The New York Times

ON THE WEB

6/21/02

## The Court Gets It Right

By declaring yesterday that the Constitution's ban on "cruel and unusual punishment" bars the execution of mentally retarded people, the Supreme Court injected a limited but wholly welcome measure of human decency into the nation's use of the death penalty.

The 6-to-3 decision was a dramatic turnaround for a court that capitulated 13 years ago to a wave of pro-death-penalty sentiment and found no reason to bar the execution of the mentally retarded. In so doing, it turned a blind eye to the obvious — that inflicting the death penalty on individuals with I.Q. scores of less than 70 who have little understanding of their moral culpability violates civilized standards of justice. This time around, the court discovered a "national consensus" against executing retarded people that it could not find in 1989.

Writing for the majority, Justice John Paul Stevens noted that mentally retarded criminals do not have the capacity to be deterred by the knowledge that they might be executed for a capital crime. He was joined by Justices Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

The majority correctly observed that the tide of public opinion had turned. Most states now either prohibit capital punishment altogether or ban its use against the mentally retarded. In an era in which DNA evidence has shown one death row inmate after another to be innocent of the crimes of which they were convicted, the polls demonstrate steadily dwindling public enthusiasm for capital punishment in general and a widespread revulsion against the idea of executing mentally retarded people in particular.

Justice Stevens also signaled that the question of what constitutes "cruel and unusual punishment" is not one that is answerable solely by coldly analyzing opinion polls and surveying state legislatures. It inevitably engages the moral sensibility of the individual justices. Indeed, the court had no business in the first instance relying so heavily on public sentiment when deciding an issue of life or death involving condemned murderers, a segment of the population that by definition is not held in particularly high esteem.

Three members of the court — Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas — joined in angry dissents. Justice Rehnquist was indignant on the matter of jurisprudence by "opinion poll results," but ignored the fact that it was that very instinct to hew to what the public seemed to want that led the court into this moral swamp to begin with.

The United States has been one of only three nations — the other two are Japan and Kyrgyzstan — that permit the execution of the retarded. Dozens of retarded convicts, most of whom had little understanding of the moral implications of their deeds, have been put to death here since 1976. In the 20 states that still have laws on the books permitting the execution of retarded people convicted of capital offenses, it is estimated that there are scores, perhaps even hundreds, of inmates whose low I.Q.'s will now qualify them for a sentence reduction to life in prison.

**Landing at a moment of mounting disquiet across the political spectrum about the unfair and arbitrary workings of the nation's death penalty system, yesterday's ruling can only add momentum to current efforts underway on Capitol Hill and elsewhere to address some of the system's other lamentable flaws.**

# The Washington Post

## Checks on the Death Penalty

Tuesday, June 18, 2002

NORMALLY, WHEN members of Congress gather to talk about the death penalty, it is to expand the list of crimes for which executions are imposed or to rein in death row appeals. Today, however, both houses of Congress will hold hearings on a bill that would, if passed, actually limit the use of capital punishment. The Innocence Protection Act, sponsored by Patrick Leahy (D-Vt.) in the Senate and William Delahunt (D-Mass.) and Ray LaHood (R-Ill.) in the House of Representatives, was first introduced more than two years ago. Since then more than half of all House members and 26 senators have signed on as co-sponsors. Many of these support the death penalty. Their backing for a bill that would ensure access to DNA testing for convicts and that would improve the quality of legal representation for capital defendants is evidence of the profound effect on public opinion of the continuing wave of death row exonerations.

Reasonable people disagree about the death penalty, but nobody can disagree that society should take extreme care to avoid executing innocent people. The recent history of the death penalty strongly suggests that many states have not been careful enough. Without question, innocent people have come within hours of being put to death. Substantial questions remain about the guilt of some who did not escape execution. Many states provide such low-quality lawyering to the accused that egregious miscarriages of justice are inevitable. Congressional action on this subject should not be controversial, especially considering the movement for reform at the state level and the wide bipartisan support in Congress for this bill.

Sen. Leahy means to mark up the bill quickly. Its prospects in the House, where Judiciary Committee Chairman James Sensenbrenner (R-Wis.) has reservations, are dimmer. But the bill's proponents should not compromise too much. To make a real difference, any bill will have to make DNA testing available to inmates and give states incentives to improve the fairness of future capital proceedings. The Innocence Protection Act offers some well-designed measures on both these fronts. While it is far from the abolition of capital punishment that we favor, to oppose it as insufficient would be as irresponsible as for death penalty proponents to reject it as unneeded. Congress should pass this bill.



## Fatal mistakes

6/7/02

It is rare to see a display of like-mindedness between Arizona Republican Rep. Jim Kolbe and his Democratic colleague Rep. Ed Pastor. Recently, though, the two have found a life-and-death issue they agree on.

Both are now cosponsors of a death penalty reform bill that would expand the availability of DNA testing in capital cases. It would also help states ensure that defendants in such cases have competent legal representation. Pastor embraced the measure last year, and Kolbe signed on last month. In all, this impressively bipartisan effort now has 235 representatives from both parties acting as cosponsors.

The fact that Kolbe and Pastor are on the same side of this issue, along with so many of their respective party members, speaks to the growing recognition of how badly America's death penalty system is in need of an overhaul.

Just a few months ago former Arizona death row inmate Ray Krone became the 100th person in America, since the death penalty was reinstated in 1976, to be exonerated after once being condemned to die.

Krone served 10 years for a murder he didn't commit. He was convicted of raping and killing a Phoenix bartender in 1991 and sent to death row, largely on the evidence of a dental expert who said bite marks on the victim matched Krone's teeth.

A few years later, his conviction was overturned and a new trial was ordered, resulting in a sentence of life in prison. Krone was eventually freed when DNA testing showed that saliva on the victim's tank top belonged to someone else, a sex criminal who was already behind bars for another offense.

In February, a few months prior to Krone's release, researchers at Columbia University released a long-term study that showed shockingly high rates of death penalty convictions were being overturned on appeal.

Researchers looked at 5,760 cases in the 34 states. On average, state or federal courts threw out a conviction or death sentence in 68 percent of the cases studied where at least one round of appeals had been completed.

In Arizona, one of the top states in the nation for sentencing people to death, the mistake rate was even higher. The study found "serious errors" in 79 percent of the Arizona cases it looked at. That means death sentences were overturned by a higher court, resulting in new sentences, new trials or a defendant's acquittal.

Increasingly, politicians and the public are realizing that a system this blunder-prone is unacceptable and immoral. It is an awareness that crosses all party lines, and encompasses those on both sides of the death penalty debate.

Even those in favor of capital punishment do not want to see it dispensed in such a haphazard manner that the real culprit goes free and the wrong person ends up taking a gurney ride to the death chamber.

The bill Kolbe and Pastor are supporting, HR 912, would go a long way toward righting the wrongs done to the Ray Krones of America. The best solution is for the death penalty to be done away with altogether. Failing that, safeguards such as those in HR 912 are the least the government can do to prevent future mistakes.

## THE ARIZONA REPUBLIC

### DNA bill serves justice life, death are at stake

June 14, 2002

A remarkable proposal in Congress aims to assure that no innocent person is executed and that everyone accused of a capital crime has competent legal representation.

No wonder the Innocence Protection Act enjoys bipartisan backing from both supporters and opponents of the death penalty.

No wonder two members of Arizona's delegation, Reps. Ed Pastor, a Democrat, and Jim Kolbe, a Republican, have helped bring the number of House co-sponsors to 235. Their very different political and philosophical viewpoints were no barrier to embracing a bill that is about justice.

The rest of Arizona's delegation, both in the House and in the Senate, where an identical plan has 26 co-sponsors, ought to join in support of this idea.

The measure is designed to assure that wrongfully convicted people who might be exonerated by DNA tests have access to such tests. It also establishes a commission to set minimum qualifications and compensation for attorneys who are appointed to try death penalty cases.

Arizona has a keen understanding of how important DNA testing can be.

The genetic fingerprint's role as a crime-solving tool is so well understood that Arizona just enacted a law mandating all felons be tested. As more states join this effort, the national DNA database will make it increasingly hard for criminals to hide from their crimes.

Arizona also has seen how DNA testing can be an astonishing tool for freeing the innocent. Former Arizona prison inmate Ray Krone won freedom after DNA tests proved he did not commit the murder for which he had been twice convicted and once sentenced to die.

DNA tests should be available to anyone this science has the potential to exonerate. Not only can the result free an innocent person, as happened with Krone. It can also point to the real culprit, something that may have happened in the Krone case.

This is the type of justice the nation should be committed to serve.

In moving to set standards for the attorneys who represent indigents accused

of capital crimes, the proposal again lands on the side of real justice, not expedience. Accused people who cannot afford an attorney deserve competent legal counsel, especially when the stakes are life or death.

Both the wrongly convicted and the crime victim suffer injustice when the real culprit gets away.

House subcommittee hearings are expected next week on the Innocence Protection Act. Those with the power to move this bill through the process should do so.

As a member of the House Judiciary Committee, which has been assigned the House bill, Arizona Rep. Jeff Flake could offer support that would be particularly helpful.

The American ideal of justice for all would be well served if this bill becomes law.

## The Charlotte Observer

### Punish the guilty

Editorial Posted on Wed, Jun. 05, 2002

The Innocence Protection Act is a sensible proposal that unites two groups that usually don't see eye to eye -- those who oppose the death penalty and those who favor it. Why this uncommon alliance? The proposal's goal is to make sure the person who did the crime faces the consequences.

That hasn't always been the case. The U.S. Conference of Catholic Bishops, urging support for the bill, notes that "since 1976, when the death penalty was reinstated in the U.S., approximately 100 people awaiting execution have managed to prove -- often with the aid of volunteer attorneys and amateur investigators -- that they were wrongly sentenced to death."

One result of such miscarriages of justice is that an innocent person faces death. The other is that a killer goes free.

Among the bill's provisions:

- Help ensure that every person accused of a capital crime has access to a competent, experienced lawyer. It would do this by establishing a National Commission on Capital Representation to develop standards for providing adequate legal representation for indigents facing a death sentence, and by offering grants to help states implement those standards.

The record of shoddy legal representation in death penalty cases is shocking. U.S. Rep. Ray LaHood, R-Ill., told the Senate Judiciary Committee, "In Illinois alone, 22 defendants have been sentenced to death while being represented by attorneys who have either been disbarred or suspended at some time during their legal careers. In some cases, attorneys have even been found sleeping or under the influence of alcohol during the trial."

- Provide condemned prisoners the right to have DNA evidence tested when it's available. Require states that seek federal grants for DNA-related programs to adopt procedures for preserving biological material. And prohibit states from denying Death Row inmates' applications for DNA testing if such testing might produce new evidence relating to a claim of innocence.

- Better inform jurors of their options by allowing them to be told whether they may hand down a sentence of life imprisonment without parole instead of death.

Americans disagree on the morality and usefulness of the death penalty. They don't disagree that the person convicted of a capital crime should be the killer, not some innocent person. This bill would create reasonable procedures for making that outcome more likely than it is now.

The proposal's chances of passage seem good. It has 235 cosponsors in the House and 26 in the Senate -- more than half of each body. House sponsors include N.C. Republicans Sue Myrick and

Howard Coble, N.C. Democrats Eva Clayton, David Price and Mel Watt, plus S.C. Democrats John Spratt and James Clyburn. John Edwards, D-N.C., is the only Carolinas senator among the sponsors.

We commend the members of Congress who support this effort to prevent injustice in our criminal justice system. We wonder why others in the Carolinas delegations aren't backing it, too.



## **Death Penalty**

### **Congress moves to protect innocent**

June, 05, 2002

More than half the members of the U.S. House of Representatives believe the nation needs to do more to ensure that capital punishment is administered fairly, and that the latest scientific tools are brought to bear to ensure that innocent people aren't put to death.

A total of 232 representatives have signed up as co-sponsors of the Innocence Protection Act, with support cutting across party and ideological lines. Rep. Roscoe Bartlett became the eighth member of the Maryland delegation to support the bill when he signed on last month. Sens. Barbara Mikulski and Paul Sarbanes also support such legislation.

Movement on the issue is being driven by a growing awareness that the current system lacks adequate safeguards to protect innocents who are wrongly accused in capital cases.

According to the Campaign for Criminal Justice Reform, more than 100 death row inmates have been exonerated, thanks largely to DNA evidence. Sixty-eight percent of all death penalty appeals are reversed due to serious trial error. The Innocence Protection Act addresses such flaws by encouraging states to establish minimum standards for defense attorneys in death penalty cases. The 1984 case of Calvin Burdine of Texas illustrates the need for such standards. During the trial, Burdine's lawyer fell asleep in court for up to 10 minutes at a time. Not surprisingly, Burdine was subsequently found guilty and sentenced to death. He was within minutes of execution in 1987 before his legal team won a reprieve. On Monday, the U.S. Supreme Court ordered the state of Texas to either retry Burdine or set him free because the lawyer's inattention undermined his right to a fair trial.

In addition, the Innocence Protection Act would provide for access to DNA testing that could scientifically prove a suspect's innocence. In April the 100th person to be found innocent based on DNA testing became a free man, 10 years after being wrongly imprisoned.

It is becoming ever more apparent that the nation's capital punishment system is deeply flawed. The Innocence Protection Act represents a promising first step toward needed national reform.

## Erie Times-News (PA)

### How We Answer Death Row Doubts

June 9, 2002

The grim evidence is overwhelming. Since 1971, 101 death row inmates have been exonerated and released, the Justice Project reports. The 101st is a former Pennsylvania death row inmate named Thomas Kimbell. A horrifying question arises from these incredible statistics: How many innocent prisoners have actually been executed? An alarmed Congress is prepared to help states fix the gaping flaws in America's capital punishment system.

The proposed remedy is the Innocence Protection Act. This growing bipartisan effort is led by representatives William Delahunt (D.-MA), Ray LaHood (R.-IL) and senators Pat Leahy (D.-VT) and Gordon Smith (R.-OR). The act's list of sponsors includes Erie Congressman Phil English and 232 others.

There is a growing urgency here. Long-time death penalty supporters harmonize with anti-death penalty voices on this issue.

The fear hanging in the air was summed up by death penalty supporter U.S. Supreme Court Justice Sandra Day O'Connor: "Serious questions are being raised about whether the death penalty is being fairly administered in this country. If statistics are any indication, the system may well be allowing some innocent defendants to be executed."

The Innocence Protection Act includes these two crucial measures:

- \* It helps states fund and provide qualified and experienced lawyers for defendants facing the death penalty. Many studies illustrate inadequate representation equals convicting innocent defendants.
- \* It offers greater access to advanced DNA testing. One hundred and six capital and non-capital cases have resulted in exonerations based on DNA evidence. This number is growing rapidly.

The federal government can't impose its will on states in capital punishment cases, although the Innocence Protection Act would directly affect the federal criminal justice system. States must be willing to accept help many in Congress are prepared to provide.

It's difficult to imagine a state refusing to accept federal aid here. A governor, legislator or judge who refuses to accept that the nation's capital punishment system is a broken-down mess must reside in some innocent, isolated utopia.

Surely even the fiercest death penalty proponent can accept that when a life is at stake, extra measures must be taken to guarantee fair and just procedures.

We heartily endorse the Innocence Protection Act and commend English and the act's other sponsors. Those unwilling to accept the cold reality that the innocent are being executed might keep columnist George Will's words in mind. "Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order."

With lives at stakes, federal and state governments must commit to insuring no innocent person is executed. The Innocence Protection Act is a significant step in this worthy process. On May 3 Thomas Kimbell was acquitted of murdering four people after a retrial. This second jury heard all the evidence the first jury had not. How many inmates have not been as fortunate as Kimbell?

  
**NEWS & RECORD**  
The leading newspaper in the Piedmont Triad • Greensboro, NC**The Sixth Amendment Takes a Dangerous Snooze**

6/17/02

Sleeping on the job has never been the route to a successful life. If the U.S. Supreme Court had not intervened, Calvin J. Burdine's life would have ended because of his lawyer's naps. The U.S. Supreme Court has upheld a lower court ruling that Burdine, a Texas death row inmate, was denied his Sixth Amendment right to competent counsel. His court-appointed lawyer slept during parts of Burdine's 1984 murder trial, naps confirmed by three jurors and the court clerk. The lawyer, now dead, had denied it. The Burdine case raises a larger issue troubling some justices on the Supreme Court: namely, the competency of attorneys representing people on trial for murder. In a speech last year, Justice Sandra Day O'Connor, a death penalty supporter, said minimum competency standards should be imposed on lawyers in capital cases. Justice Ruth Bader Ginsburg was more explicit: "People who are well represented at trial do not get the death penalty."

Justice Ginsburg underscored a point we've often argued: that the death penalty is imposed unfairly. Good lawyers make an immeasurable difference, but poor people can seldom afford them.

Congress will soon hold hearings on the Innocence Protection Act - legislation that requires all states to provide DNA testing in capital cases and, equally important, provides federal financial incentives for states to raise standards for death-penalty lawyers. Thirty-eight states have the death penalty.

The congressional bill proposes that federal standards be the guide for state lawyers. Attorneys in federal cases must meet high competency levels, and the pay attracts good lawyers.

States courts, however, have a mixed record. In North Carolina, a court-appointed lawyer representing an indigent death-penalty client, was later disbarred for addiction to cocaine. Another was an alcoholic. Here and elsewhere in the nation, judges have appointed lawyers with no experience trying murder cases.

In Guilford County, the state-funded Public Defender's Office represents poor people in criminal cases. But other parts of the state do not.

America's patchwork system of legal counsel is unacceptable. Framers of the Sixth Amendment had higher standards in mind.



## **When the innocent spend years in prison**

6/7/02

Sometimes bad things happen to innocent people in our court system.

Consider a recent story in the News & Record that profiled the lives of 110 former prisoners in the nation who were released after DNA tests proved their innocence.

Years of innocent men's lives had been swallowed behind bars. There may be others; the Associated Press story strongly suggests that more innocent people may be languishing in prison cells.

The average time behind bars for the 110 former inmates had been 10 years and six months; one had served 22 years. Altogether they had spent 1,149 years in prison for crimes they didn't commit.

After initial jubilation, most found misery, not happiness, in the outside world. They had lost those crucial years when young people launch their lives, get jobs and raise families. If DNA tests had been available to them, imprisonment would not have been in the cards.

Still, only 25 states mandate DNA tests, among them North Carolina. Last year the General Assembly enacted a law allowing prisoners convicted of capital crimes to be DNA tested.

Congress soon will hold hearings on legislation requiring all states to provide DNA tests to those convicted of capital crimes. The Innocence Protection Act, as it is called, is a bipartisan bill supported by both Sixth District Republican Rep. Howard Coble and Democratic Sen. John Edwards.

Besides mandating DNA tests for capital crimes in all states, the law would require defendants to have experienced lawyers at all stages of death penalty cases. Incompetent lawyers, some with drug or alcohol addictions, have cost their clients in many states, including North Carolina.

The legislation also requires judges to inform juries of all sentencing options, including life imprisonment without parole. Virginia and a handful of states deny juries this information.

In addition, the legislation would mandate some compensation for wrongly convicted prisoners. Only about one-third of the 110 former inmates had received any compensation. Many now are living in poverty.

Finally, the bill wisely requires all states to impose strict rules on preserving physical evidence. Last January Gov. Mike Easley commuted the death sentence of Charles Mason Alston Jr. to life imprisonment without parole only hours before his execution. Physical evidence had been lost, denying Alston the chance for DNA tests to prove his innocence.

Thanks to growing bipartisan support in Congress, the Innocence Protection Act stands a promising chance for passage.

Failure to enact this law would be an affront to the nation's criminal justice system and would risk more innocent lives being ruined.



Long Beach, CA

## Protecting the innocent

May 23, 2002

Death penalty: Flaws in convictions can no longer be ignored.

Regardless of whether one agrees or disagrees with the concept of the death penalty, mounting evidence that the nation's capital punishment system is terribly flawed cannot be ignored.

One hundred innocent people have been exonerated from death rows in the past three decades. About a dozen of those prisoners were freed in recent years on DNA evidence - without which they almost certainly would have been wrongly killed.

That is a chilling indictment of the system. Equally disturbing are the disparities that stem from the varying quality of legal representation.

The death penalty falls hardest on the poor. Capital punishment isn't as likely to be sought against those with access to high-priced teams of attorneys and legal experts. Often the most inexperienced and incompetent public defenders are assigned to death penalty cases. (In one recent case, a public defender actually fell asleep during several hearings that would determine whether his client lived or died.) Inadequate representation is the most common reason for reversal of death penalty cases.

Racial inequity is also a concern. Numerous studies throughout the country have shown that the death penalty is overwhelmingly applied to African-Americans (whites on trial for the same crimes are almost twice as likely to be given a plea bargain to avoid the death penalty). The governor of Maryland this month issued a temporary moratorium on capital punishment because of his concerns over racial disparity.

Those on opposite sides of the death penalty debate agree that the system can and should be improved. One such reform is working its way through Congress.

A bill called the Innocence Protection Act would address some of the key problems in the application of the death penalty. Long Beach Rep. Steve Horn this week joined the large, bipartisan support in the House of Representatives for this worthwhile piece of legislation.

The bill would help states provide qualified, competent, experienced lawyers for defendants facing the death penalty, and encourage states to establish minimum standards for attorneys. It would also ensure that death penalty defendants have greater access to DNA testing and DNA evidence in their cases.

As long as capital punishment remains on the books, flaws in the system must be corrected. The Innocence Protection Act is a strong step in the right direction. It deserves to become law.



The Morning Call, Allentown PA

## **Politics as Usual**

May 26, 2002 Sunday FIRST EDITION

DEADLY BUSINESS

By: Jeff Miller

U.S. Rep. Jim Greenwood signed on this month as a co-sponsor to a bill giving defendants facing the death penalty greater access to DNA testing and dependable legal counsel.

With the Bucks County Republican on board, the Innocence Protection Act reached 232 co-sponsors, or more than half the House. The bill's sponsors said the milestone earned the bill (H.R. 912) a hearing in June that could lead to its passage this year. U.S. Reps. Pat Toomey, R-15th District, Joe Hoeffel, D-13th District, and Paul Kanjorski, D-11th District, had signed on earlier.

A companion bill (S. 486) in the Senate by Vermont Democrat Patrick Leahy has 24 co-sponsors.

Republican Sen. Arlen Specter of Pennsylvania has introduced his own death penalty and DNA bills (S. 2443 & S. 2441).



The Desert Sun, Palm Springs, CA

## **Our Voice: Death penalty act merits support** **Reform could help release innocent from penal system**

June 5th, 2002

Ray Krone is a name you should remember. He personifies flaws in the nation's capital-punishment system; his situation punctuates the need for reform.

In April, Krone became the 100th innocent person to be exonerated while on death row.

His release -- along with the 99 others -- is fueling a growing concern over defects in the United States' capital-punishment system, and understandably so.

In response, the U.S. House of Representatives in May announced the bipartisan, majority support of 235 cosponsors, including 61 Republicans, of the Innocence Protection Act. We applaud Rep. Mary Bono, R-Palm Springs, for lending her support to the cause. She is joined by 27 other members of the California delegation in the fight for reform.

The bill clearly indicates the growing bipartisan consensus that defects in America's death-penalty system beg for attention. Reform is desperately needed to stop erroneous convictions of innocent people.

This is an exceptional moment in the country's ongoing debate about the death penalty. Rarely have Democrats and Republicans come to a working consensus on the need for change.

When a life hangs in the balance, every effort must be made to guarantee fair and just procedures. Moreover, national and statewide opinion polls show the public overwhelmingly supports changes in the system to ensure fairness and equal access to justice.

For the first time in many years, lawmakers concede that the capital punishment system has faults. The Innocence Protection Act offers a variety of common sense approaches to address wrongful convictions -- measures that can -- and should be -- embraced by both pro and anti-death penalty supporters.

The Innocence Protection Act includes measures that would help states provide qualified and experienced lawyers to defendants facing the death penalty. Recent studies show that inadequate representation is the most common reason for the reversal of death-sentence convictions.

The bill also affords greater access to DNA testing. This is critical given that 106 capital and non-capital cases have resulted in exonerations due to DNA testing, including 12 from death row.

Reform is vital so other innocent people like Ray Krone have a shot at freedom.

**PEORIA JOURNAL STAR (IL)****Put additional safeguards in the death penalty**

June 26, 2002

The U.S. Supreme Court didn't intentionally give a boost to legislation sponsored by Congressman Ray LaHood to reduce the risk that capital punishment will reach the innocent, but that's what two rulings within the last week may have done.

In outlawing executions of the mentally retarded and striking down laws that permitted judges to impose the death sentence, the court indicated a lack of comfort with capital punishment as many states apply it. That should help LaHood and others make their case for legislation that mandates two key safeguards against executing the innocent.

First, anyone charged with a capital crime would be granted access to DNA testing. Second, a higher-quality defense team would be guaranteed in death penalty cases. LaHood has been pushing his legislation the last two years, and there is a similar companion bill in the Senate. The arguments in their behalf are persuasive.

DNA - samples of blood, tissue, hair or bodily fluid - can be the best evidence available to confirm a murderer's guilt or help establish innocence. Three Illinois Death Row inmates were freed after DNA testing found that others committed the crimes they were to die for. Largely because of this, Illinois agreed to mandate, where it applies, DNA evidence in capital appeals. This spring the General Assembly also approved establishing a DNA database of all Illinois felons.

As for defense lawyers, the federal bill would require that they meet higher than usual standards and be independently appointed, something the Illinois Supreme Court already has done. The quality of defense work became a big issue in Illinois when it was revealed that 22 Death Row inmates had been represented by attorneys previously disbarred or suspended. No one needs a good lawyer more than someone facing death.

Opponents want to weaken, if not kill, the bill. They argue that it would add appeals, increase costs and impose federal requirements upon state courts. It may do all three, but the need to guarantee a correct outcome when a life is at stake trivializes the objections. And if Illinois can manage, so can other states.

Despite having 236 House sponsors - more than a majority - LaHood's bill is having trouble in the Judiciary Committee because Chairman James Sensenbrenner isn't a supporter. He may not call it. He should.

The Supreme Court has indicated it has surprisingly little problem making case law on capital punishment when it's been unsatisfied with what legislators have done. That should be an incentive to pass this legislation intended to protect the innocent.



## **Death penalty reform is overdue**

Monday, June 17, 2002

As long as the nation allows capital punishment, laws must ensure it is applied fairly. The current system, rife with inequities, should be reformed.

REP. Bob Goodlatte of Roanoke could land a blow for justice Tuesday by supporting the Innocence Protection Act.

Key provisions of the death-penalty reform bill would lay the groundwork to set and help states meet a uniform high standard in the caliber of legal representation in capital cases. And the bill would allow convicted offenders greater access to DNA testing.

An Innocence Protection Act for the protection of convicted offenders? Yes. The federal legislation is sadly needed. In April, the nation's 100th death-row inmate walked out of prison after being exonerated.

The patchwork system of capital punishment in states across the nation is deeply flawed, so much so that two governors who favor the death penalty have declared moratoriums on executions in their states.

This newspaper opposes capital punishment on principle. Even the most avid proponents, though, cannot want to impose it on innocent people convicted because they had poor counsel or are unable to challenge a wrong verdict because they lack access to exculpatory DNA evidence.

The morality of having a death penalty can be debated. The morality of having a death penalty that is applied unfairly cannot. It is wrong. And a growing body of evidence points to unconscionable inequities in a system that too often leaves poor people without adequate defenses in a legal battle for their lives.

A bipartisan majority in both houses of Congress agree. The Innocence Protection Act has 235 co-sponsors in the House, including Virginia Reps. Rick Boucher of Abingdon and Tom Davis, Jim Moran, Bobby Scott and Frank Wolf. Sen. John Warner is one of 26 co-sponsors of a companion bill in the Senate.

They have taken a responsible stand for equal justice.

Goodlatte has not yet signed on. That is significant because he is a member of the House Subcommittee on Crime, Terrorism and Homeland Security, which is scheduled to hold a hearing on the bill Tuesday.

The subcommittee should allow the legislation to move forward, with its critical provisions for reform intact.

Lawmakers who favor the death penalty and lawmakers who favor its abolition have found common ground. As long as capital punishment can be imposed, it must be administered fairly throughout the land.

Goodlatte should stand with them in support of the Innocence Protection Act.

## TENNESSEAN .com

### **A Fairer System of Justice**

6/19/02

 No one should oppose the Innocence Protection Act now under review in Congress.

The bill seeks to instill a measure of fairness to the death penalty. Its broad support indicates how well the legislation is succeeding in that regard. Senate Judiciary Committee Chairman Patrick Leahy is sponsoring the bill in the Senate while Reps. William Delahunt and Ray LaHood, a Democrat and Republican respectively, have the House version. More than half the House and Senate are co-sponsors of the bill. The sponsors include supporters of the death penalty as well as opponents.

Governors in Illinois and Maryland concluded that a moratorium on executions was justified until changes could be made. Other states have begun to look at new laws to take advantage of technological advances, like the use of DNA, to ensure the integrity of the process. Still other states are looking at ways to improve legal representation of capital crime defendants.

States are responding to this hot-button issue because the American people have shown in polls their dissatisfaction with the process, if not the policy, of capital punishment.

The Innocence Protection Act would bring those state concerns together. While the bill would make DNA testing available to inmates, its aim is not technological change alone. The lack of tests in so many high-profile cases only underscores the inadequacy of the representation, which the bill also seeks to improve. The measure encourages states to enact at least minimum standards for legal representation with the promise of federal dollars to bolster the commitment.

Few issues are as divisive as capital punishment. Yet both sides can agree that no stone should be left unturned in the quest for justice. This bill provides a way to ensure that goal. Congress should unite behind it.

## **The Virginian-Pilot (Norfolk, Va)**

### **CONGRESS TAKES SMALL STEP TO AVERT WRONGFUL VERDICTS**

June 24, 2002 Monday

One-hundred-and-one.

That's the number of inmates who've been released from death rows nationally since 1973 due to evidence of innocence.

It's also the number of reasons Congress should pass the Innocence Protection Act now gathering steam in Washington, D.C.

A decade of experience with DNA testing proves that innocent people wind up on death row. So long as capital punishment remains in the arsenal of punishments, it would be a crime in itself not to do everything possible to avoid such miscarriages of justice. The Innocence Protection Act is an opportunity to improve the system.

Already, Sen. John Warner and five members of Virginia's House delegation - Congressmen Frank Wolf, Jim Moran, Tom Davis, Bobby Scott and Rick Boucher - are co-sponsors. Second 2nd District Rep. Ed Schrock and 4th District Rep. Randy Forbes should lend their support as well.

The legislation will generate national standards for appointing attorneys for the poor in capital cases and will ensure that DNA testing is available for both capital and non-capital cases when such tests might produce evidence of innocence.

Reasonable legislators ought not object to either of those provisions.

Evidence abounds that individuals unable to afford good lawyers often get inferior representation, even when their lives are at stake. If executions must exist, then at least let the punishment be applied because someone is guilty, not because their side of the story was inadequately told.

Many states, including Virginia, already have standards, but they are not of uniformly high quality. A national standard, developed by leading legal ethicists and others, would be a positive development in many states.

States, again including Virginia, also are beginning to insist on the retention of biological material that might be used to exonerate an individual as science advances. And they are developing procedures by which newly discovered action can be submitted to a court after conviction.

But again, there is no uniformity.

These are simple, common-sense measures that will help prevent the execution or incarceration of innocent people.

One-hundred-and-one wrongful death-row convictions are plenty for all time.

**Innocent on Death Row**  
George F. Will

**The Washington Post**  
April 6, 2000, Thursday, Final Edition, OP-ED; Pg. A23

"Don't you worry about it," said the Oklahoma prosecutor to the defense attorney. "We're gonna needle your client. You know, lethal injection, the needle. We're going to needle Robert."

Oklahoma almost did. Robert Miller spent nine years on death row, during six of which the state had DNA test results proving his sperm was not that of the man who raped and killed the 92-year-old woman. The prosecutor said the tests only proved that another man had been with Miller during the crime. Finally, the weight of scientific evidence, wielded by an implacable defense attorney, got Miller released and another man indicted. You could fill a book with such hair-curling true stories of blighted lives and justice traduced. Three authors have filled one. It should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

Horror, too, is a reasonable response to what Barry Scheck, Peter Neufeld and Jim Dwyer demonstrate in "Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted." You will not soon read a more frightening book. It is a catalog of appalling miscarriages of justice, some of them nearly lethal. Their cumulative weight compels the conclusion that many innocent people are in prison, and some innocent people have been executed.

Scheck and Neufeld (both members of O. J. Simpson's "dream team" of defense attorneys) founded the pro-bono Innocence Project at the Benjamin N. Cardozo School of Law in New York to aid persons who convincingly claim to have been wrongly convicted. Dwyer, winner of two Pulitzer Prizes, is a columnist for the New York Daily News. Their book is a heartbreaking and infuriating compendium of stories of lives ruined by:

- \* Forensic fraud, such as that by the medical examiner who, in one death report, included the weight of the gallbladder and spleen of a man from whom both organs had been surgically removed long ago.

- \* Mistaken identifications by eyewitnesses or victims, which contributed to 84 percent of the convictions overturned by the Innocence Project's DNA exonerations.

- \* Criminal investigations, especially of the most heinous crimes, that become "echo chambers" in which, because of the normal human craving for retribution, the perceptions of prosecutors and jurors are shaped by what they want to be true. (The authors cite evidence that most juries will convict even when admissions have been repudiated by the defendant and contradicted by physical evidence.)

- \* The sinister culture of jailhouse snitches, who earn reduced sentences by fabricating "admissions" by fellow inmates to unsolved crimes.

- \* Incompetent defense representation, such as that by the Kentucky attorney in a capital case who gave his business address as Kelley's Keg tavern.

The list of ways the criminal justice system misfires could be extended, but some numbers tell the most serious story: In the 24 years since the resumption of executions under Supreme Court guidelines, about 620 have occurred, but 87 condemned persons—one for every seven executed—had their convictions vacated by exonerating evidence. In eight of these cases, and in many more exonerations not involving death row inmates, the evidence was from DNA.

One inescapable inference from these numbers is that some of the 620 persons executed were innocent. Which is why, after the exoneration of 13 prisoners on Illinois' death row since 1987, for reasons including exculpatory DNA evidence, Gov. George Ryan, a Republican, has imposed a moratorium on executions.

Scheck, Neufeld and Dwyer note that when a plane crashes, an intensive investigation is undertaken to locate the cause and prevent recurrences. Why is there no comparable urgency about demonstrable, multiplying failures in the criminal justice system? They recommend many reforms, especially pertaining to the use of DNA and the prevention of forensic incompetence and fraud. **Sen. Patrick Leahy's Innocence Protection Act would enable inmates to get DNA testing pertinent to a conviction or death sentence, and ensure that courts will hear resulting evidence.**

The good news is that science can increasingly serve the defense of innocence. But there is other news.

Two powerful arguments for capital punishment are that it saves lives, if its deterrence effect is not vitiated by sporadic implementation, and it heightens society's valuation of life by expressing proportionate anger at the taking of life. But that valuation is lowered by careless or corrupt administration of capital punishment, which "Actual Innocence" powerfully suggests is intolerably common.