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THE INNOCENCE PROTECTION ACT OF 2002

OCTOBER 16, 2002.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 486]

The Committee on the Judiciary, to which was referred the bill (S. 486) to reduce the risk that innocent persons may be executed, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of the Innocence Protection Act, S. 486, is to help reduce the risk both that innocent persons will be put to death and that those guilty of violent crimes will remain at large. The bill, as amended and reported by the Senate Judiciary Committee, would improve the administration of justice by (1) providing eligible inmates access to DNA testing to establish innocence; (2) authorizing

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grants to assist States in improving systems for the appointment of capital defense attorneys; (3) authorizing grants to train State and local prosecutors, defense counsel, and judges in handling capital cases; (4) increasing compensation of individuals wrongfully convicted in Federal court; (5) staying the execution of inmates whose cases are pending in the U.S. Supreme Court; and (6) establishing a student loan forgiveness program for prosecutors and public defenders.

II. Legislative History

A. 106TH CONGRESS

The Innocence Protection Act was first introduced as S. 2073 on February 10, 2000, by Senators Leahy, Levin, Feingold, Moynihan and Akaka. A revised version of the bill was introduced as S. 2690 on June 7, 2000, by Senators Leahy, Smith of Oregon, Collins, Levin, Jeffords, Feingold, Moynihan, Akaka, Kerrey, and Wellstone. Representatives William Delahunt, Ray LaHood, and nine cosponsors introduced the measure in the House of Representatives as H.R. 4167 on April 4, 2000.

On June 13, 2000, the Judiciary Committee held a hearing entitled "Post-Conviction DNA Testing: When is Justice Served?", chaired by Senator Hatch. The witnesses included two State Attorneys General—Drew Edmonson of Oklahoma and Elliott Spitzer of New York—and three members of the Department of Justice's National Commission on the Future of DNA Evidence—George Clarke, Deputy District Attorney in San Diego, CA; James Wooley, a partner in the law firm of Baker & Hostetler and a former Federal prosecutor; and Barry Scheck, cofounder of the Innocence Project at the Benjamin N. Cardozo School of Law in New York City. The other witnesses were Enid Camps, Deputy Attorney General for the State of California; Charles Baird, a former judge on the Texas Court of Criminal Appeals and cochair of the Constitution Project's National Committee to Prevent Wrongful Executions; Joshua Marquis, District Attorney of Clatsop County, OR; and Dennis Fritz, a man wrongfully convicted of rape and murder who was exonerated through DNA testing after serving 12 years in Oklahoma prisons.

Incident to the June 13 hearing, the Committee received letters in support of S. 2690 from former Associate Deputy Attorney General Bruce Fein and Prof. Larry Yackle of Boston University Law School. Other items submitted for the hearing record included the following: a memorandum entitled "The Effect of the Innocence Protection Act on State Sovereignty"; a letter from former F.B.I. Director William S. Sessions to Senator Hatch dated June 12, 2000; Chapters I–III of the National Institute of Justice report entitled "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," published in June 1996; Chapters I–III of the National Institute of Justice report entitled "Postconviction DNA Testing: Recommendations for Handling Requests," published in September 1999; and the executive summary of "A Broken System: Error Rates in Capital Cases, 1973–1995," published in June 2000 by professors at Columbia University.

One week after the Senate hearing, the House Subcommittee on Crime held a hearing on H.R. 4167. Testifying in support of the legislation were Illinois Governor George Ryan; New York Attorney General Elliot Spitzer; Stephen Bright, Director of the Southern Center for Human Rights; Gerald Kogan, former Chief Justice of the Florida Supreme Court and cochair of the National Committee to Prevent Wrongful Executions; Prof. James Coleman, Jr., of the Duke University School of Law, on behalf of the American Bar Association (ABA); Peter Neufeld, cofounder of the Innocence Project; and Kirk Bloodsworth of Cambridge, MD, who was the first capital defendant freed as a result of DNA testing. Testifying against the legislation were two State prosecutors, Stuart VanMeveren, District Attorney in Fort Collins, CO, on behalf of the National District Attorneys Association, and California Deputy Attorney General Ward Campbell.

B. 107TH CONGRESS

Senators Leahy, Smith of Oregon, Collins and 13 additional cosponsors introduced S. 486 on March 7, 2001. The same day, Representatives Delahunt, LaHood and 116 cosponsors introduced an identical version of the bill, H.R. 912, in the House of Representatives.

1. Hearings

On June 27, 2001, the Judiciary Committee held a hearing on the bill entitled "Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases," chaired by Senator Leahy. Witnesses testifying in support of the bill were: Texas State Senator Rodney Ellis; Stephen Bright, Director of the Southern Center for Human Rights; Beth Wilkinson, a former Federal prosecutor and cochair of the Constitution Project's Death Penalty Initiative (formerly the National Committee to Prevent Wrongful Executions); and Michael Graham, a former death row inmate who was exonerated in December 2000. Testifying against the bill were Alabama Attorney General William Pryor; Ronald Eisenberg, Deputy District Attorney in Philadelphia; and Kevin Brackett, Deputy Solicitor, 16th Circuit, South Carolina.

The Committee received written statements and letters regarding various State capital defense systems from Steven Benjamin (Virginia); David Bruck (South Carolina); Bryan Stevenson (Alabama); Clive Stafford Smith (Louisiana); Charles Press (Mississippi); Michael Pescetta (Nevada); Maureen Kearney Rowley (Pennsylvania); Maurie Levin (Texas); and Denise Young (Arizona). Other items submitted at the hearing included the executive summary of a report entitled "The Crisis in Post-Conviction Representation in Capital Cases since the Elimination by Congress of Funding for the Post-Conviction Defender Organizations," published by the Administrative Office of the U.S. Courts in 1999 and updated in 2001; a statement by Norman Lefstein, Dean of the Indiana University School of Law, on behalf of the ABA; a summary of the recommendations of the Constitution Project's Death Penalty Initiative; an open letter from a number of current and former prosecutors, law enforcement officers, and Justice Department officials, endorsing S. 486; and a letter from Charles Lloyd, an attorney who

represented Michael Graham's codefendant, Albert Burrell, describing the "shocking incompetence" of Burrell's trial lawyers.

The Judiciary Committee continued its examination of the Nation's capital punishment systems on June 18, 2002, with a hearing chaired by Senator Leahy entitled, "Protecting the Innocent: Proposals to Reform the Death Penalty." This hearing addressed S. 486 and a number of other bills introduced in the 107th Congress designed to reform systems of capital punishment: S. 233, the National Death Penalty Moratorium Act of 2001; S. 800, the Criminal Justice Integrity and Innocence Protection Act of 2001; and S. 2446, the Confidence in Criminal Justice Act of 2002. The witnesses were Representatives Delahunt and LaHood; Barry Scheck; Prof. Larry Yackle of the Boston University School of Law; Prof. James Liebman of the Columbia Law School; Paul A. Logli, State's Attorney for Winnebago County, IL, on behalf of the National District Attorney's Association; and William G. Otis, a former prosecutor and adjunct professor of law at the George Mason University Law School. Submissions for the hearing record included a letter from former prosecutors and a letter from victims' organizations, both endorsing S. 486.

Also on June 18, 2002, the House Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the House version of the Innocence Protection Act, H.R. 912. Peter Neufeld and Beth Wilkinson testified in support of the bill; Paul Logli and Robert Graci, Assistant Executive Deputy Attorney General of Pennsylvania, testified in opposition.

2. Markup

The Senate Judiciary Committee met in executive session on two occasions, with a quorum present, to consider S. 486. The first of these meetings occurred on July 11, 2002. An amendment in the nature of a substitute was offered by Senator Leahy, together with Senators Specter, Feinstein, Biden, Durbin, and Edwards, and adopted by unanimous consent. In general, the substitute amendment tightened the original bill's requirements for obtaining postconviction DNA testing, overhauled the counsel provisions to reduce Federal mandates, struck or modified various miscellaneous provisions, and added new provisions respecting stays of execution and student loan forgiveness.

The Committee next considered another amendment in the nature of a substitute, which was offered by the Ranking Member, Senator Hatch. Titled the "Death Penalty Integrity Act of 2002" and later introduced as S. 2739, this substitute amendment proposed more limited DNA testing than the Innocence Protection Act. For example, a Federal inmate could obtain testing only if favorable results would prove that he was "actually innocent" of the crime, and even an inmate with a highly persuasive claim of actual innocence would be denied relief if he applied more than 60 months after enactment. With respect to counsel, the Hatch substitute amendment proposed a series of grant programs to train prosecutors, judges, and defense lawyers in handling capital cases. The substitute also contained miscellaneous provisions which, among other things, imposed eligibility restrictions on the assignment of indigent defense counsel in Federal capital and noncapital cases.

Following discussion, the Committee rejected the Hatch substitute amendment by a recorded vote of 8 to 11.

The Committee turned next to an amendment, offered by Senator Kyl, to restrict which qualified capital defender organizations may receive grants under section 203 of the bill. Under the amendment, no grant could be awarded to "an organization that the State determines, with the concurrence of the United States Attorney General, has repeatedly filed large numbers of meritless claims that challenge State death sentences with the purpose or effect of substantially delaying or otherwise interfering with the State's administration of its capital sentencing scheme." Senator Feinstein proposed changing "State" to "State Attorney General," without objection. Senator Feinstein also proposed changing "meritless" to "frivolous," reasoning that "meritless" means that you have gone to court and just lost and you shouldn't be condemned for doing that." Senator Kyl responded that he chose the term "meritless" because it was an "objective way of measuring whether these groups win or lose," whereas the term "frivolous" was "a subjective judgment about whether they really intended to just delay." While noting that he preferred "meritless," he agreed to substitute "frivolous" to dispose of the amendment.

During this discussion, Senator Leahy offered a second-degree amendment to the Kyl amendment, to limit its application and scope. Under the second-degree amendment, the Attorney General would, when selecting which capital defender organizations to award grants, "consider whether an organization has repeatedly filed large numbers of claims that a court has found to be frivolous that challenge State death sentences with the purpose of substantially delaying or otherwise interfering with the State's administration of its capital sentencing scheme." The Committee adjourned before disposing of the Kyl or Leahy amendment.

The Committee met again on July 18, 2002, to continue its markup of S. 486. At this time, Senator Leahy offered an amendment that contained compromise language he had negotiated with Senators Kyl and Sessions on the pending Kyl amendment, and also addressed other issues of concern to Senator Sessions and other Members.

First, with respect to the pending amendment, the Leahy amendment set out several factors for the Attorney General to consider when deciding which capital defender organizations to fund under section 203 of the bill, including "whether an organization has been found to have filed large numbers of frivolous claims in State capital cases, with the effect of unreasonably delaying or otherwise interfering with the State's administration of its capital sentencing scheme." To facilitate Committee oversight, the Attorney General must notify Congress before denying a grant based in whole or in part on a listed consideration.

Second, the Leahy amendment clarified language in section 201 of the bill, prohibiting capital defender organizations that receive Federal grants from using the money for political activities, with specified exceptions.

Third, the Leahy amendment authorized new grant programs to train State and local prosecutors, judges, and defense lawyers to better handle capital cases. This new provision supplements the

program already in the bill to assist States in strengthening their indigent defense systems in capital cases.

Fourth, the Leahy amendment required that the results of any DNA testing ordered under the act be disclosed simultaneously to the defense, prosecution, and court of jurisdiction.

Finally, the Leahy amendment encouraged State prosecutors to initiate programs to review their capital cases in order to identify those in which biological evidence is readily accessible and conduct DNA testing where appropriate. The amendment also authorized the Attorney General to conduct postconviction DNA testing as appropriate in Federal capital cases.

The Committee adopted the Leahy amendment by unanimous consent. There being no other amendments proposed, the Committee proceeded to a roll-call vote on S. 486 as amended. The bill was reported favorably to the Senate by a vote of 12 to 7.

III. Votes of the Committee

The following votes occurred on the bill and amendments proposed thereto:

(1) Senators Leahy, Specter, Feinstein, Biden, Durbin, and Edwards offered an amendment in the nature of a substitute, to be considered as original text for the purposes of debate and amendments. The amendment was adopted by unanimous consent.

(2) Senator Hatch offered an amendment in the nature of a substitute, to establish procedures for postconviction DNA testing, authorize grant programs for training prosecutors, judges, and defense lawyers in capital litigation, and impose restrictions on who may be assigned as counsel for indigent defendants in Federal cases. The amendment was defeated by a rollcall vote of 8 yeas to 11 nays.

YEAS	NAYS
Hatch	Leahy
Thurmond (proxy)	Kennedy (proxy)
Grassley (proxy)	Biden (proxy)
Kyl	Kohl
DeWine	Feinstein
Sessions	Feingold
Brownback	Schumer
McConnell (proxy)	Durbin
	Cantwell (proxy)
	Edwards (proxy)
	Specter (proxy)

(3) Senator Leahy offered an amendment to establish factors for the Attorney General to consider when selecting grantees among capital defender organizations; clarify language prohibiting organizations that receive grants from using the money for political activities; authorize grants to train criminal justice personnel in handling capital cases; require simultaneous reporting of DNA test results to the defense, prosecution, and court; and encourage prosecutors to initiate DNA testing of death row inmates as appropriate. The amendment was adopted by unanimous consent.

(4) The Committee then voted to favorably report S. 486, with an amendment in the nature of a substitute, by a rollcall vote of 12 yeas to 7 nays.

YEAS	NAYS
Leahy	Hatch (proxy)[1]
Kennedy	Thurmond (proxy)
Biden	Grassley (proxy)
Kohl	Kyl (proxy)
Feinstein	DeWine (proxy)
Feingold	Sessions
Schumer	McConnell (proxy)
Durbin (proxy)	
Cantwell	
Edwards (proxy)	
Specter (proxy)	
Brownback	

IV. Discussion

A. OVERVIEW

Recent exonerations of inmates awaiting capital punishment or serving lengthy prison sentences have cast doubt on the reliability of the criminal justice system. Erroneous convictions are extremely costly: they cause incalculable harm to the wrongfully incarcerated defendants, undermine public safety by permitting violent felons to remain at large, and generally erode public confidence in American justice. The prospect that an innocent man may be sentenced to death or even executed is especially harrowing.

Last year, two members of the U.S. Supreme Court questioned whether the death penalty is being fairly administered in this country. In a widely reported speech to the Minnesota Women Lawyers Association, Justice Sandra Day O'Connor warned that "the system may well be allowing some innocent defendants to be executed." She added, "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." Editorial, "Justice O'Connor on Executions," The New York Times, July 5, 2001. Justice Ruth Bader Ginsburg has also criticized the often "meager" amount of money spent to defend poor people and has supported a proposed State moratorium on the death penalty. Anne Gearan, "Ginsburg Backs Ending Death Penalty," AP Online, April 9, 2001. More recently, another respected jurist—Senior Judge Gilbert Merritt of the Sixth Circuit Court of Appeals—asserted that the capital punishment system "is still broken" and emphasized the need for States to do better on a key problem: providing good legal representation in capital cases. Gilbert Merritt, Speech to a Federal-State Judicial Conference sponsored by the Tennessee Bar Association, September 26, 2002, available at *www.tennessean.com/local/archives/02/09/22866454.shtml?Element*_ID=22866454.

Professor James Liebman and his colleagues at Columbia University recently released a comprehensive empirical study of modern American capital appeals. The study—which was undertaken at the Committee's request and based exclusively on public records

[1] In addition to a lengthy set of Minority Views, Senator Hatch has submitted hundreds of pages of "attachments," as if this Committee Report were instead an open record of a legislative hearing. While the printing of this material will cost the taxpayers a great deal of money, the material itself—such as a case-by-case analysis of the voting record of the ninth circuit—has little or no relevance to the pending legislation and, therefore, will not be addressed at length in this Report.

and court decisions—found that serious error permeates the administration of the death penalty system in the United States, compelling courts to reverse more than two-thirds of all death verdicts. The single most common error, the study revealed, was egregiously incompetent defense lawyering. See "A Broken System," available at *www.law.columbia.edu/instructionalservices/liebman/* (Part I) and *www.law.columbia.edu/brokensystem2/* (Part II).[2]

The ABA has endorsed a moratorium on executions until steps are taken to bolster the reliability of the capital punishment system, especially by improving the quality of indigent defense in capital cases. Heeding this call was Governor George Ryan of Illinois, who halted executions in his State in January 2000, after 13 individuals were found to be innocent and released from death row in a period of just 10 years. In some cases, exonerations were based on the results of investigations by journalism students rather than defense attorneys. A blue-ribbon commission appointed by Governor Ryan to undertake a comprehensive review of flaws in the system released its report on April 15, 2002, making 85 recommendations for improvements in Illinois' implementation of capital punishment. Several of these recommendations highlight the need to improve the quality of indigent defense. See "Report of the Governors Commission on Capital Punishment," available at *www.idoc.state.il.us/ccp*. Meanwhile, Governor Parris Glendening of Maryland announced a moratorium in May 2002 to examine ra-

[2] The Minority Views' discussion of the Columbia death penalty study is inaccurate. It begins, for example, with the statement that, in the Columbia study, "the error rates included any reversal of a capital sentence at any stage by any court, even if the courts ultimately upheld the sentence." It also states that the prominent Columbia researchers—in some manner that is not described—used an overbroad measure of error of their own choosing. Both charges are false. The Columbia study considers only the final outcomes of State and Federal court decisions after all appeals have been exhausted and the highest court of the State or the United States Supreme Court has definitively determined the legality and reliability of the capital verdict under review. Moreover, the study counts only errors that State and Federal courts themselves identified as so substantial and egregious that the capital verdict had to be overturned and sent back to be done over or scrapped entirely. Even using this extremely conservative method of analysis, fully 68 percent of all capital verdicts that were finally reviewed by State and Federal courts were found to be too flawed to be carried out and had to be overturned. On retrial, where information is available, 82 percent of those retrials ended in a sentence less than death, including 9 percent that ended in acquittals. Each of these cases cost many years of precious court time, hundreds of thousands of dollars above what a life-without-parole sentence would have cost, and untold anguish by crime victims who relied on the accuracy and finality of the verdicts only to find out that the verdicts were seriously flawed.

Other criticisms of the Columbia study in the Minority Views are similarly inaccurate. They come almost verbatim from a Web site that identifies itself only as *www.prodeathpenalty.com.* Further, the Minority Views entirely ignore: (1) the very positive academic reception of the Columbia study by such noted scholars as Stanford Law School's Deborah L. Rhode writing in the Harvard Law Review, C. Ronald Huff, President of the American Society of Criminology writing in his 2001 Presidential Address, Yale Law School Prof. and former Assistant Secretary of State Harold Hongju Koh in the University of California Davis Law Review, and Elliott S. Milstein, President of the American Association of Law Schools, in his August 2000 President's message; (2) a point-by-point refutation of each one of the "pro-deathpenalty.com" claims that was made in an amicus brief filed in a Federal death penalty case (*United States* v. *Quinones,* No. S3–00–Cr.–761 (JSR)) in New York City this past summer by 42 of the top American academic experts in criminology, sociology and law (concluding the Columbia research was "a well-regarded, carefully conducted, award-winning study"); (3) an attachment to that brief by the Columbia authors themselves; (4) several scholarly exchanges between the Columbia authors and other academics (*see* Judicature, Sept.–Oct. 2000; Judicature, Nov.–Dec. 2000; Indiana Law Journal, vol. 76, p. 951 (2001); Washington University Law Quarterly, Vol. 80, No. 1 (2002)), which cover all of the issues raised in the Minority Views, and many other important issues; and (5) the authors' responses to most of these baseless assertions at the time they were made (*see, e.g.*, The Knight Ridder newspapers (Mar. 18, 2002); The National Law Journal, (Sept. 4, 2000); The New York Times (July 12, 2000); The Wall Street Journal (June 23, 2000); San Francisco Daily Journal, July 21, 2000). These various analyses by respected scholars clearly demonstrate the soundness and reliability of the Columbia study, and are far more reliable than are discredited and outdated attacks posted on an anonymous Web site.

cial and geographic disparities in that State's capital punishment system.

Proponents and opponents of a moratorium—indeed, proponents and opponents of capital punishment itself[3] can agree on the need to improve the reliability and fairness of the system by which the death penalty is imposed in the United States. The Innocence Protection Act seeks to enact such reforms.

Some have argued that Federal action in this area is inappropriate. But where, as here, fundamental constitutional rights are at issue, unjust punishments have been imposed, and sufficient time has passed without comprehensive State action, it is necessary and appropriate for the Congress to intervene and establish minimum protections.

It has also been suggested that our society cannot afford to pay for the reforms proposed by this bill, such as increased access to postconviction DNA testing and qualified counsel in every capital case. The truth, however, is that we cannot afford to do otherwise if our system of justice is to have the confidence of the American people.

Perhaps the most disturbing argument against the bill—or, indeed, against any attempt to upset the status quo with respect to the death penalty—is that the system needs no improvement. This argument is reflected in claims that "the system is working" when an erroneous conviction is overturned years after the defendant was put on death row, even when the proof of innocence was uncovered not by any legal process but rather by a class of journalism students. This argument is reflected in efforts to discredit every death row exoneration,[4] even when local prosecutors admitted fault or apologized, and in vitriolic attacks on the scores of independent studies which show that the current system is gravely flawed. And this argument is reflected in the often-repeated insistence that, however many death row inmates have been exonerated, no one can prove that an innocent person has actually been executed, even when a conservative jurist like Justice O'Connor, who has reviewed virtually every death penalty conviction in the country during her more than 20 years on the Court, acknowledges that "the system may well be allowing some innocent defendants to be executed."

The "innocence deniers" will never concede that there is a problem. But given the appalling number of known cases of the system failing, it would be surprising if there were not more unknown cases of innocent people sentenced to death. As conservative col-

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[3] A significant portion of the Minority Views is dedicated to defending capital punishment as an institution, arguing that it deters crime and "saves lives." But there is no need to engage in the broader societal debate over capital punishment, since the fundamental goal of the Innocence Protection Act is to foster consensus between proponents and opponents of the death penalty on basic, commonsense reforms to the system.

[4] Appended to the Minority Views is a detailed critique of the Death Penalty Information Center's Innocence List (the "DPIC List"), available at *www.deathpenaltyinfo.org/innoccases.html*. The critique, prepared by California prosecutor Ward Campbell, argues that 68 of the 102 former death row inmates on the DPIC List have been "falsely exonerated." The gravamen of the critique is that people are not necessarily innocent simply because they were acquitted at retrial or because the prosecution dropped all charges against them. This is of course true, just as people are not necessarily guilty simply because they were convicted and sentenced to death. But our only objective forum for determining guilt or innocence is the criminal justice system, and in that system, if a jury acquits or a prosecutor determines that a case is too weak to go to a jury, the defendant is entitled to a presumption of innocence. Mr. Campbell also counts as "falsely exonerated" at least 16 individuals whose innocence is not contested, but who, according to Mr. Campbell, might not have been sentenced to death under currently prevailing law. Because these individuals suffered years and sometimes decades on death row for crimes they did not commit, their inclusion on the Innocence List seems entirely appropriate.

umnist George Will has observed, the cumulative weight of these miscarriages of justice, some of them nearly lethal, "compels the conclusion that many innocent people are in prison, and some innocent people have been executed." George Will, "Innocent on Death Row," Washington Post, April 6, 2000. Congress needs to act before, not after, the execution of an innocent person is confirmed.

B. NEED TO ENHANCE ACCESS TO POSTCONVICTION DNA TESTING

Over the past decade, DNA testing has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene. Because of its scientific precision, DNA testing can, in some cases, conclusively establish a suspect's guilt or innocence. In other cases, DNA testing may not conclusively establish guilt or innocence, but may have significant probative value for investigators. For these reasons, Attorney General Ashcroft has described DNA testing as "the truth machine of law enforcement." Attorney General transcript, news conference—"DNA Initiative", March 4, 2002, available at *www.usdoj.gov/ag/speeches/2002/030402newsconferncednainitiative.htm.*

While DNA's power to root out the truth has been a boon to law enforcement, it has also been the salvation of those who, for one reason or another, were convicted of crimes that they did not commit. In little over a decade, some 110 people in the United States have been exonerated through postconviction DNA testing. This number includes at least 12 individuals sentenced to death, some of whom came within days of being executed. See generally Innocence Project, "Case Profiles," *www.innocenceproject.org/case/index.php* (up-to-date summary of every postconviction DNA exoneration occurring in the United States); National Institute of Justice, "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," June 1996 (describing 28 cases in which DNA tests exonerated a convicted offender), available at *www.ojp.usdoj.gov/nij/pubs-sum/161258.htm.*

The National Commission on the Future of DNA Evidence, a Federal panel established by the Justice Department and comprised of law enforcement, judicial, and scientific experts, issued a report in 1999 urging prosecutors to consent to postconviction DNA testing, and more sophisticated retesting, in appropriate cases. Appropriate cases may include those in which exclusionary test results would support the inmate's claim of innocence, although reasonable persons might disagree as to whether the results were exonerative. See National Institute of Justice, "Postconviction DNA Testing: Recommendations for Handling Requests," September 1999, at 5, available at *www.ojp.usdoj.gov/nij/pubs-sum/177626.htm.*

Postconviction DNA testing does not merely exonerate the innocent—it can also solve crimes and lead to the incarceration of very dangerous criminals. When a DNA profile from the crime scene does not match the inmate who had been convicted of the crime, it has become standard police practice to enter the crime scene profile into the Combined DNA Index System (CODIS), a national database containing DNA profiles from both unsolved crimes and convicted offenders. In case after case, postconviction DNA testing that exonerated an inmate has led to the identification of a violent

criminal who had long evaded apprehension. For example, the 2001 exoneration of Jerry Frank Townsend in Florida led to the apprehension of Eddie Lee Mosely, a man who had committed at least 62 rapes and several homicides. Mosely might have been identified much earlier if prosecutors had acceded to a request for testing by another wrongfully convicted Florida inmate, Frank Lee Smith, who died on death row before testing was ordered. See "Requiem for Frank Lee Smith, PBS Frontline, March 11, 2002, transcript available at *www.pbs.org/wgbh/pages/frontline/shows/smith/etc/script.html;* "DNA Evidence Clearing Convicts of Crimes," NBC Nightly News, June 18, 2001; "DNA Test Clears 'Killer' after His Death," Miami Herald, December 15, 2000.[5]

Other reported cases in which DNA testing has led to the identification of the actual criminal include: Clark McMillan (Tennessee); Ray Krone (Arizona); Robert Miller (Oklahoma); and Kevin Green (California). In each of these cases the real assailant was a serial rapist and/or murderer.

There are still numerous prisoners throughout the country whose trials preceded modern DNA testing, or who did not receive pretrial testing for other reasons. If history is any guide, some of these individuals are innocent of any crime.

1. Standard for obtaining testing

The Committee recognized the need to establish a meaningful statutory threshold before an inmate is eligible for postconviction DNA testing in order to discourage frivolous applications and permit their summary dismissal. At the same time the Committee rejected suggestions that the standard be so strict that only defendants who could prove that testing would necessarily exonerate them would qualify for relief. In balancing competing concerns, the Committee was guided by the principle that the justice system should err on the side of permitting testing in nonfrivolous cases, in light of the low cost of testing and the high cost of wrongful convictions.

As reported, section 101 of S. 486 contains an eligibility standard similar to the standards in a number of State DNA laws, including those in New York, Illinois and California. In relevant part, section 101 requires an inmate to assert under oath that he "did not commit" the crime of which he was convicted,[6] and authorizes testing only upon a determination that testing "has the scientific potential to produce new, non-cumulative evidence which is material to the claim that the applicant did not commit, and which raises a reasonable probability that the applicant would not have been convicted of" the crime. Even if a defendant meets that threshold, a court may still deny testing if the Government shows that the application was made to interfere with the administration of justice rather

[5] The Minority Views assert that Florida prosecutors agreed to DNA testing for Smith, but the testing was delayed by the demand of Smith's lawyers that the result be given only to them and not to the State. In fact, the testing was delayed by the prosecutors, who initially agreed to testing only if it was done in their own lab (the defense proposed that the testing be carried out at the FBI lab), and subsequently opposed testing altogether on the ground that it was procedurally barred. See "Requiem for Frank Lee Smith," supra.

[6] The Minority Views criticize S. 486 because it does not require an applicant for DNA testing to assert his "actual innocence" of the crime. But the word "actual" is a rhetorical flourish that has no legal meaning and therefore no place in Federal law. The reported bill requires an applicant to assert that he "did not commit" the crime. Those words have the same meaning as the colloquial phrase "actual innocence."

than to support a claim of innocence. In addition, the bill provides meaningful disincentives to filing false claims or trying to "game the system": test results must be disclosed simultaneously to both parties and, if inculpatory, the court must assess the applicant for the cost of the testing, submit the results to the Department of Justice for inclusion in the national DNA database, and make such further orders as may be appropriate, including an order of contempt. Further, because an applicant's assertion that he did not commit the crime must be made "under oath," an applicant may be subject to prosecution for perjury, as well as for making a false statement, if his assertion is later disproved.[7]

Experience shows that this formulation strikes an appropriate balance. For example, only a handful of tests have been ordered under the "reasonable probability" standard in New York's now 8-year old DNA law. N.Y. Crim Proc. Law § 440.30(1–a) (DNA test shall be granted upon court's determination that, if test result had been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant"). New York Attorney General Elliot Spitzer testified before the Committee in June 2000:

> [New York's] experience demonstrates that postconviction DNA testing can bolster the integrity of our judicial system without unduly burdening our criminal justice resources. * * * [T]he existence of a statutory right to postconviction DNA testing does not mean that there will be an avalanche of testing at great cost to a state.

Illinois has had a similar experience with its now 5-year old DNA law, which employs a standard of "material relevance." 725 Ill. Comp. Stat. 5/116–3(c) (DNA test shall be granted upon court's determination that test result "has the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence"). In Cook County—the largest county in Illinois and the second largest in the Nation—fewer than 12 requests for postconviction DNA tests were filed between January 1, 1998, and late March 2002. Of those tests, seven led to the exoneration of the defendant. See "Memorandum on Postconviction DNA Testing," from Brenda Whalen Munro, legislative fiscal analyst, to Senator Joseph A. Montalbano, chair, Senate Judiciary Committee, State of Rhode Island, April 25, 2002 (on file with the Committee on the Judiciary, U.S. Senate) (concluding, after State-by-State survey: "Based on experiences of other states, it appears that very few individuals will seek postconviction DNA testing").[8]

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[7] The Minority Views cite the case of Danny Joe Bradley to illustrate "the potential for abuses" in providing inmates a right to DNA testing. For its account of the Bradley case, the Minority Views rely on a June 2002 letter sent by Alabama Attorney General Bill Pryor to Senator Jeff Sessions, which blames his State's "very restrictive" DNA policy on alleged misconduct by Bradley's postconviction counsel, the Innocence Project at the Benjamin N. Cardozo School of Law. The Minority Views note that General Pryor's allegations "have never been refuted by the Innocence Project"—which is not surprising given that General Pryor's letter was not provided to Chairman Leahy or to the Innocence Project until October 11, 2002. The Innocence Project has now replied, in a letter to the Committee dated October 15, 2002 (on file with the Committee on the Judiciary). That letter provides a detailed refutation of the allegations in General Pryor's letter, and further notes that the Eleventh Circuit has reversed the district court's denial of Mr. Bradley's § 1983 claim. *Bradley* v. *Pryor, 2002* WL 31103573 (11th Cir. Sept. 23, 2002).

[8] The Minority Views advance contradictory arguments that (1) "[t]he small number of defendants seeking DNA tests and actually claiming innocence suggests that for the most part that our criminal justice system works well to convict the guilty and free the innocent" and (2) "con-

Some prosecutors who testified before the Committee urged that in order to obtain a DNA test, an inmate should be required to show that the test results would prove "actual innocence." The Committee rejected this formulation because it could preclude testing in any case in which the prosecutor can put forward a new theory of the defendant's guilt that is consistent with an exculpatory DNA test. To illustrate, an "actual innocence" standard might have been a bar to testing in the following cases, in which factually innocent individuals were eventually exonerated through DNA testing:

• *Roy Criner, convicted 1990, released 2000 (Texas).* Criner was convicted of aggravated assault. When DNA tests excluded Criner, the trial judge rejected the results on the theory—unsubstantiated by any evidence—that the victim might have had consensual sex with someone else before being raped by Criner, or that Criner might have participated in the rape and used a condom. Criner was eventually pardoned by then-Governor George W. Bush.

• *Ray Krone, convicted 1992, released 2002 (Arizona).* Krone was convicted of murder based on "junk science"—bite marks on the victim that allegedly matched his dental records. The prosecutor opposed DNA testing of blood and saliva stains on the victim's clothing on the ground that the stains might have come from someone other than the murderer. The prosecutor argued that even an exclusion would not prove actual innocence. Once testing was ordered, not only was Krone excluded but the DNA profile matched that of a convicted rapist, already in jail, who had bitten his other victims.

• *Earl Washington, convicted 1984, released 2000 (Virginia).* Washington, who has an IQ of 69, confessed to a rape murder he did not commit after being interrogated by the police. The principal evidence presented at trial was the victim's dying declaration that she had been attacked by a lone black man with a beard. Washington was eventually cleared by DNA testing, but the district attorney asserted that the test had not established actual innocence on the theory—never advanced by the prosecution at trial and contradicted by the victim's declaration—that the DNA could have belonged to a second assailant.

To ensure that DNA testing is available to inmates like Criner, Krone, and Washington, the Committee rejected an "actual innocence" standard and instead utilized the standard that appears in section 101 of the bill as reported.

A related issue is whether testing may be ordered if an inmate failed to contest the issue of identity at an earlier stage of the case. Some prosecutors urged the Committee to bar testing unless identity was an issue at the inmate's trial. In response, the Committee adopted a provision from California law requiring an inmate to show that "the identity of the perpetrator was or should have been a significant issue in the case." But the Committee declined to adopt the stricter "identity was an issue at trial" approach because it would automatically disqualify inmates who confessed and/or

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victed offenders serving lengthy sentences will exploit the provisions of S. 486 to file frivolous motions that could squander the resources of courts, prosecutors and law enforcement." Since the provisions of S. 486 are drawn from existing State statutes, it can be reliably predicted that there will be relatively few applications for postconviction DNA testing under Federal law. But if even a small fraction of those applications result in an innocent person's release from prison or death row, the bill will have achieved its purpose. It is utterly unsatisfactory to say, as the Minority Views do, that our criminal justice system protects the innocent "for the most part."

pled guilty despite documented cases in which defendants confessed and/or pled guilty to crimes they did not commit. For example:

• *Bruce Godschalk, convicted 1987, released 2002 (Pennsylvania).* Godschalk confessed to two rapes and was convicted by a jury. The State courts denied him DNA testing on the ground that he had confessed. Eventually, a Federal court ordered the prosecutor to release the DNA for testing. The tests proved that both rapes had been committed by the same man, and that man was not Godschalk.

• *Chris Ochoa, convicted 1988, released 2001 (Texas).* Ochoa confessed to a murder that he did not commit and implicated his friend Richard Danziger in the crime. Under threat of receiving the death penalty, Ochoa agreed to plead guilty and testify against Danziger at trial. Both men received life sentences. Years later, a man named Achim Mario confessed his responsibility for the murder. Eventually, DNA testing proved that Mario was telling the truth, and exonerated both Ochoa and Danziger. Released from prison in 2001, after 13 years in prison, Ochoa explained that his confession and implication of Danziger were the results of police pressure and his fear of the death penalty.

• *Jerry Frank Townsend, convicted 1980, released 2001 (Florida).* Mentally retarded with the capacity of an 8-year-old, Townsend confessed to multiple murders in Florida. He pled guilty to two murders and no contest to two others, thus avoiding a possible death sentence. In 1998, the mother of one of the victims asked prosecutors to review Townsend's convictions. He was cleared by DNA evidence of that murder and eventually exonerated of all charges. He spent a total of 22 years in jail.

• *David Vasquez, convicted 1985, released 1989 (Virginia).* Vasquez, who is borderline mentally impaired, confessed and later pled guilty to a murder he did not commit. He was eventually exonerated by DNA testing, and the prosecution joined with defense attorneys to secure him a full pardon.

In light of this experience and the growing awareness of the danger of coerced confessions, the Committee concluded that an inmate who pled guilty or otherwise confessed to the crime should not automatically be disqualified from obtaining DNA testing, if he can meet the other threshold requirements.

Under S. 486 as reported, an inmate who satisfies the eligibility standards for obtaining DNA testing may obtain a test not only with respect to the crime of conviction, but also with respect to "any other offense that the sentencing authority relied upon to sentence the defendant either to death or to an enhanced term of imprisonment as a career offender or armed career criminal." In such cases, the fact of the ancillary offense led to imposition of either a death sentence (as is the case with the rape in a rape-murder case) or a lengthy mandatory sentence of incarceration. The Committee believes that justice warrants DNA testing in such circumstances.

2. Inappropriateness of time limits for DNA testing

The Committee considered and rejected the suggestion that the bill include a deadline by which inmates must have filed their claims in order to obtain postconviction DNA testing. For example, during the Committee markup of S. 486, Senator Hatch offered a

substitute amendment that created a 60-month period from the date of enactment during which inmates could seek DNA testing, but which barred such testing after 60 months.

Such proposals mistakenly assume that the need for a DNA testing law is temporary. While the need for postconviction DNA testing will diminish over time as pretrial DNA testing becomes more prevalent, there will always be cases that fall through the cracks due to a defense lawyer's incompetence, a defendant's mental illness or mental retardation, or other reasons that the Committee cannot anticipate.

Time limits also raise significant practical problems. Barry Scheck testified that it takes his organization, the Innocence Project at the Benjamin N. Cardozo School of Law, an average of between 3 to 5 years to evaluate and perfect an application for postconviction DNA testing:

> The difficulties are legion: The inmates are indigent. They have no lawyers and their lawyers from trial or appeal have often been disbarred, died, or disappeared. They do not have complete copies of their transcripts and neither does anyone else. Important police and laboratory results relating to key items of biological evidence cannot be found. And most importantly, no one can find the evidence. It might be in the court house as an exhibit, at the crime laboratory, in the prosecutor's safe, with the court reporter, at a hospital or medical examiner's office, or different items could be at a variety of these locations. Since the cases are very old, inventory records are lost, and long-term storage facilities for each institution change.

Many of the individuals who have been exonerated by postconviction DNA testing did not win freedom until many years after they were convicted. Kirk Bloodsworth was in prison for 9 years. Ray Krone was in prison for 10 years. Eddie Joe Lloyd, a very recent exoneree, spent 17 years in Michigan prisons for a rape he did not commit. These men and others could still be in prison (or executed) if a rigid limitations period had been applied to their petitions for DNA testing.

The injustice of time limits is highlighted by the case of Frank Lee Smith, who died of cancer on Florida's death row after he was denied a DNA test due to that State's 2-year limitations period for filing a motion for postconviction relief based on newly discovered evidence. Hearing of June 18, 2002 (statement of Barry Scheck). Cf. *Zeigler* v. *State,* 654 So.2d 1162 (Fl. 1995) (inmate motion for DNA testing must be filed within 2 years of when testing method became available). Eleven months after his death, and 14 years after his 1986 conviction, DNA testing exonerated Smith and also identified the real perpetrator. Notwithstanding this experience, Florida passed a postconviction DNA statute in 2001 that provides only 2 years for inmates to make applications. Fla. Stat. Ch. 925.11

Deadlines make sense when society has an interest in the finality of a judgment, but there is no interest in the finality of an incorrect judgment, especially one that would result in the execution of an innocent person. A serious claim of innocence should never be barred by arbitrary time limits.

3. Federalism concerns

In light of the extraordinary probative power of DNA science, it might be expected that every State would by now have established a right to postconviction DNA testing. Unfortunately that is not the case. As of October 2002, only 31 of the 50 States have provided for postconviction DNA testing by legislation, and the scope of these laws vary considerably. Some States erect unjustifiably high procedural hurdles to testing. Others make testing available in capital cases but not in noncapital cases in which innocent people may have been sentenced to decades of imprisonment. Still others rely on arbitrary and unnecessary time limits. Many States' legislatures have failed to act altogether.

Even where there is no postconviction DNA testing law, some prosecutors consent to defense motions for testing and some have commendably initiated programs for systematic testing of inmates who might benefit from testing. But in the absence of a clear, comprehensive statutory right to DNA testing, too many prosecutors reflexively oppose requests for DNA testing and cite time limits and procedural default rules to deny prisoners the opportunity to present DNA test results in court. Indeed, during its consideration of S. 486, the Committee learned of many cases in which inmates were forced to litigate for years to obtain access to biological evidence for the purpose of DNA testing.

• *A.B. Butler, convicted 1983, released 2000 (Texas).* Butler spent 10 years struggling for the DNA testing that eventually exculpated him. He was pardoned by then-Governor George W. Bush in May 2000, having served 17 years of a 99-year sentence.

• *Clyde Charles, convicted 1982, released 1999 (Louisiana).* Charles spent 9 years seeking the DNA tests that ultimately proved his innocence. He was freed in August 1999, after 19 years in the Angola penitentiary.

• *Dennis Fritz, convicted 1988, released 1999 (Oklahoma).* Fritz testified that he spent 4 years while he was in prison petitioning the courts to allow him to obtain DNA testing on the crime scene evidence, but his pleas were repeatedly denied. Eventually, lawyers for Fritz's codefendant, Ron Williamson, succeeded in gaining access to the evidence for DNA testing. The tests exonerated both men, and they were freed in April 1999. Williamson had come within 5 days of being executed.

• *Bruce Godschalk, convicted 1987, released 2002 (Pennsylvania).* Godschalk first sought DNA testing in 1995, but it took 7 years of litigation before he obtained the tests that cleared him of his rape conviction.

• *Larry Johnson, convicted 1984, released 2002 (Missouri).* Convicted of rape, robbery, and kidnapping in 1984 and given a life sentence, Johnson asked for DNA testing in 1995. Seven years later—after serving 18 years in prison—Johnson was exonerated by biological evidence that excluded him as the perpetrator.

Institutional resistance to inmate requests for DNA testing has continued even in States that have passed postconviction testing laws. Since Texas passed its law in 2001, for example, several inmates have been executed without a ruling from the State's highest criminal court on a pending issue involving DNA. Dianne Jennings, "Clarity Urged on DNA Law: Right to Testing Debated as Fourth

Inmate Nears Execution Without Ruling," The Dallas Morning News, September 4, 2002.[9]

In our Federal system, States generally operate their criminal justice systems without Federal interference. But over the course of 3 years the Committee has compiled a substantial record demonstrating that many States have failed to protect the liberty interests of numerous Americans wrongfully convicted of crimes. Moreover, the Federal Government provides billions of dollars each year to State and local criminal justice systems and has a right to condition such grants on fundamental fairness. Under these circumstances, Congress has a duty to establish Federal protections. While the Committee appreciates and respects the concerns that have been raised by some State officials,[10] it agrees with Attorney General Spitzer that "DNA testing is too important to allow some States to offer no remedy to those incarcerated who may be innocent of the crimes for which they were convicted." Hearing of June 13, 2000 (statement of Eliot Spitzer).

The Innocence Protection Act imposes conditions on Federal grants that are used by States to develop or improve a DNA analysis capability in a forensic laboratory, or to collect, analyze, or index DNA samples for law enforcement identification purposes. In establishing these conditions, the Committee does not underestimate the importance of improving DNA analysis capabilities and reducing the backlogs in our Nation's crime labs. State crime labs are overburdened, and every day that DNA evidence goes untested, solvable crimes remain unsolved.

But just as it is an appropriate use of Federal funds to assist the States in processing DNA evidence for law enforcement purposes, it is also appropriate to require that this truth-seeking technology be made available to both sides. Indeed, Congress said as much 2 years ago in the legislation that established the backlog and forensic sciences improvement programs. See DNA Analysis Backlog Elimination Act of 2000, Public Law 106–546, § 11 ("It is the sense of the Congress that Congress should condition forensic science-related grants to a State or State forensic facility on the State's agreement to ensure postconviction DNA testing in appropriate cases."); Paul Coverdell National Forensic Sciences Improvement Grants, Public Law 106–561, § 4 (same).

As reported, S. 486 affords the States some flexibility in crafting their DNA laws. State procedures for postconviction DNA testing need only be "consistent with"—not identical to—the Federal procedures. Consistency means that the procedures adopted by a State must, at a minimum, incorporate the core elements of the Federal

[9] The Minority Views' claim that only 18 death row inmates have been denied DNA testing is based on staff's confidential conversations with State and Federal prosecutors and, thus, cannot readily be verified. But even assuming that death row inmates are seldom denied DNA testing, the Minority Views miss the point. DNA testing should be available to all inmates who can meet the bill's threshold requirements, not just those facing execution. There is, however a need to prioritize DNA testing in capital cases. During the Committee markup, Senator Leahy offered and the Committee unanimously accepted an amendment that, among other things, encourages State prosecutors to review all their capital convictions, identify those in which biological evidence is readily accessible, and conduct DNA testing where appropriate. The amendment also directs the U.S. Attorney General to conduct postconviction DNA testing as appropriate in Federal capital cases.

[10] The Minority Views quote a June 2000 letter signed by 30 State attorneys general that expresses concerns about a much earlier version of the Innocence Protection Act. Many of the specific concerns raised in the letter have been addressed in the reported version of the bill, which tightens the requirements for DNA testing to screen out frivolous applications, and reduces Federal mandates with respect to competent counsel.

procedures. For example, a State postconviction statute that applied only to death row inmates and not to inmates serving long terms of incarceration would not be "consistent with" the Federal procedures. Similarly, a State statute that included a time limit or any other provision that would systemically deny testing to whole categories of prisoners who would receive testing under the Federal procedures would not be "consistent with" those procedures and so would not satisfy the act.

While it is unknown how many individuals will apply for DNA testing under S. 486, the cost to the States will be limited by a number of factors. First, as discussed above, the bill sets strict eligibility standards to discourage frivolous applications. Second, DNA evidence exists only in a finite number of cases, and that number will continue to shrink as pretrial DNA testing becomes more common and accessible. Third, the bill gives discretion to courts to order that the cost of testing be borne by applicants who have the means to pay. Fourth, the cost of DNA testing has decreased in recent years: New York Attorney General Elliott Spitzer told the Committee that a typical postconviction set of DNA tests for a defendant costs between $2,500 and $5,000 at a private laboratory, and much less—between $100 and $300—at the New York City medical examiner's office. Beyond all this, DNA testing will provide offsetting cost savings by securing the release of innocent persons from costly confinement and ensuring that those who pose a threat to society are not left walking the streets.

4. Invocation of section 5 of the 14th amendment

The Committee expects that States will continue to accept Federal funds and abide by the new conditions regarding DNA evidence. But if States do not accept Federal funds, there are certain circumstances in which it is appropriate for Congress to mandate the availability of postconviction testing.

As introduced, S. 486 invoked section 5 of the 14th amendment to require that States make DNA testing available to death row inmates with a plausible claim of innocence. The substitute amendment adopted by the Committee includes a provision advanced by Senator Specter to expand the invocation of the 14th amendment to nondeath cases. Thus, section 103 of the bill as reported recognizes a constitutional right of all State prisoners to access biological evidence in the State's control for the purpose of DNA testing, if they meet the threshold requirements.

Two Federal judges and several State courts have recognized this constitutional right. In a carefully reasoned opinion respecting the fourth circuit's denial of rehearing en banc in *Harvey* v. *Horan,* Judge Michael Luttig concluded that "A right of access to evidence for tests which * * * could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required * * * as a matter of basic fairness." 285 F.3d 298, 314 (4th Cir. 2002).[11] An inmate's interest in pursing his freedom—and possibly

[11] The Minority Views note that Chief Judge Wilkinson, writing separately in *Harvey,* did not find a constitutional right to DNA testing. Notably, however, Judge Wilkinson's view was premised on the belief that Congress would pass the Innocence Protection Act:

> I repeat my hope that inmates such as Harvey will receive DNA testing. And I repeat my faith that the American system will provide it to them. This is not an area in which legislative bodies have gone into permanent recess. On the contrary, the panel majority opinion detailed the fact that Congress is actively considering legislative initiatives in

saving his life—is sufficient to outweigh the Government's comparatively insubstantial interest in withholding access to DNA evidence. Id. at 320. See also *Godschalk* v. *Montgomery County District Attorney's Office,* 177 F. Supp.2d 366 (E.D. Pa. 2001) (finding that plaintiff had a due process right of access to genetic materials held by the prosecution for the limited purpose of DNA testing); National Institute of Justice, Postconviction DNA Testing: Recommendations for Handling Requests, September 1999, at 11–12 (discussing State court cases finding constitutional right to DNA testing).

The constitutional right at issue is a limited one. It is simply a postconviction right of access to evidence that is in the State's possession—evidence that could be an inmate's only means of proving his innocence. This provision does not necessarily entitle an inmate to further judicial review of his case. Rather, if further access to the judicial process is unavailable—either because of a procedural bar or because the courts refuse to entertain the assertion of a freestanding constitutional right not to be punished if actually innocent—an inmate's only recourse may be to present the results of a DNA test to the executive in a petition for clemency.

5. Need to preserve biological evidence

Another important reason for a Federal law in this area is to ensure appropriate preservation of biological evidence throughout the country. As reported by the Committee, S. 486 requires States to adopt reasonable preservation procedures consistent with the new Federal law as a condition of receiving certain Federal grant money. Not only will such procedures safeguard the rights of inmates to produce proof of their innocence through DNA testing, they will also help law enforcement retest old cases to catch the actual perpetrators.

Rules and procedures for the preservation of biological evidence vary widely among the State. Even in States that have enacted postconviction DNA testing laws in recent years, there is rarely a requirement that biological evidence be preserved. In too many jurisdictions, the biological evidence that could set innocent people free is being lost, destroyed, or degraded by bacterial contamination. Indeed, the Innocence Project in New York City must close nearly 75 percent of the cases it accepts—cases in which DNA testing on some piece of biological evidence might be determinative of guilt or innocence—because the relevant biological evidence is no longer available. Hearing of June 18, 2002 (statement of Barry Scheck).

The case of Marvin Anderson of Virginia demonstrates the compelling need for preservation of evidence. In 1983, Anderson was sentenced to 210 years for a rape he did not commit. After the advent of DNA technology in the early 1990's, Anderson sought testing of the semen samples recovered from the victim's body but was told that the rape kit and its contents had been destroyed in ac-

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this area. The Innocence Protection Act, which has been introduced in both houses of Congress, would increase the availability of postconviction DNA testing for an individual convicted of a Federal crime. Further, the Act would condition the grant of Federal funds for State DNA—related programs on an assurance that the State would make postconviction DNA testing available in certain types of cases.

285 F.3d at 301–302 (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc) (citations omitted).

cordance with an explicit State policy under which every rape kit was deliberately destroyed following trial and direct appeal. In 2001, the biological evidence was discovered by happenstance: years earlier, a State employee had violated lab rules by taping the vaginal swabs to file notes rather than returning them to the rape kit, where they would have been destroyed. But for this fortuity, Anderson would still be in prison and the real assailant, who was identified by the DNA testing, would be on the streets. Id.

The cases of Calvin Johnson of Georgia and Kevin Byrd of Texas are similarly illustrative. The DNA tests that exonerated Johnson after 17 years in prison were possible only because, by sheer chance, an assistant district attorney had retrieved the rape kit from a garbage can, where it had been discarded by a judge's clerk who was cleaning out his office. Similarly, Byrd was exonerated in 1997 only because, by pure luck, the 12-year old DNA evidence that cleared him had not been destroyed pursuant to bureaucratic routine. The very week that Byrd was freed, however, the office that prosecuted him systematically destroyed the rape kits from 50 other old cases, citing an overcrowded storage space. Sharon Cohen, "Sheer Luck Saves DNA Evidence," AP Online, October 7, 2000. This is all too common across the country.

Compliance with the preservation requirements of S. 486 will not be unduly expensive. As a general matter, the bill requires the preservation of all biological evidence that was secured in relation to a criminal case for as long as any person remains incarcerated in connection with that case. But biological evidence may be destroyed (assuming that no other law requires its preservation) if inmates are notified at least 6 months in advance and afforded an opportunity to apply for DNA testing. Moreover, in cases where the evidence is of such a size, bulk, or physical character as to render retention impracticable, the prosecution need only take "reasonable" measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing.[12] Finally, while it has been suggested that preserving biological evidence requires costly freezer space, experience demonstrates that as long as such evidence is stored in a dark dry room, air conditioned in the summer, it will remain robust for years.

C. NEED FOR IMPROVED CAPITAL INDIGENT DEFENSE SYSTEMS

Postconviction DNA testing is an essential safeguard that can save innocent lives when the trial process has failed to uncover the truth. But it would be neither just nor sensible to enact a law that merely expanded access to DNA testing. It would not be just because innocent people should not have to wait for years after trial to be exonerated and freed. It would not be sensible because society should not have to wait for years to know the truth. When innocent people are sentenced to death, and the guilty are permitted to walk free, any meaningful reform effort must consider the root causes of these wrongful convictions and take steps to address them.

The root causes of wrongful convictions are varied. They include flaws in eyewitness identification procedures, undue reliance on

[12] Thus, contrary to the suggestion in the Minority Views, the bill would not require authorities to preserve a seized automobile because there might be DNA on the steering wheel. At most, if the steering wheel did have material DNA evidence on it, authorities would be required to preserve part of that evidence.

jailhouse informants, police misconduct and prosecutorial misconduct. These problems exist both in cases where biological evidence is available for DNA testing and in cases where it is not. DNA testing may expose problems in individual cases, but it is not a comprehensive solution because biological evidence is often unavailable. Instead, the causes of wrongful convictions must be addressed directly.

Most criminal cases, and most capital cases, are prosecuted at the State and local level. The reliability of State criminal convictions depends on the practices of local police and prosecutors, and efforts to improve such practices are not readily susceptible to Federal intervention. The Department of Justice funds research on police and prosecutorial techniques and disseminates best practices, but rarely requires that local agencies adopt any particular reform. One way in which the Federal Government can play an important role, however, is in helping States improve the systems by which defense lawyers are appointed for indigent defendants in capital cases.

The appointment of competent, adequately compensated lawyers in capital cases will not preclude the possibility of a wrongful conviction but can enhance the system's reliability. A competent defense lawyer knows how to probe weaknesses in eyewitness testimony and challenge suggestive identification procedures, and is more apt to recognize police or prosecutorial misconduct than an incompetent lawyer. The adversarial system of justice depends on competent defense lawyers to hold the Government to its proof and uncover flaws in the Government's case.

It is no accident that in the wrongful conviction cases examined by the Committee, one recurring theme is incompetent and grossly underfunded defense counsel. For example:

• *Albert Burrell, convicted 1987, released 2001 (Louisiana).* Burrell was convicted of murdering an elderly couple and sentenced to death. An attorney who later represented Burrell on a pro bono basis wrote to the Committee about the "shocking incompetence" of Burrell's trial lawyers, who had only recently graduated from law school. They undertook little investigation before the trial, were ineffective during the trial, and did nothing to prepare for the penalty phase. Both lawyers were later indicted and convicted—one on a drug charge, the other for stealing client money—and disbarred. Dismissing the charges against Burrell and codefendant Michael Graham, the Louisiana Attorney General's office cited a "total lack of credible evidence." The prosecutor who tried the case has also acknowledged that the case was weak and should not have been indicted.[13]

[13] The Minority Views' one-sided recitation of the facts in the Burrell case, and its irresponsible suggestion that Burrell was actually guilty, demonstrate "innocence denial" at its most pernicious. The Minority Views selectively quote from a series of articles about the case in The Baton Rouge Advocate, but a full reading of those articles and other materials makes clear that Burrell was wrongfully convicted.

Burrell's conviction rested on the testimony of two people—a mentally ill jailhouse snitch who was widely known as "Lying Wayne Brantley," and Burrell's ex-wife, who had been battling with Burrell over the custody of their child, and whose story to the police was materially at odds with the crime scene evidence. Postconviction DNA tests proved that blood found at the victims' home did not belong to either Burrell or Graham.

The Minority Views quote the original prosecutor, a man named Dan Grady, as saying that he would retry the case if the judge ordered a new trial. Unmentioned is the fact that Grady had recommended against presenting the case to a grand jury because, in his view, the evidence

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• *Dennis Fritz, convicted 1982, released 1999 (Oklahoma).* The Committee heard testimony from Dennis Fritz, a science teacher and football coach, the father of a young daughter, who spent 12 years in prison for a crime he did not commit. Fritz was represented at his capital murder trial by a civil lawyer who had never handled any type of criminal case, much less a capital murder case, and who had no resources to mount a proper defense because he was paid only $500. Fritz and his codefendant were ultimately cleared through DNA testing.[14]

• *Federico Martinez-Macias, convicted 1984, released 1993 (Texas).* Martinez-Macias spent 9 years on death row and came within 2 days of execution because his trial lawyer, who was paid less than $12 an hour, did almost nothing to prepare for trial. This lawyer failed to call available witnesses who could have refuted the State's case, and based his trial decisions on a fundamental misunderstanding of Texas law. The lawyer also admitted he conducted no investigation in anticipation of the penalty phase of the trial. Martinez-Macias was eventually cleared of all charges and released from prison, thanks to volunteer work by a Washington lawyer who intervened just before the scheduled execution. In its decision overturning Martinez-Macias's conviction, the Federal appeals court stated: "We are left with the firm conviction that Martinez-Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The State paid defense counsel $11.84 per hour. *Unfortunately, the justice system got only what it paid for." Martinez-Macias* v. *Collins,* 979 F.2d 1067 (5th Cir. 1992) (emphasis added).[15]

• *Gary Nelson, convicted 1980, released 1991 (Georgia).* Nelson was represented at his capital trial by a solo practitioner who had never tried a capital case. This court-appointed lawyer, who was

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against Burrell and Graham was "too weak and too dependent upon witnesses of questionable credibility." Affidavit of Dan J. Grady, III (on file with the Committee on the Judiciary). Notwithstanding this advice, the district attorney directed Grady to proceed to the grand jury, and then to trial, in order to avoid embarrassment to the local sheriff. Id.

The Minority Views suggest that the current prosecutor declined to retry the case because the evidence against the defendants had been lost, destroyed, or otherwise compromised over the course of time. But when the Louisiana Attorney General dismissed the charges against Burrell and Graham, he acknowledged that there had never been any credible evidence against them in the first place: "These men were convicted solely upon testimonial evidence, virtually all of which had been discredited either of [sic] virtue of subsequent disclosures, recantation of witnesses and withholding of exculpatory evidence bearing directly upon the witnesses credibility at the original trial." Written Reasons for Dismissal, submitted by the Louisiana Attorney General in *State* v. *Graham and Burrell* (on file with the Committee on the Judiciary).

Albert Burrell is a mentally retarded man who, before his conviction, took care of his young son and repaired cars and trucks to make ends meet. He spent 13 years on death row for a crime that he did not commit. He deserves better than to be maligned in these pages. The Minority Views' stubborn refusal to accept Burrell's innocence in the face of contrary facts and official findings bespeaks its blind faith in the status quo and casts doubt on the accuracy of its description of other cases.

The Minority Views' unreliable account of the Burrell case mirrors the account provided in prosecutor Ward Campbell's critique of the DPIC List, which is attached to the Minority Views. Mr. Campbell's critique is likewise impeached by his failure to accept the fact that Burrell and Graham were innocent.

[14] The Minority Views point out that Fritz was sentenced to life imprisonment and not to death, as if that somehow excuses the incompetent representation he received at his capital murder trial. Fritz's codefendant, Ronald Williamson, was less fortunate: he was sentenced to death, and once came within five days of being executed. In 1997, a Federal appeals court overturned Williamson's conviction on the basis of ineffectiveness of counsel. Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997). The Court noted that the lawyer, who had been paid a total of $3,200 for the defense, had failed to investigate and present to the jury the fact that another man had confessed to the crime. Subsequent DNA tests of crime scene evidence excluded Fritz and Williamson and implicated Glen Gore, a former suspect in the case.

[15] Notably, Mr. Campbell's critique of the DPIC List omits mention of the Martinez-Macias case, implicitly conceding the fact of Martinez-Macias's innocence.

struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour. His request for cocounsel was denied, and he was not provided funds for an investigator or expert. His closing argument was only 255 words long. He was later disbarred for other reasons. Nelson was eventually exonerated and released after 11 years on death row.[16]

• *Dennis Williams, convicted 1979, released 1996 (Illinois).* Williams was defended at trial by a lawyer who was simultaneously defending himself in disbarment proceedings. After nearly 2 decades on death row, Williams was exonerated with the help of three journalism students from Northwestern University.[17]

These cases are not unique. On the contrary, the prevalence of incompetent counsel in State death penalty proceedings, particularly at the trial level, has been well documented. A 2001 report by a bipartisan committee of experts identified the lack of adequate counsel as "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." The Constitution Project, "Mandatory Justice: Eighteen Reforms to the Death Penalty," available at *www.constitutionproject.org/dpi/MandatoryJustice.pdf.* The recent empirical study by professors at Columbia University confirmed that in many death penalty jurisdictions, the crucial adversarial check provided by competent and adequately funded defense lawyers has broken down, resulting in inaccurate and unreliable capital convictions. "A Broken System," part II, at 413–18. See also "The Crisis in Capital Representation," 51 The Record of the Association of the Bar of the City of New York 169 (March 4, 1996) (on file with the Committee on the Judiciary); Stephen Bright, "Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake," 1997 NYU Annual Survey of American Law 783 (1997); Stephen Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer," 103 Yale L.J. 1835 (1994).

In at least three States—Illinois, Washington, and Texas—recent investigations revealed that large numbers of death row inmates were represented at trial by court-appointed lawyers who had been, or were later, disbarred or suspended for incompetent, unethical, or even criminal conduct. See Ken Armstrong & Steve Mills, "The Failure of the Death Penalty in Illinois," Chicago Tribune, November 15, 1999 (part II of a 5-part series); Lise Olson, "Uncertain Justice," Seattle Post-Intelligencer, August 6, 2001 (part I of a 3-part series); Texas Civil Rights Project, "The Death Penalty in Texas: Due Process and Equal Justice or Rush to Execution?," The Sev-

[16] As with Martinez-Macias, the Minority Views refuse to accept that Nelson was innocent, even though the critique attached to the Minority Views implicitly concedes the point. And once again, the Minority Views selectively quote from press accounts to suggest that prosecutors declined to retry Nelson only because the evidence against him had become stale. Left unmentioned is the fact that the county district attorney, after a close review of the evidence, acknowledged that "There is no material element of the State's case in the original trial which has not subsequently been determined to be impeached or contradicted." Jingle Davis & Mark Curriden "Man condemned for murder of girl is freed,"The Atlanta Journal and Constitution, November 7, 1991.

[17] While conceding that Williams was wrongfully convicted, the Minority Views argue that this was caused by police and prosecutorial misconduct, not bad lawyering. But as noted above, by ensuring that capital defense lawyers are competent and that they have adequate resources to investigate the case and test the State's evidence, the Innocence Protection Act will make miscarriages of justice such as occurred in the Williams' case less likely.

enth Annual Report on the State of Human Rights in Texas, September 2000.

Even more disturbing, there is now a whole category of capital cases in Texas known as "sleeping lawyer" cases, to which the State courts have responded with apathy. This attitude was chillingly conveyed by one Texas judge who reasoned that, while the Constitution requires a defendant to be represented by a lawyer, it "doesn't say the lawyer has to be awake." John Makeig, "Asleep on the Job? Slaying Trial Boring, Lawyer Says," Houston Chronicle, August 14, 1992, at A35. The Fifth Circuit Court of Appeals, sitting en banc in another sleeping lawyer case, was recently compelled to state the obvious: "Unconscious counsel equates to no counsel at all." *Burdine* v. *Johnson,* 262 F.3d 336, 348 (5th Cir. 2001), cert. denied, 122 S. Ct. 2347 (2002).

The lack of adequate counsel is also a continuing problem in other death penalty States, including Alabama, Arizona, Georgia, Louisiana, Mississippi, Nevada, and Pennsylvania. See, e.g., hearing of June 27, 2001 (statements of Bryan Stevenson, Denise Young, Stephen Bright, Clive Stafford Smith, Charles Press, Michael Pescetta, and Maureen Kearney Rowley); Bill Rankin, "Justice Delayed: A Report on Indigent Defense in Georgia," Atlanta Journal-Constitution, April 21–23, 2002 (3-part series). In general, capital defense services in these States are administered at the county level: there is no unified system of indigent capital defense. The public defenders and contract attorneys who handle capital cases in these States are often grossly underfunded, overworked, and inexperienced.

The crisis in postconviction proceedings is particularly grave. The failure of many States to provide adequate compensation and reimbursement of costs in capital postconviction cases has resulted in a chronic shortage of qualified counsel. Two States—Alabama and Georgia—do not guarantee counsel to death row inmates after a direct appeal to the State's highest court. In Alabama, dozens of death row inmates are unrepresented and have been unable to raise their constitutional claims in State postconviction or Federal habeas corpus petitions. See Janice Bergmann, "The Crisis in Post-Conviction Representation in Capital Cases since the Elimination by Congress of Funding for the Post-Conviction Defender Organizations" (Admin. Office of the U.S. Courts, rev. ed. 2001); hearing of June 27, 2001 (statement of Bryan Stevenson).

This is not how the American adversarial system of criminal justice is meant to work. Americans on trial for their lives should not be condemned to rely on sleeping lawyers, disbarred lawyers, lawyers with only a few years or months at the bar, lawyers with no capital or even criminal law experience, lawyers who fail to conduct even a rudimentary investigation, or lawyers who do not have the resources to carry out their constitutionally mandated function.

The Committee recognizes that a few States have established effective systems for providing indigents with qualified lawyers, such as the North Carolina system described below. But the unfortunate fact is that many jurisdictions—including many that sentence large numbers of people to death still do not have a working adversary system, even in cases in which a person's life is at stake.

No set of reforms can guarantee that the innocent will not be convicted, but Congress has a responsibility to, at a minimum, en-

sure that when people in this country are on trial for their lives, they will be defended by lawyers who meet reasonable minimum standards of competence and who have sufficient funds to investigate the facts and prepare thoroughly for trial. That goal can be achieved by cooperation between the States and the Federal Government whereby Congress provides funding to State criminal justice systems conditioned on minimum standards of fairness. Of course, States may improve on those minimum standards if they are so inclined.

1. Meaning of "effective system"

Section 201 of the bill authorizes a program under which the Federal Government will make available to the States "Capital Representation System Improvement Grants." States that choose to participate in the program will agree to use these Federal funds to establish, implement, or improve an "effective system" for providing competent legal representation to defendants in capital cases.

The Committee defined the term "effective system" with great care. Under section 201(d), such a system must include an entity to identify and appoint capital defense lawyers, and that entity must carry out its core functions independently of the three branches of State government. The entity will also establish qualifications for capital defense counsel, maintain a roster of qualified lawyers from which it will make appointments, conduct training of capital lawyers and monitor their performance. In an effective system, defense attorneys will be compensated at a reasonable rate comparable to the Federal rate for compensating capital defense lawyers, and will receive reasonable reimbursement for litigation expenses.

The Chairman's substitute amendment generally enhances State flexibility by moving away from the model of national counsel standards included in S. 486 as introduced. For example, the bill, as reported, does not prescribe the qualifications of lawyers appointed to represent capital defendants, leaving that task to State authorities. But the amendment still reflects the Committee's strongly held view that meaningful reform of capital indigent defense systems must include functional independence from the elected branches of government for the entity that appoints capital defense lawyers and reasonable compensation for the lawyers so appointed.[18]

ABA standards

These concepts are grounded in the work of various expert professional bodies that have studied the crisis in capital representation for decades. In a statement submitted to the Committee for its hearing on June 18, 2002, Indiana Law School Dean Norman Lefstein, testifying on behalf of the ABA, traced the notion of an independent appointing authority back to the 1973 National Advisory Commission that promulgated criminal justice recommendations to the Nixon Administration. The ABA adopted this model as

[18] The Minority Views suggest that this requirement of functional independence will destroy the States' ability to ensure the accountability and ethical behavior of defense attorneys. But nothing in the bill would affect the ability of courts and State bar associations to enforce ethical standards and take disciplinary action where necessary.

its official policy in the 1979 edition of its Standards for Providing Defense Services, and the 1989 edition of its Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (available at *www.abanet.org/legalservices/publications/home.html).* The ABA is in the process of preparing the second edition of the latter set of standards and Guideline 3.1 of that document provides that an agency "independent of the judiciary" should be designated to "recruit," "certify" and maintain a roster of qualified capital lawyers and "assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys." See also "ABA Standards for Criminal Justice, Providing Defense Services," Standard 5–1.3 (3d ed. 1990) (discussing need to secure professional independence for defender organizations and assigned counsel).

In his statement to the Committee, Dean Lefstein persuasively explained the importance of vesting responsibility for appointing defense lawyers in an independent body:

> There are a variety of reasons why judges should not appoint lawyers in indigent cases, or otherwise be involved in the overall supervision of indigent defense, and these arguments are even more compelling when capital cases are involved because the stakes are so much greater. The paramount reason for not having judges appoint defense lawyers is to assure that counsel always feels completely free to act in the client's best interest. While there are obviously many fine judges who preside over criminal cases, there are occasions when judges are angered by motions filed by defense attorneys, resent arguments advanced by counsel, and rule against lawyers insistent upon continuances. Judges, for example, are understandably concerned with moving their dockets, but this is not defense counsel's concern and should never be the reason that a lawyer fails to make arguments or take actions on the client's behalf.
>
> A lawyer should not have to fear reprisals of any kind from either the judge before whom he or she is appearing or some other judge before whom the lawyer might later appear. The power of judges to appoint lawyers and approve claims for compensation necessarily includes the power to withhold appointments and to reduce payments for the time lawyers devote to indigent cases.
>
> A lawyer's advocacy on behalf of an indigent defendant in an appointed criminal case, especially a capital case, should be no more inhibited than the lawyer's advocacy in representing a client in a retained private case. Judges do not select privately retained lawyers or prosecutors. Judges should not be involved in the selection and operation of indigent defense programs either. The appointment of counsel and the oversight of indigent defense by an independent authority should also alleviate the fear of defendants that the judge or some other court official in charge of assignments controls the defense lawyer.

Hearing of June 18, 2002 (statement of Dean Norman Lefstein).

This rationale also underlies standards published by the National Legal Aid and Defender Association (NLADA). Standards for

the Appointment of Counsel in Death Penalty Cases, available at *www.nlada.org/Defender/Defender_Standards/Standards For Death Penalty*. The NLADA standards call for designation of a body within each death penalty jurisdiction "for performing all duties in connection with the appointment of counsel" in capital cases and notes that this body may be the defender office or assigned counsel program of the jurisdiction or a "special appointments committee." Id., Standard 3.1.

The Constitution Project's Death Penalty Initiative, whose 30 members include former judges, prosecutors, and other public officials, issued a report last year recommending 18 reforms for the Nation's flawed death penalty system. The crucial and central 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. 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 postconviction 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.

"Mandatory Justice," at 2 (quoting ABA, "Criminal Justice Section Report," reprinted in 40 Am. U. L. Rev. 1, 9 (1990)). The report emphasizes that "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." Id. at 3.

Even the National Center for State Courts (NCSC), an organization reflecting the views of State judges, recognized in 1996 that "[m]uch more systematic and sophisticated methods are required to provide a higher level of representation" in capital cases because "the most common basis for postconviction relief in capital cases has been incompetence of counsel, quite legitimately so in a number of cases." NSCS, "Discussion Paper on Competence of Counsel in Capital Cases," at 2 (on file with the Committee on the Judiciary). The NCSC Paper noted "almost unanimous agreement" that "a program to provide competent counsel in death penalty cases must be administered at the state level," through the designation or creation of a State-wide administrative entity. Id. at 3. While NCSC stopped short of recommending that State judges be relieved of responsibility for appointing capital defense attorneys, it took account of the argument that appointments should be "carried out by an administrative entity, because the appearance of judicial detachment is undermined by involvement of judges in certification, appointment and monitoring" and observed that where judges retain the duty to appoint lawyers "they may have to operate within defined parameters, using lists provided to them." Id. at 13.

Each of these expert bodies also identified reasonable compensation of defense attorneys as a fundamental element of an effective capital counsel system. The ABA and NLADA insist on compensation "for actual time and service performed * * * [at] a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation." ABA Guideline 10.1(A); NLADA Standard 10.1(A). The Constitution Project urges States to 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. "Mandatory Justice," at 5. And the NCSC Discussion Paper observes that:

> Low fees discourage competent attorneys from seeking assignments in capital cases and expending the time and effort to provide an adequate defense. The low fees may result from policies that impose a cap on attorney compensation, set a flat rate per case, or simply set a very low hourly rate.

NCSC Discussion Paper at 8. See also Conference of Chief Justices, Resolution XVII: Competence of Counsel in Capital Cases, August 3, 1995 (calling for "timely appointment of competent counsel, with adequate resources, to represent defendants in capital cases at each stage of such proceedings").

The views of these expert professional bodies has been validated by empirical evidence. Dean Lefstein has published a study of Indiana's capital counsel standards and concluded that since their adoption in 1994, "no person has been released from the State's death row because of innocence. Nor has there been a case in which lawyers were appointed pursuant to the Supreme Court's rule, complied with its requirements, and were held to be ineffective." Hearing of June 18, 2002 (statement of Dean Norman Lefstein).[19] And Columbia Law School Prof. James Liebman and his colleagues concluded that the startlingly high incidence of error in capital cases could be reduced if death penalty jurisdictions were to (1) establish standards assuring that only well-qualified lawyers represent capital defendants; (2) adopt methods of appointing capital lawyers that avoid patronage considerations and rewards to financial contributors to judicial campaigns; and (3) ensure sufficient compensation and reimbursement for experts, investigators and other litigation necessities to trigger the formation of a stable and qualified capital defense bar. "A Broken System," part II, at 418.

Thus, the definition of "effective system" in the Innocence Protection Act is consistent with proposals put forward by practitioners and scholars who have examined the issue in depth over the course of many years. The time has come for Congress to recognize the capital representation crisis that experts long ago identified and to

[19] The Minority Views correctly point out that Indiana court rules permit trial judges to appoint counsel in capital cases. Dean Lefstein's praise of the Indiana system is based on the fact that Indiana has stringent standards governing who may be appointed in capital cases, so while judges make the appointments their choices are constrained by the standards. Indeed, the Committee understands that Indiana judges largely rely on the recommendations of the Indiana Public Defense Commission in making capital appointments. Also, Indiana reimburses capital lawyers at the relatively high rate of $90 per hour, a rate that will increase to $93 per hour effective January 1, 2003, and does not place a cap on total reimbursements.

accept the recommendations of the legal profession for responding to this emergency.

Example of an "effective system"

A good example of a State that has already established an effective system is North Carolina, where 2 years ago the legislature adopted sweeping reforms to the process by which lawyers are appointed for indigent defendants in death penalty cases. The centerpiece of these reforms was the creation of a centralized, independent appointing authority. See generally Indigent Defense Services Act of 2000, codified at N.C. Gen. Stat. § 7A–498 et seq.; Rules of the Commission on Indigent Defense Services (2001), available at *www.aoc.state.nc.us/www/ids/*.

The legislation created the 13 member Commission on Indigent Defense Services and its full-time staff, the Office of Indigent Defense Services. Five members of the Commission are appointed by the North Carolina bar and other members are appointed by the Governor, the Chief Justice, and the State legislature. Ten members of the Commission themselves appoint an additional three at-large members. Commission members serve four-year terms and are functionally independent of the entity that appointed them.

The Commission appoints a statewide Capital Defender who is accountable to the Commission but not subservient to the judiciary or to the political branches of government. The Capital Defender supervises a staff (currently four lawyers) of death penalty specialists and also compiles and maintains a roster of private lawyers and public defenders who are qualified to try capital cases. Lawyers even those who work for one of the State's county-wide public defender offices—must apply to be included on the roster. Applications are assessed based on both objective and subjective criteria such as seniority, trial experience and confidential assessments from judges and other lawyers. These criteria are set forth in regulations promulgated by the Commission.

Each morning a computerized system alerts the Capital Defender to every case in the State in which a defendant has been charged with general or first-degree murder (i.e., a death eligible case). There are approximately 600 such cases each year in North Carolina. In these cases the trial judge has no role in the appointment of counsel; instead, the Capital Defender appoints one or two defense lawyers for each defendant, depending on the likelihood that the case will actually be tried capitally. (If the case is tried capitally, the defendant is entitled to two lawyers by statute). The Capital Defender may appoint himself and his staff, or he may appoint lawyers from the roster.

The Commission handles all compensation in capital cases and has authorized a rate of $85 per hour for in-court and out-of-court work. This compares with a $65 per hour rate in noncapital cases and contrasts favorably with the hourly rate for capital representation in other States in the region. Both defense and prosecution expenses are paid from State funds, not county funds. A parallel independent appointment system exists for appeals from capital convictions and State postconviction proceedings.

The appointment system adopted by North Carolina is not the only model that would qualify as an "effective system" under the bill. Other States have already adopted reforms that would satisfy

the statutory criteria or that move in the right direction. The Committee does not intend to establish a one-size-fits-all definition of an effective system. Rather, the Committee has set forth the key parameters of such a system, including an independent appointing authority and reasonable compensation for attorneys and expenses.

It is expected that the independent appointing authority in each State will utilize a roster system of the kind used in North Carolina and other States. As a result of amendments adopted during markup, the reported bill provides some specific direction regarding the qualifications of attorneys on the roster. Among the many factors an appointing authority is to consider in determining if an attorney is qualified to represent indigents in capital cases is whether, during the past 5 years, the attorney (1) has been sanctioned for ethical misconduct; (2) has been found to have rendered constitutionally ineffective assistance of counsel; or (3) has asserted his own constitutional ineffectiveness in relation to three or more felony cases.

None of these factors is an automatic basis for permanent disqualification. Attorneys are sanctioned for all kinds of conduct, some very serious, some relatively minor. Similarly, the fact that an attorney has been found to have rendered ineffective assistance in a case may mean that he should not be appointed in subsequent cases, but it may not, just as a doctor who has lost a malpractice suit may still be competent to practice medicine. Indeed, it is often the most experienced professionals who have made a mistake at some point over a long career. For example, an attorney's failure to assert a seemingly meritless claim that later prevailed in another case due to the reversal of existing law is not disqualifying conduct.

2. Need for enforcement suits

Section 202 of the bill authorizes litigation by private parties to ensure that a State which accepts Federal funding to improve its capital indigent defense system complies with the statutory conditions on that funding.

Oversight by the agency administering the grant program is the ordinary means for ensuring compliance with statutory conditions, but in this instance agency oversight is insufficient. The Justice Department is itself a prosecutorial agency with close ties to prosecutorial agencies in the States, and it is unrealistic to expect the Department to be the sole oversight mechanism for a program designed to strengthen the defense function. Section 202 thus authorizes enforcement lawsuits that will enable the Federal courts to make an impartial assessment of State indigent defense programs and to order any changes needed to bring failing programs into compliance.

The Committee has deliberately authorized any "person" to bring an enforcement suit. The Supreme Court has held that Congress may eliminate any nonconstitutional barriers to a private person's standing that might otherwise apply, as long as Congress makes that intention clear by authorizing "everyman" to sue in Federal court to enforce Federal law. *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997). A person whose interests are widely shared with others may serve as a plaintiff. *Federal Election Commission* v. *Akins,* 524 U.S. 11, 24–25 (1998). Section 202 clearly states the Committee's

intention to exercise all the power at Congress' disposal to authorize "citizen suits" in this context.

A person who initiates an enforcement suit under this section acts not only for himself, but also for the United States. The Supreme Court has held that Congress can assign its capacity to sue to a private party. *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773–74 (2000). Such an assignment permits a private person to proceed even though the person would not satisfy the constitutional prerequisites for standing in his own right. The United States itself has standing to sue a State for failing to comply with the terms of a Federal grant and may assign that capacity to a private relator. The United States has a sovereign interest in enforcing Federal law, a quasi-sovereign interest in protecting the beneficiaries of Federal law, and a proprietary interest in ensuring that Federal funds are used according to conditions fixed by Federal law. Section 202 tracks the provision of the False Claims Act that was before the Court in *Stevens.* The provision in section 202 authorizing the Attorney General to intervene in an enforcement suit, like the similar provision in the False Claims Act, ensures that the executive branch will have political responsibility for enforcement lawsuits.

An enforcement lawsuit under this section will name a State executive officer as the defendant; if a court concludes that relief is appropriate, it will issue declaratory or injunctive relief running to that officer, plus costs and fees. The relief available in an enforcement suit, accordingly, will redress an ongoing violation of Federal law. The Supreme Court has held that a State officer cannot invoke the State's sovereign immunity as a defense to such an action. *Verizon Maryland Inc.* v. *Public Service Comm'n*, 122 S. Ct. 1753, 1760–61 (2002) (explaining *Ex parte Young*, 209 U.S. 123 (1908)). The Court has also held that State sovereign immunity does not prevent the award of attorney's fees against a State or State officer. *Hutto* v. *Finney*, 437 U.S. 678, 691–92 (1978).

The Supreme Court has also recognized that Congress can create private rights of action to enforce the provisions of Federal statues enacted under the Spending Power, so long as Congress is clear. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002). Section 202 clearly states Congress' intention to do just that. Congress has frequently authorized citizens to bring lawsuits in Federal court against States to enforce statutory rights. Examples include the Safe Drinking Water Act, 42 U.S.C. 300j–8(a); the Endangered Species Act, 16 U.S.C. 1540(g); and the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C. 9659(a). In addition, the Supreme Court has recognized implied private rights of action against States under several statutes, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and the Voting Rights Act of 1965, 42 U.S.C. 1973 et seq. See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100 (2002); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 557 (1969).

Title VI of the Civil Rights Act is an especially important precedent. In that law, Congress established nondiscrimination as a condition of Federal funding to States. Federal agencies enforce this condition through administrative actions and litigation, but private rights of action are recognized as a necessary adjunct to agency enforcement.

The Supreme Court has applied a contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable in private suits under spending clause legislation. A withdrawal of funds is not the only acceptable means of enforcing conditional grants; rather, a funding recipient may be enjoined to comply with the clear terms of the relevant statute. See *Barnes*, 122 S. Ct. at 2101.

3. Appropriateness of special funding mechanism

Title II of the bill as reported includes two unusual funding mechanisms that the Committee determined were necessary to achieve the goals of improving capital indigent defense systems in the States.

Under the first special funding mechanism, if Congress fails to fully fund the new grant program, up to 10 percent of the Byrne block grant will be used for this purpose. This provision is justified for several reasons. First, it is only a contingency: if Congress appropriates sufficient money for this program, then the Byrne programs are unaffected. Second, the Committee recognizes that there is an unfortunate bias against funding for criminal defense programs at both the State and Federal levels. The incentive in this section is necessary to overcome this traditional reluctance to fund defense lawyers. Third, even if this provision is triggered, the amount of Byrne money each State receives remains the same, but money is targeted to this activity. (Of course, Byrne grants to States without capital punishment are unaffected). Finally, this provision is part of a compromise bill that otherwise reduces Federal mandates on States that authorize capital punishment.

The second special funding mechanism provides that if a State fails to apply or qualify for funding under section 201 of the bill, grants are to be made available under section 203 to qualified capital defender organizations that provide services in the State. This provision provides an incentive for States to accept funding to improve their own systems, and provides a means for improving capital indigent defense services in States that chooses not to participate in the Federal program itself.[20]

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[20] The Minority Views oppose section 203, arguing that it would, in effect, refund the Death Penalty Resource Centers (also known as Post-Conviction Defender Organizations, or "PCDOs") which, according to the Minority Views, routinely engaged in "unethical behavior, misconduct, and abuse of the legal process." The Committee accepts neither the conclusion nor its underlying premise.

First, it bears repeating that section 203 is a provisional measure: no grants will be made under section 203 in States that have received funds under section 201. Second, the program established by section 203 differs from the PCDO program in several important respects, including the fact that it would be administered by the Department of Justice and not by the U.S. Judicial Conference, the judicial branch agency responsible for administering the PCDO program. Third, the PCDO program was, in fact, highly successful. A Judicial Conference report dated March 1993 concluded that PCDOs "provided invaluable services in an appropriate and cost efficient manner." Specifically, the report stated, PCDOs "facilitated the appointment of competent attorneys in capital cases," "brought a higher quality of representation to those cases," and "streamlined the capital litigation process by expediting cases and avoiding costly repetitive legal proceedings." "Report of the Judicial Conference of the United States on the Federal Defender Program," March 1993, at 26 (on file with the Committee on the Judiciary). A second report, which was approved by the Judicial Conference in September 1995, also gave the PCDOs high marks. Prepared by a special subcommittee chaired by Eleventh Circuit Judge Emmett Ripley Cox, and based on a careful review of a wide variety of views and data, the report found that PCDOs "facilitated the provision of counsel to death-sentenced inmates," "enhanced the quality of representation," and "help[ed] control the cost of providing that representation." The report concluded by recommending that "PCDO funding should be continued so that PCDOs may continue to play a vital role in providing representation in capital habeas corpus cases." Finally, a 2001 publication by the Administrative Office of the U.S. Courts, which describes each State's capital representation system after Congress stopped funding PCDOs, provides ample

Subsection 203(f), added during the Committee markup, sets out several factors for the Attorney General to consider when deciding which capital defender organizations to award grants, including whether an organization has been found to have filed large numbers of "frivolous" claims in State capital cases, with the effect of unreasonably delaying or otherwise interfering with the State's administration of its capital sentencing scheme. The Committee approved the term "frivolous," which implies some measure of bad faith, rather than "meritless," which may be used to describe any claim that ultimately failed. As Senator Kyl observed during the first day of the Committee markup of S. 486, the term "frivolous" requires "a subjective judgment about whether they [i.e., the capital defender organizations] really intended to just delay."

Like all lawyers, defense attorneys are ethically bound to represent their clients zealously. On the other hand, a lawyer has a duty not to assert a claim unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law. ABA Model Rules of Professional Conduct, rule 3.1. In determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. Id., comment [1]. The Committee recognizes that a defense lawyer may legitimately assert a large number of claims in order to avoid procedural default of such claims as may become viable at a later stage in the litigation. *Cf. Smith* v. *Murray*, 477 U.S. 527 (1986) (holding that petitioner's meritorious constitutional claim was procedurally barred, and that petitioner must therefore be executed, because counsel elected not to press the claim before the State supreme court on direct appeal in light of governing precedent, which was then entirely valid and only 2 years old, that decisively barred the claim).

The Committee emphasizes that, if no grant is made under section 201 to a State, then the Attorney General shall make grants under section 203 to one or more qualified capital defender organizations in the State. Nothing in subsection 203(f) authorizes the Attorney General to deny grants to all such organizations. To facilitate Committee oversight of this provision, the Attorney General must notify Congress before denying a grant based in whole or in part on a listed consideration.

D. NEED FOR OTHER REFORMS

The Committee's hearings shed light on a number of other problems in the Nation's criminal courts, especially applicable to cases involving the death penalty. The bill as reported addresses three of these ancillary matters.

1. Supreme Court procedure

Senator Specter focused the Committee's attention on an anomaly in the appeals process that allows a prisoner to be executed even after the Supreme Court has agreed to hear the case.

In 1990, for example, four members of the Court voted to grant certiorari to death row inmate James Edward Smith, but for some unknown reason the Court did not formally act on the petition. The

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evidence that the defunding of the PCDOs made an already bad situation incomparably worse. See "The Crisis in Post-Conviction Representation in Capital Cases since the Elimination by Congress of Funding for the Post-Conviction Defender Organizations," supra.

Court also did not vote to grant a stay of execution. Smith was subsequently executed. The Court then denied the petition, noting that the case was now "moot." *Hamilton* v. *Texas,* 498 U.S. 908, 911 (1990) (Stevens, J., concurring).

In the 1992 case of *Herrera* v. *Collins,* 502 U.S. 1085, the Court actually granted certiorari, but then failed to grant a stay of execution. Herrera's claim was that he was factually innocent of the crime for which he had been sentenced to death. Ultimately, the Texas Court of Criminal Appeals granted a stay while the case was pending before the Supreme Court, allowing the Court to consider the case on the merits.

These anomalies result from idiosyncrasies in Supreme Court procedure. Although certiorari is recognized by statute as the procedure by which the Court hears a case, the statute does not state how many votes are needed. By Court practice, only four votes are required to grant certiorari. To grant a stay, however, there must be a majority—five votes—and the standard the Court applies is different from that for granting certiorari. There may be good reasons why the standard is different, and in almost all other cases, the failure to grant a stay when certiorari has been granted does not have the dispositive effect that it does in a capital punishment case. But in a capital case, the denial of a stay means that the petitioner is executed, and the case mooted, even though four Justices considered his constitutional claim important enough to be heard.

For many years, the Supreme Court had an informal practice whereby a fifth Justice would vote to grant a stay when four Justices had voted to grant certiorari. The late Justice Brennan articulated the rationale for this rule:

> A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this "anti-majoritarianism" is evident: in the context of a preliminary 5–4 vote to deny, 5 give the 4 an opportunity to change at least one mind. Accordingly, when four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the "Rule of Four" will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits.

Straight v. *Wainwright,* 476 U.S. 1132, 1134–35 (1986) (Brennan, J., dissenting).

No defendant has a right to have his or her case heard by the Supreme Court. See Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."). But once a defendant has had his certiorari petition granted, he expects to have his case heard. This is the expectation of all those seeking Supreme Court review—an expectation resulting from the longstanding practices of the Court. The Court already has great discretion not to hear virtually any case it does not wish to consider. Congress has given the Court this discretion by eliminating almost all avenues of appeal by right to the Court and instead giving the Court the power to pick the cases it wants to hear through the certiorari process. Since Congress has created this 2-step procedural

mechanism, Congress has the authority to ensure that it is effective. The Court does not have to grant a petition, but once it has done so, it must not allow the case to become moot by failing to take steps to preserve its jurisdiction.

The strength of our justice system is predicated upon the notion that Americans see the system as being fair to all. To the average American, when the Supreme Court has decided to consider a case by granting certiorari, but then fails to act to ensure that it can in actuality hear the case, fundamental questions about fairness are raised, regardless of the procedural nuances that permit such a result. It defies logic and makes a mockery of the phrase "equal justice" when four votes results in Supreme Court review of a case in virtually all circumstances, but not when a person's life hangs in the balance.

2. Compensation of wrongfully convicted prisoners

Society bears a debt to individuals who have been convicted and incarcerated for crimes they did not commit. How are they compensated for all the years they spent behind bars, sometimes on death row, for all the lost wages, for all the pain and suffering?

In most cases, there is no compensation, or at least not much. Under current Federal law, as enacted more than 60 years ago, the Federal Government pays a miserly $5,000 in cases of unjust imprisonment, regardless of the length of time served. See act of May 24, 1938, ch. 266, 1–4, 52 Stat. 438. This cap is substantially lower than comparable limits established by States that have adopted statutes to compensate the wrongfully imprisoned. For example, Iowa and Ohio award up to $25,000 per year of imprisonment, plus lost wages, attorney's fees, fines and court costs. Iowa St. 663A.1(6); Ohio Rev. Code Ann. § 2743.48(E)(2). California sets damages at $100 per day ($36,500 per year). Cal. Penal Code § 4904. Maine allows damage awards of up to $300,000. 14 Me. Rev. Stat. Ann. § 8242(1). Texas's cap is $500,000. Tex. Civ. Prac. & Rem. § 103.105(c). And at least three jurisdictions—New York, West Virginia, and the District of Columbia—do not limit damages at all. N.Y. Ct. Claims Act § 8–b (6); W. Va. Code § 14–2–13(g); DC St. § 2–423. On the other hand, most States have no statute to compensate the wrongfully imprisoned, with the result that innocent inmates are barred from recovering any damages at all. See generally Richard Willing, "Exonerated prisoners are rarely paid for lost time," USA Today, June 18, 2002; Adele Bernhard, "When Justice Fails: Indemnification for Unjust Conviction," 6 U. Chic. L. Sch. Roundtable 73 (1999); Michael Higgins, "Tough Luck for the Innocent Man," ABA Journal 46 (March 1999).

The Committee heard testimony on this issue from Michael Graham. Graham was 22 years old and working as a roofer when he was arrested in Louisiana for a brutal double murder. After a short trial, he was convicted and sentenced to death. For the next 13 years, he spent 23 hours a day in his 5-by-10 foot cell, alone. He was finally released from prison in December 2000, when the State Attorney General admitted that there was a "total lack of credible evidence" linking Graham to the crime. As Graham told the Committee in June 2001:

> Half of my adult life had been taken from me. I had been falsely branded as a murderer in connection with hor-

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

Graham's codefendant, Albert Burrell, was released from prison a few days after Graham. He, too, received no compensation for his years on death row.

Walter McMillian was convicted of a capital offense and imprisoned for 6 years, including being sent to Alabama's death row for 13 months before his capital trial. His case went through four rounds of appeals, all of which were denied. New attorneys, not paid by the State of Alabama, voluntarily took over the case and eventually found that prosecutors had illegally withheld exculpatory evidence. Finally, the State agreed to investigate its earlier handling of the case and admitted that a grave mistake had been made. See Bryan Fair, "Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb," 45 Alabama L. Rev. 403 (1994); "Innocence and the Death Penalty," hearing before the Senate Committee on the Judiciary, 103rd Cong. 16–21 (1993) (statement of Walter McMillian).

Despite many years of litigation, McMillian has never been given any recompense for the years he was unjustly held on death row. His attorney took the issue of just compensation all the way to the U.S. Supreme Court, but to no avail. *McMillian* v. *Monroe County,* 520 U.S. 781 (1997) (affirming dismissal of McMillian's civil rights action against Alabama county sheriff).

Another wrongly convicted man, Calvin Johnson, wrote to the Committee about his efforts to obtain compensation from the State of Georgia for the years of suffering that he and his family endured before he was exonerated by DNA testing in 1999:

> Those 16 years [in prison] were the hardest years of my life, and the only consolation I felt came from the love of my family and my faith in a higher power that one day the truth would prevail.
>
> Everyday that I woke up behind bars, everytime the door locked on my cell, everytime I cut a bush or swept a floor, everyday that I put in eight hours work for the State of Georgia for 16 years not receiving a penny for one single day, everytime I received a visit and watched as my family walked out the door, and as my fiancee left to pursue her own life, a life without me, a life to start her family, a family that I now couldn't give her, everytime I saw a happy couple or a small child, I felt a deep cut inside of me. It was the thought of what could be. Instead each day as I looked into the mirror and saw the events of life going on without me, I felt a deep, deep waste.
>
> When my mother suffered a stroke shortly after my conviction I knew her heart had been broken. When I couldn't be there for her, when I couldn't help in anyway, when she suffered heart attack after heart attack as the years went by, my own heart nearly broke. As I watched her health deteriorate, and watched as my family suffered both financially and emotionally my heart fell to my knees.

> How can one describe the pain you feel when your behind bars for a crime you know you didn't do. When the prison counselor tells you, you may never receive parole if you don't sign an admission of guilt and complete a sexual offenders program, when the parole board denies you parole over and over again because they say you won't accept responsibility for the crime, when staff, guards, and fellow inmates all looked down upon you because your labeled as a sex offender. Nothing can possibly express what I or my family endured for those 16 years. * * *
>
> Where would I have been if those 16 years had not been stolen from me? Would I have a family of my own, would I own my own home, would I have money saved for my children's future, could I go to a bank and obtain a loan? My answer is yes, and now after 16 years with no family of my own, no home of my own, no real credit established, all I want is the opportunity to fulfill my dreams, to help my parents in the later years of their life, to live the American dream, and to be a productive and active citizen in our society.

Putting one's life back together after such an experience is difficult enough, even with financial support. Without such support, a wrongly convicted person might never be able to establish roots that would allow him to contribute to society. To help repair the lives that are shattered by wrongful convictions, the bill raises the Federal cap on compensation, and urges States to follow suit—at least in cases where the wrongly convicted person was sentenced to death. The new Federal cap proposed by the bill as reported is significantly lower than the cap proposed by the bill as introduced, and significantly lower than many Members of the Committee think appropriate. It is very least that the Congress should do.

3. Loan forgiveness

Today's law students graduate with staggering amounts of student loan debt. A recent analysis using data collected by the U.S. Department of Education estimates that the average cumulative indebtedness for the law school class of 2000 (encompassing both undergraduate and law school loan debt) was $77,300. "Update on Annual and Cumulative Borrowing Trends Among Law and Other First-Professional Students, 1992–93, 1995–96, and 1999–2000," prepared by Kipp Research and Consulting for Access Group, Inc., June 11, 2002 (on file with the Committee on the Judiciary). A study of the student loan indebtedness of assistant district attorneys in New York found that nearly 20 percent of them owe in excess of $100,000 on student loans, while a survey of public defenders in Massachusetts found total student loan burdens of up to $140,000. See hearing of June 18, 2002 (statement of Hon. Paul Logli); Letter to Senator Kennedy from William J. Leahy, Chief Counsel, Massachusetts Committee for Public Counsel Services, September 25, 2002 (on file with the Committee on the Judiciary). By contrast, the average entry-level public interest legal salary is only about $34,000. See ABA Commission on Loan Repayment and Forgiveness, "Commission Information and Loan Repayment/Forgiveness News," *www.abanet.org/legalservices/lrap/home.html* (last updated March 25, 2002).

These enormous loan burdens are a relatively recent phenomenon. The ABA reports that average law school tuition has more than doubled since 1990, and has increased more than tenfold since 1975. ABA Section of Legal Education and Admissions to the Bar, "Median Tuition at ABA Approved Law Schools," 2000 (on file with the Committee on the Judiciary). This is approximately three times the rate of inflation over the same period. See American Institute for Economic Research, "Cost of Living Calculator," *www.aier.org/cgi-bin/colcalculator.cgi.* Student loans which were unnecessary in 1975 (when private law school tuition was $2,525 and public law school tuition for in-State residents was $700) and at least manageable in 1990 (when tuition was $11,680 and $3,012, respectively), now constitute a major barrier to the recruitment and retention of competent and skilled young lawyers to public-service careers as prosecutors or public defenders. The barrier is greatest for low-income students with the highest loans, consisting disproportionately of minorities.

According to the Department of Justice, nearly one-third of prosecutors' offices across the country reported problems recruiting or retaining staff attorneys in 2001. Low salaries were cited as the primary reason for the problems. Bureau of Justice Statistics, "Prosecutors in State Courts, 2001," NCJ 193441, May 2002, at 3, available at *www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf.*

Similar surveys of public defender offices report significant difficulty in recruitment and retention of attorneys due mainly to low salaries and high student loan debt. A 2002 survey by Equal Justice Works (formerly the National Association for Public Interest Law) and the National Legal Aid and Defender Association found that educational debt is cited by 88 percent of public interest legal employers as a major problem in recruitment, and by 82 percent in retention. See *www.equaljusticeworks.org/news/index.php-view=detail&id=1166.* At the Legal Aid Society in New York City, public defenders take second jobs to make ends meet, and exit interviews have shown that the No. 1 reason for abandoning a career as a public defender is student loan debt. Letter to Senator Patrick Leahy from Susan Hendricks, Deputy Attorney-in-Charge, The Legal Aid Society, September 25, 2002 (on file with the Committee on the Judiciary).

Nowhere in public service is it more important to encourage the recruitment of competent lawyers and the retention of experienced ones than in the disciplines of prosecution and public defense, where people's lives and liberty hang in the balance. Lawyers on both sides of a capital case shoulder the weightiest burden our civilization imposes on the legal profession: sorting out people who deserve to be put to death from those who do not. The cost of the unskilled or inappropriate discharge of one's professional responsibilities, including overzealousness on the part of a prosecutor or laxity on the part of a public defender, can be the execution of an innocent person—the most unthinkable corruption of a justice system that is held out as a model to the world.

The Illinois Governor's Commission on Capital Punishment recently included among its recommendations for avoiding the execution of the innocent a recommendation that efforts be undertaken to reduce the burden of student loans for those entering careers in criminal justice. "Report of the Governor's Commission on Capital

Punishment," April 2002 (recommendation 81), available at *www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html.* Legislation extending varying degrees of student loan repayment assistance to prosecutors and public defenders has been passed in four States (California, Georgia, Maryland, and Texas), and considered in six others (Connecticut, Florida, Illinois, Michigan, New York and Washington). See ABA Commission on Loan Repayment and Forgiveness, "State Loan Forgiveness/Repayment Legislation," *www.abanet.org/legalservices/lrap/statelegislation.html* (last updated August 6, 2002).

The Federal Government has a legitimate interest in helping the Nation's prosecutor and public defender offices recruit and retain highly skilled young lawyers. A report issued in 2000 by the Justice Department's Office of Justice Programs concludes that both prosecutors and public defenders should have access to student loan forgiveness as "an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing." "Improving Criminal Justice Systems through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense," NCJ 181344, February 1999, at x, available at *www.ojp.usdoj.gov/indigentdefense/icjs.pdf.* While the Federal Government cannot and is not expected to pay the salaries of local prosecutors and public defenders, providing student loan repayment assistance can provide a powerful incentive for many to make their careers in State and local criminal justice systems.

There are two principal Federal student loan programs: the Stafford Loan Program (20 U.S.C. 1071 et seq.) and the Perkins Loan Program (20 U.S.C. 1087aa–1087ii). Both provide long-term, low-interest loans to students for post-secondary education.

In recent years, Congress has enacted several student loan repayment programs to help recruit and retain individuals with Stafford and Perkins loan debt in occupations that can offer only modest salaries, including teachers, child care providers, law enforcement and corrections officers, and nurses and medical technicians. See, e.g., 20 U.S.C. 1078–10, 1078–11; 1087j, 1087ee. The ratio of debt to salary for individuals in these occupations is usually far less than for new lawyers considering a career in prosecution or public defense, due to the combined burden of undergraduate and law school loans.

As reported by the Committee, S. 486 establishes a program under which full-time prosecutors and public defenders who agree to remain employed for the required period of service may apply for repayment assistance of their Federal Stafford loans. This program is modeled after the Stafford loan repayment program in current law for Federal employees. See 5 U.S.C. 5379.

The reported bill also extends the existing Perkins loan forgiveness program (20 U.S.C. 1087ee) to public defenders. Prosecuting attorneys are already eligible for loan forgiveness under this program in their capacity as law enforcement personnel. Establishing equivalent eligibility for full-time public defenders recognizes that the public defense function is equally essential—indeed, it is constitutionally required—to the process of enforcing the Nation's criminal laws. For the adversarial system of criminal justice to op-

erate effectively, efficiently and reliably, there must be balanced resources between prosecution and indigent defense.

E. SUPPORT FOR LEGISLATION

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

The bill has also been endorsed by numerous editorial boards across the country, including The New York Times ("Death Penalty Reform in the Spotlight," 6/18/02); Washington Post ("Pass This Bill," 7/15/02); Arizona Daily Star ("Fatal Mistakes," 6/7/02); Arizona Republic ("DNA Serves Justice Life, Death at Stake," 6/14/02); Bangor Daily News ("Protecting the Accused," 7/10/02); The Charlotte Observer ("Punish the Guilty," 6/5/02); Chicago Daily Herald ("Essential Death Penalty Reforms," 7/31/02); Christian Science Monitor ("Death Penalty Fixes," 7/24/02); Columbus Dispatch ("Protecting the Innocent," 8/3/02); Cumberland Times-News ("Congress Moves to Protect Innocent," 6/5/02); The Desert Sun ("Death Penalty Act Merits Support," 6/5/02); Erie Times-News ("How We Answer Death Row Doubts," 6/9/02); Greensboro News & Record ("When the Innocent Spend Years in Prison," 6/7/02); The Indianapolis Star ("Congress Should Enact the Innocence Protection Act," 7/2/02); Lakeland Ledger ("Rum Justice," 7/28/02); Los Angeles Times ("In Defense of the Innocent," 9/21/02); Long Beach Press-Telegram ("Protecting the Innocent," 5/23/02); The Miami Herald ("Help for Poor Defendants," 7/24/02); The Morning Call ("Politics

As Usual," 5/26/02); The Orlando Sentinel ("Back DNA Tests; Our Position: Congress Should Pass A Law Preventing Execution of Innocent People," 9/7/02); Pasadena Star News ("Spare Innocents Death Penalty," 8/2/02); Peoria Journal Star ("Put Additional Safeguards in the Death Penalty," 6/26/02); Philadelphia Inquirer ("Protecting The Innocent; Federal Action Is Needed On Executions," 9/4/02); The Roanoke Times ("Death Penalty Reform is Overdue," 6/17/02); San Antonio Express-News ("Giving Inmates Access to DNA Tests Only Just," 08/19/02); Star Tribune ("Protect the Innocent: Another Death Penalty Fix," 7/27/02); St. Louis Post Dispatch ("An Apology Isn't Enough," 8/6/02); The Tennessean ("A Fairer System of Justice," 6/19/02); The Topeka Capital Journal ("Death Penalty Rulings—Sane Safeguards," 6/30/02); Tulsa World ("New Rules for Death Row," 6/28/02); University of Florida/University Wire ("Innocence Protection Act Victory for America, Congress," 7/23/02); and The Virginian-Pilot ("Congress Takes Small Step to Avert Wrongful Verdicts," 6/24/02).

The Committee also received a letter endorsing S. 486 signed by more than 50 current and former prosecutors, law enforcement officers, and Justice Department officials who have served at the State and Federal levels, some of whom support capital punishment and some of whom do not.[21] The letter states:

> 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 postconviction 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.

[21] Signatories to the letter include the following former Federal prosecutors: Former Director of the FBI William S. Sessions; Former Deputy Attorneys General Arnold I. Burns, Phillip Heymann, and Harold R. Tyler, Jr.; Former Associate Attorney General John Schmidt; Former Assistant Attorney General Laurie Robinson; Former Associate Deputy Attorneys General Robert S. Litt and Irvin Nathan; and Former Special Attorney for the Attorney General Beth Wilkinson; Former U.S. Attorneys Robert C. Bundy, Zachary W. Carter, W. Thomas Dillard, Gaynelle Griffin Jones, Thomas K. McQueen, and Katrina Pflaumer; and Former Assistant U.S. Attorneys Matthew Bettenhausen, David B. Bukey, Howard W. Goldstein, Jeremy Margolis, Charles B. Sklarsky, Neal R. Sonnett, and Ketih Uhl. Sitting district attorneys who signed the letter include William M. Bennett (Hampden County, MA); Charles Hynes (Kings County, NY); E. Michael McCann (Milwaukee County, WI); Robert M. Morgenthau (New York County, NY); William L. Murphy (Richmond County, NY); Thomas J. Spota (Suffolk County, NY). Former State attorneys general who signed the letter include Francis X. Bellotti (MA); William G. Broaddus (VA); W.J. Michael Cody (TN); Tyrone C. Fahner (IL); Lee Fisher (OH); Scott Harshbarger (MA); Jim Mattox (TX); Charles M. Oberly, III (DE); and Ernie Preate (PA). Other former State prosecutors who signed the letter include William Aronwald (NY); J. William Codinha (MA); Timothy M. Gunning (MD); Terence Hallinan (CA); Thomas R. Kane (MD); William J. Kunkle, Jr. (IL); Jim E. Lavine (TX); Ralph C. Martin, II (MA); Randi McGinn (NM); Phyllis J. Perko (IL); Alan Silber (NJ); and Harry S. Tervalon, Jr. (LA). The letter is also signed by two former State court judges, retired Florida State Supreme Court Justice Gerald Kogan and retired Ilinois Appellate Court Justice Dom Rizzi.

V. SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents

Section 2. Severability clause

This standard severability clause states that if any provision of the act is held to be unconstitutional, the remainder of the act is not affected.

TITLE I—EXONERATING THE INNOCENT THROUGH DNA TESTING

Section 101. DNA testing in Federal criminal justice system

This section establishes rules and procedures governing applications for DNA testing by inmates in the Federal system. It authorizes DNA testing where the testing has the scientific potential to produce new, non-cumulative evidence that is material to the applicant's claim of innocence, and that raises a reasonable probability that he or she would not have been convicted. Testing is barred if the court finds that the application was made to interfere with the administration of justice rather than to support a valid claim. Where test results are exculpatory, the court shall order a hearing and make such further orders as may be appropriate under existing law. Where test results are inculpatory, the court shall assess the applicant for the cost of the testing and submit his or her DNA to the CODIS database.

In addition to establishing procedures for postconviction DNA testing, this section prohibits the destruction of biological evidence in a criminal case while a defendant remains incarcerated, absent prior notification to the defendant of the Government's intent to destroy the evidence. Violations of this preservation provision are punishable by fine or, in the case of willful and malicious violations, criminal liability.

Section 102. DNA testing in State criminal justice system

This section conditions the receipt of certain Federal grants on a State's adopting adequate procedures for preserving DNA evidence and making DNA testing available to inmates. States must also agree that, in cases where DNA testing exonerates an inmate, they will investigate the causes of such convictions and take steps to prevent such errors in future cases. Finally, if a State authorizes capital punishment, it must agree to establish a program of prosecutor-initiated DNA testing in appropriate capital cases. These conditions apply only to grants made for activities involving DNA analysis, and then only to States that apply for such grants. The effective date is 1 year after the date of enactment of this act.

Section 103. Prohibition pursuant to section 5 of the 14th amendment

Section 103 recognizes a constitutional right of all State prisoners to access biological evidence for the purpose of DNA testing, if they meet the threshold requirements. This provision rests on Congress' power under the 14th amendment to enforce the due process clause, and is severable from the provision that conditions Federal DNA grants on States' adopting postconviction DNA procedures.

Section 104. Grants to prosecutors for DNA testing programs

This section permits States to use grants under the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs to fund the growing number of prosecutor-initiated programs that review convictions to identify cases in which DNA testing is appropriate and that offer DNA testing to inmates in such cases.

TITLE II—IMPROVING STATE SYSTEMS FOR PROVIDING COMPETENT LEGAL SERVICES IN CAPITAL CASES

Section 201. Capital Representation System Improvement Grants

This section establishes a grant program administered by the Department of Justice to improve the quality of legal representation provided to indigent defendants in State capital cases. States that choose to accept Federal funds agree to create or improve an "effective system" for providing competent legal representation in capital cases. An effective system is defined as one in which an independent authority establishes qualifications for attorneys who may be appointed to represent indigents, identifies and appoints attorneys who meet these qualifications, and trains and monitors the performance of such attorneys. Attorneys are to be paid reasonable compensation at a rate comparable to the typical Federal rate and receive reasonable reimbursement for expenses.

The following funds are authorized to carry out the grant programs: fiscal year 2003: $50 million; fiscal year 2004: $75 million; fiscal year 2005 and fiscal year 2006: $100 million per year; fiscal year 2007: $75 million; fiscal year 2008: $50 million. In the first year, the Federal Government may pay up to 100 percent of the cost of the new program; in subsequent years, the State's share increases.

If Congress fails to fully fund this new grant program, up to 10 percent of the Byrne block grant will be used for this purpose.

Each State receiving funds must submit an annual report to the Justice Department. Both the Department and the General Accounting Office are to submit periodic reports to Congress evaluating State activities under the program. The Attorney General monitors whether a State has established and maintained an effective system and may direct the State to take steps to achieve compliance.

Section 202. Enforcement suits

States that accept grants assume the duty and responsibility to use the funds they receive to establish and maintain legal services programs that satisfy the standards and conditions specified in section 201. Section 202 authorizes enforcement lawsuits that will enable the Federal courts to determine whether State programs comply with Federal requirements and to order any changes needed to bring failing programs into compliance.

Under this section, any person may initiate an enforcement suit, acting on his own behalf and on behalf of the Federal Government. Such a suit may not be brought until one year after the State first receives Federal assistance, and if more than one suit is filed they are to be consolidated. The Attorney General may intervene in such a suit, and where he does so, he assumes responsibility for conducting the action. A Federal court has jurisdiction to entertain

such a suit pursuant either to 28 U.S.C. 1331 or 28 U.S.C. 1345. If the court finds that the State has not complied with the conditions it agreed to when it accepted Federal funds, the court may order injunctive or declaratory relief, but not money damages. The pendency of such a suit will not result in suspension of a grant to a State, except as ordered by the court.

Section 203. Grants to qualified capital defender organizations

If a State does not qualify or does not apply for a grant under section 201, a qualified capital defender organization in that State may apply for grant funds. Such defender organizations must be comprised of attorneys who have experience in capital cases. Organizations have broad discretion on how such grants may be used, whether to strengthen systems, recruit and train attorneys, or otherwise augment the organization's resources for providing competent representation in capital cases. Thus, unlike grants made under section 201, grants under this section may be used to fund direct representation in particular cases. The only specific prohibition on the use of funds is that they not be used to sponsor political activities. The Committee clarified this prohibition during the markup to ensure its consistency with Federal law. See 48 CFR § 31.205–22 (lobbying and political activities costs unallowable except as specified).

The reported bill includes a formula for determining the amount of money available to qualified capital defender organizations in a State.[22] Under this formula, the population of the State in question is divided by the aggregate population of all States which authorize the death penalty. The resulting figure is multiplied by the sum appropriated by Congress for capital representation improvement grants in the relevant fiscal year. Grants made to capital defender organizations in the State may not be greater than the result of this equation and may not be less than half of the same amount.

For example, according to the 2000 census, the population of North Carolina was 8,186,268 and the aggregate population of all death penalty States was 247,303,231. Dividing the North Carolina population by the aggregate State population results in the decimal figure 0.03. (8,168,268 ÷ 247,303,231 = 0.03.) This number is multiplied by the sum appropriated to carry out capital representation improvement grants under section 201. Assuming that the appropriated amount in a fiscal year was $50,000,000 (the amount authorized by section 201 for fiscal year 2003), then the maximum amount available to capital defender organizations in North Carolina in that fiscal year would be $1,500,000 (0.03 × $50,000,000 = $1,500,000) and the minimum would be half that amount, or $750,000.

[22] The reported version of S. 486 erroneously reverses the numerator and denominator in the formula for calculating the amount available to qualified capital defender organizations. This error will be corrected by a technical amendment at the next opportunity for legislative action on the bill. The description of the formula above reflects the corrected language.

TITLE III—RIGHT TO REVIEW OF THE DEATH PENALTY UPON THE GRANT OF CERTIORARI

Section 301. Protecting the rights of death row inmates to review of cases granted certiorari

This section is designed to ensure that a defendant who is granted certiorari by the Supreme Court (an action requiring four affirmative votes by qualified Justices), but who is not granted a stay of execution by the Court (an action requiring five affirmative votes), is not executed while awaiting review of his case. With respect to Federal cases, the bill prohibits the Bureau of Prisons and the military from executing a death row inmate when the Supreme Court has granted certiorari. With respect to all cases, the bill requires the Court to treat a motion for a stay of execution as a petition for certiorari, and provides for an automatic stay of execution if the requisite number of Justices vote to hear the case.

TITLE IV—COMPENSATION FOR THE WRONGFULLY CONVICTED

Section 401. Increased compensation in Federal cases

This section increases the maximum amount of damages that the U.S. Court of Federal Claims may award against the United States in cases of unjust imprisonment from $5,000 per case to $10,000 per year in prison. A person suing for unjust imprisonment must prove that he was factually innocent of the offense of which he was convicted. See 28 U.S.C. 2513.

Section 402. Sense of Congress regarding compensation in State death penalty cases

This section expresses the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death. Currently, fewer than 20 States have statutes to compensate the wrongfully imprisoned, and caps in most statutes result in unreasonably low compensation.

TITLE V—STUDENT LOAN REPAYMENT FOR PUBLIC ATTORNEYS

Section 501. Student loan repayment for public attorneys

This section establishes a Federal Stafford Loan repayment option for full-time prosecutors and public defenders who agree to serve as public interest attorneys for a minimum of 3 years. Repayment benefits may not exceed $6,000 in a single calendar year, or a total of $40,000 for any individual. This section also extends the existing Perkins Loan forgiveness program, 20 U.S.C. 1087ee, to public defenders.

For both the Stafford and Perkins Programs, the term "public defender" is defined to include full-time attorneys providing publicly funded indigent criminal defense services, either in a Government agency or in a non-profit organization operating under a contract with a State or local government. This definition recognizes that such non-profit agencies, utilized in many jurisdictions across the United States, are functionally indistinguishable from governmental public defense agencies.

Because the purpose of these provisions is both recruitment and retention, eligibility is intended to extend not only to persons who

have not yet completed their legal education, but also to persons who have already entered service as a prosecutor or public defender but still have Federally financed student loans outstanding.

VI. Cost Estimate

The cost estimate from the Congressional Budget Office requested on S. 486 has not yet been received. Due to time constraints, the CBO letter will be printed in the Congressional Record.

VII. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 486 will not have significant regulatory impact.

VIII. MINORITY VIEWS

I. Introduction and Summary

The stated purpose of S. 486, "The Innocence Protection Act," is to "reduce the risk that innocent persons may be executed." No one on the minority objects to such a purpose. There is no question that every member of the Judiciary Committee agrees that the death penalty in our country must be imposed fairly and accurately. To ensure such fairness, we agree on the need to provide post-conviction DNA testing for certain defendants. And we agree on the need to ensure that every defendant is represented by competent counsel as required by the Sixth Amendment of our Constitution and numerous Supreme Court decisions enforcing this requirement. But, as detailed herein, we disagree with the means contained in S. 486 to accomplish these important goals and some of the underlying premises on which the bill is based.

S. 486 is presented by the Majority as a bill to ensure access to DNA testing and competent counsel in capital proceedings. While such goals are laudable, the Majority Report raises broader issues relating to the overall fairness of the death penalty system in this country, the need for a national moratorium, and the need to address other "defects of capital punishment systems nationwide." Majority Report at 7–8, 19. Some who have injected these larger concerns into the debate over S. 486 are simply attempting to frustrate the administration of the death penalty in our country by alleging, without any credible evidence, that there is a significant risk that innocent persons have been or will be executed. By attaching itself to this claim, the Majority has lent credence to a minority of activist groups that has little concern for the overall safety of the public and the significant benefits to our society of a swift, accurate and fair death penalty system.

Contrary to the Majority's view, we submit that the death penalty system in our country is accurate. Suggestions to the contrary are contradicted by the fact that no credible evidence has been provided to suggest that a single innocent person has been executed since the Supreme Court imposed the heightened protections in 1976. The death penalty system now includes numerous layers of court review, which ensure that errors are identified and corrected. In fact, the death penalty system saves lives by incapacitating dangerous offenders who, if freed, would pose a significant risk that they will kill again. Moreover, there is substantial evidence that the death penalty is a significant deterrent; states that impose the death penalty have reduced murder rates, while states that do not impose the death penalty have experienced increases in murder rates. For convicted murderers who are already serving life without parole sentences, the death penalty is a critical deterrent to the murder of prison guards, nurses, and other inmates. Moreover, the

possibility of the death penalty has served a vital national security interest by encouraging those guilty of espionage against the United States, like Aldrich Ames and Robert Hanssen, to cooperate and provide full disclosure of the damage they caused.

We remain vigilant in ensuring that capital punishment is meted out fairly against those truly guilty criminals. We cannot and should not tolerate defects in the capital punishment system. No one can disagree with this ultimate and solemn responsibility. No one wants to see an innocent person punished. Responsible reforms should be enacted when needed.

With respect to post-conviction DNA testing, we recognize that, in the last decade, DNA testing has become the most reliable forensic technique for identifying criminals when biological evidence is recovered. Since the early 1990s, DNA testing is now standard in pre-trial investigations. We recognize that the need to ensure that the convicted have access to DNA testing where such testing was not previously available and where such testing holds a real possibility of establishing the defendant's actual innocence. No one disagrees with the fact that post-conviction DNA testing should be made available to defendants when it serves the ends of justice. The integrity of our criminal justice system and, in particular, our death penalty system, can be enhanced with the appropriate use of DNA testing.

Unfortunately, S. 486 establishes post-conviction DNA testing procedures which are too broad and unfairly skewed in favor of convicted defendants who have no reasonable chance to establish their innocence. S. 486 does not adequately protect against convicted criminals filing frivolous post-conviction applications in order to "game" the system. In addition, S. 486 unconstitutionally relies on Section 5 of the 14th Amendment to impose these same specific DNA testing requirements on the States, even though many States already have adopted, or are in the process of adopting, DNA testing procedures for convicted defendants.

With respect to measures designed to improve the competency of defense counsel handling of state capital cases, the Majority has built into S. 486 a host of improper provisions aimed at restricting state sovereignty, and burdening States with a new set of unfunded federal mandates. Specifically, S. 486: (1) strips the States and state courts of their traditional role in the administration of state court systems by requiring States to establish "independent" agencies responsible for representation of indigent defendants in capital cases; (2) mandates competency standards which must be imposed on defense counsel in each State; or alternatively (3) funds private defense organizations to administer systems for appointment of defense counsel to represent indigent defendants in state capital trials. S. 486 also threatens to reduce vital Byrne Grant funding to the States in order to fund private defense organizations. Finally, S. 486 will unleash a torrent of enforcement suits by prisoners, private interest groups and others by authorizing private enforcement suits against the States to ensure that the separate agency is, in fact, "independent," and that federally-mandated competency standards are being met.

Considered in this context, S. 486 is not limited to the creation of a reasonable post-conviction DNA testing system for certain de-

fendants. If that were the case, legislation on the post-conviction DNA testing issue could have been worked out in short order and passed by a unanimous Judiciary Committee. Rather, S. 486 will remove the States and state courts from their traditional responsibility for appointing counsel to represent indigent capital defendants in state criminal cases. In its place, S. 486 seeks to resuscitate private organizations, e.g. capital resource litigation centers, which Congress defunded in the mid-1990s because of serious ethical, political and financial abuses.

It is unfortunate that an opportunity to build a broad consensus around the important issues of DNA testing and competency of defense counsel has been missed. When the Judiciary Committee first began to examine these issues, we all shared the hope that meaningful and appropriate legislation could be developed by a unanimous Judiciary Committee. Unfortunately, S. 486, as passed by the Judiciary Committee, has been used as a vehicle for a broader and more dangerous agenda which relies on unconstitutional assertions of power, threatens traditional notions of federalism, and will frustrate the effective and fair imposition of the death penalty.

We share the desire to afford post-conviction DNA testing where such tests will establish the defendant's actual innocence. We also agree that funding should be provided to prosecutors, defense counsel and state courts to conduct meaningful training programs which will improve performance, and reduce errors in state capital trials.

We remain hopeful that further consideration of S. 486 will result in modifications to reflect the true consensus on these important issues. We continue to support the more reasoned approach to the issues of access to DNA testing and competence of counsel made in S. 2739, which was introduced by Senator Hatch. That proposal will further our nation's commitment to justice, ensure that our country has a fair death penalty system, and protect the sovereignty of states from burdensome and unnecessary federal assertions of power.

II. Capital Punishment in America

We disagree with the underlying premise for much of S. 486—that the death penalty system in our country is "broken" and needs to be fixed. In our view, the death penalty system in our country continues to play a vital role in protecting the public from vicious criminals by deterring and punishing murderers. Moreover, aside from the protection of the public and the just punishment of the guilty, our death penalty system vindicates the right of victims and their families to see that justice is done. All too often, the value of a swift, certain and reliable death penalty is challenged by a vocal minority of special interest groups seeking to advance their own anti-death penalty agenda by proffering unreliable studies and generalizations based on isolated incidents. Death penalty opponents pursue their cause without even considering the public benefits of the death penalty. S. 486, and the debate surrounding the bill, demonstrate once again the dangers of making public policy based on such a narrow viewpoint.

The death penalty system in our country has been built on "super due process," a term used by former Supreme Court Justice

Lewis Powell to describe the procedural system for imposing and reviewing death penalty cases. We have an elaborate system of appeals in capital cases, which typically involves multiple levels of state and federal review, ultimately landing at the United States Supreme Court. Over the past 25 years, procedural protections have been adopted to reduce as much as possible the likelihood that error will be committed or, if committed, that it will go undetected. Neither the Majority nor any death penalty opponents has cited any credible evidence that any innocent person has been executed since the Supreme Court reinstated the death penalty in 1976. "There is, in short, no persuasive evidence that any innocent person has been put to death in more than twenty-five years." See Markman and Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121 (1988).

> The likely explanation for the absence of errors in capital cases during the past quarter century is the greater care taken by the courts to assure the correct resolution of such cases and, particularly, the pains-taking reviews that occur in cases in which the death sentence is actually imposed.

Id. at 151.

More significantly, death penalty opponents undervalue the important benefit of the death penalty—it saves lives. Through a combination of deterrence, incapacitation and the imposition of just punishment, a swift, certain and accurate death penalty system protects a significant number of innocent lives.[1] Even sentences of life without parole do not eliminate the potential risk that a murderer will kill in prison. Murderers who premeditate before they kill are shrewd enough to recognize the potential punishment for their actions. Recent statistical studies, see Section A below, confirm that capital sentences have a deterrent effect. Recognizing these significant benefits to society, the death penalty furthers important societal goals and saves innocent lives. With these benefits in mind, proponents of abolition or even a moratorium bear the burden of supplying some credible justification for such measures. Instead, they offer certain isolated examples that cannot be fairly extrapolated to indict the capital punishment system as a whole or support the speculative claim that the risk of error must be eliminated entirely for such a system to continue. That claim ignores the real benefits to the public. That is not to say that we oppose any modifications to the current death penalty system; indeed, we support efforts to try and make a good system near perfect.

Recent data concerning capital punishment during the period of 1973 to 2000 support the assertion that our death penalty system is accurate. A Department of Justice study, Capital Punishment 2000, sets out specific data which support our contention that the death penalty system, far from broken, is indeed working well. See Tracy L. Snell, Bureau of Justice Statistics, Capital Punishment 2000 (December 2001). Appendix 1 is a detailed table for the years 1973 to 2000 for prisoners sentenced to death and the outcome sen-

[1] Among inmates under a death sentence on December 31, 2000, 64 percent had prior felony convictions, including 8 percent with at least one previous homicide conviction. See Tracy L. Snell, Bureau of Justice Statistics, Capital Punishment 2000 (December 2001).

tence. Between the years 1973 and 2000, a total of 6,930 prisoners were sentenced to death; of these, 1,970, or 28 percent, were removed from death row upon appellate reversal of a defendant's conviction (681), or sentence (1,102), commutation or other reason (187).[2] Thus, less than 10 percent of all defendants sentenced to death during the period of 1973 to 2000 had their underlying conviction reversed (681 of 6,930 or 9.82 percent). This data suggests that the amount of error in our capital punishment justice system is far less than death penalty opponents claim. In fact, such data suggests that our appellate and habeas system for review has been effective in identifying and ultimately rectifying errors at the trial and appellate levels.

A. THE DEATH PENALTY: AN EFFECTIVE DETERRENT

Death penalty opponents attack capital punishment by focusing on the alleged risk that we will execute an innocent person or that we already have executed an innocent person. While there is no credible evidence to support these claims, there is overwhelming evidence that capital punishment saves a substantial number of innocent lives, deterring probably thousands of murders in the United States every year. The recent and most comprehensive academic studies, our nation's historical experience, and criminals' own account of their motives and behavior all point in the same direction: that the death penalty is a substantial deterrent to homicide.

All of the scientifically valid statistical studies—those that examine a period of years, and control for national trends—consistently show that capital punishment is a substantial deterrent. The most up-to-date and exhaustive study, produced by researchers at Emory University in 2002, concludes that each execution prevents, on average, about 18 murders. The academic studies' findings are confirmed by the recent experience of those states that actively enforce the death penalty and those states that do not allow capital punishment. As one journalist reviewing the data has pointed out, "[a]lmost the entire drop in murder rates over the past decade has occurred in states with capital punishment, with the biggest decrease seen in states that are executing people."[3] Felons themselves have repeatedly explained why this is so: a robber, rapist, or surprised burglar already knows that he is risking a long prison term before he decides to commit his crime. If there is no death penalty, killing the victim simply means more jail time—and eliminates a witness, reducing the risk that he will ever be caught. It is only the additional risk of execution that provides an effective deterrent to murder.

Those who would prevent the states from enforcing the death penalty must also account for why society should forego the inca-

[2] Appendix Table 1 lists 461 prisoners removed from sentence of death because an appellate or higher court overturned the state's death penalty statute. These reversals are not included in the 1 percent calculation since they do not involve review of issues which could possibly implicate the factual innocence of the defendant. Id. at Appendix Table 1.

[3] See William Tucker, Capital Punishment Works, The Weekly Standard, August 13, 2001; see also, Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong. (June 27, 2001) (statement of Alabama Attorney General William Pryor); Jeff Jacoby, The Myth of Executing Children, Boston Globe, June 2, 2002; Jeff Jacoby, Capital Punishment Saves Lives, Boston Globe, June 6, 2002.

pacitation effect of the death penalty. An executed murderer will never kill a prison guard, will never escape, and will never be paroled into society, no matter who is elected governor. In 1984, this nation's prisons held 810 inmates serving sentences for murder who, once before in their lives, had been convicted of murder. Markman and Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121, 153 (1988). Had these killers been executed for their first murder conviction, 821 innocent men, women and children would have lived.

(i) The deterrence studies

The first sophisticated econometric study of the deterrent effect of the death penalty was published by Isaac Ehrlich in 1975. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975); Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 J. Pol. Econ. 741 (1977). He found that capital punishment significantly deterred homicides in the United States. Ehrlich's findings were noted by the Solicitor General of the United States, who introduced them to the Supreme Court in support of the States' post-Furman death-penalty laws. See *Fowler* v. *North Carolina,* 428 U.S. 904 (1976). In 1984, Professor Stephen Layson of the University of North Carolina expanded on Erhlich's work, extending the data under consideration to 1977. Layson, Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence, 52 S. Econ. J. 68, 75, 80 (1984); Layson, United States Time-Series Homicide Regressions with Adaptive Expectations, 62 Bull. N.Y. Acad. Med. 589 (1986). Layson found that on average, each execution in the United States deterred approximately 18 murders.

To be sure, some studies—usually conducted by avowed death-penalty opponents—have concluded that the death penalty has no deterrent effect. The U.S. Department of Justice, however, has reviewed these no-deterrence findings and concluded that "few, if any, of these studies relied on rigorous methodologies or adequately controlled for variables that affect the homicide rate." Markman, supra, at 154 (citing W. Weld & P. Cassell, Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission 15–19 (Feb. 13, 1987)).

The most recent and comprehensive studies of the death penalty have confirmed Ehrlich and Lawson's findings. A May 2002 study by the University of Colorado at Denver used "a data set that consists of the entire history of 6,143 death sentences between 1977 and 1997 in the United States to investigate the impact of capital punishment on homicide." H. Naci Mocan, R. Kaj Gittings, Removals from Death Row, Executions, and Homicide, University of Colorado at Denver, Dep't of Economics, at 21 (available on the internet at: *http://econ.cudenver.edu/gittings/KajPaperJune.pdf*). Comparing changes in states' murder rates to the probability of being executed for murder, the authors found not only that each execu-

tion has a significant deterrent effect, but that each commutation of a death sentence increases homicides by between four and five.[4]

The most comprehensive death-penalty study ever conducted has also been released this year. Researchers at Emory University used "a panel data set covering 3,054 counties [in the United States] over the period 1977 through 1996 to examine the deterrent effect of capital punishment."[5] Hashem Dezhbaksh, Paul H. Rubin, Joanna Mehlhop Shepherd, Does Capital Punishment Have A Deterrent Effect? New Evidence from Post-moratorium Panel Data, Emory University (January 2002), at 27 (study available on the internet at: *http://userwww.service.emory.edu/cozden/Dezhbakhsh_01_01_paper.pdf*). While past studies examined only national or statewide data, the Emory group tracked changes in murder rates and other data down to the county level. According to the study's authors, "[t]his is the most disaggregate and detailed data used in [the death-penalty deterrence] literature." The Emory study also controlled for the effect of other factors on murder rates, including age, race, unemployment, population density, other crime rates, and police- and prison-related variables. The results are impressive. Comparing changes in murder rates to the probability of execution, the Emory group's findings "suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide." Specifically, the study's "most conservative estimate is that the execution of each offender seems to save, on average, the lives of 18 potential victims."

Finally, another recent study raises disturbing questions about the impact of the various "execution moratoria" that have been imposed or are being contemplated by several states' governors. Professors Dale Cloninger and Roberto Marchesini of the University of Houston have examined the effects of a de facto moratorium recently applied by the Texas Court of Criminal Appeals. Cloninger & Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 Applied Economics 569 (2001).[6] That court delayed virtually all executions in Texas for over a year while it reviewed a legal question that affected all cases. *Ex parte Davis,* 947 S.W.2d 216 (Tex. Crim. App. 1996). Cloninger and Marchesini developed a statistical model that linked changes in the Texas homicide rate with corresponding changes in the national murder rate over the five years preceding the moratorium. They then used that model to predict Texas homicide rates for each month of the effective moratorium—from early 1996 to early 1997.

Cloninger and Marchesini concluded that "[s]ignificant changes in the number of homicides appear associated with sudden changes in the number of executions in a manner consistent with the deter-

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[4] Id. at 21–22. These findings might be kept in mind by Governor George Ryan of Illinois, who has hinted that he might issue a blanket commutation to the 160 convicted murderers on that State's death row. See Steve Mills, Clemency Clock Ticking—160 on Death Row Face Deadline in Pleas to Ryan, Chicago Tribune, August 25, 2002, at 1. See also Blanket Reprieves Would Be Wrong, Chicago Daily Herald, August 29, 2002, at 12. If the University of Colorado study's findings are correct, such an action by Governor Ryan would discredit the state's death-penalty regime and undermine its deterrent effect, potentially leading to many additional homicides in Illinois.

[5] See also Rubin, Study: Death Penalty Deters Scores of Killings, Atlanta Journal-Constitution, March 14, 2002, at A22.

[6] See also, Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong. (June 27, 2001) (statement of Alabama Attorney General William Pryor).

rence hypothesis." Specifically, they found that "the number of additional (unexpected) homicides that occurred over the approximate 12-month de facto moratorium in Texas ranged from 150 to 250." As Cloninger has since noted,

> [t]he unexpected homicides occurred despite the fact that arrests continued to be made for homicide, scheduled trials for both capital and non-capital offenses went on, sentencing for capital and non-capital verdicts went uninterrupted, and there were no known, dramatic changes in the state's demographics. The only change relevant to the crime of homicide was the suspension of executions.

Dale Cloninger, Scientific Data Support Executions' Effect, Wall Street Journal, June 27, 2002, at A21.

Reflecting on their findings, Cloninger and Marchesini have suggested that "politicians may wish to consider the possibility that a seemingly innocuous moratorium on executions could very well come at a heavy cost." Cloninger and Marchesini conclude their Texas study with some noteworthy remarks about the body of death-penalty deterrence studies:

> Any single empirical study, including the present one, is subject to honest criticism. * * * [Moreover,] a morally contested issue like the deterrence effect of capital punishment attracts criticism that other less contested issues elude.
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> * * * * *
>
> If this were the only study to find evidence of deterrence, then the scrutiny that it will undoubtedly attract could cast some doubt upon its conclusions. However, this study is but another on a growing list of empirical works that finds evidence consistent with the deterrence hypothesis. These studies as a whole provide robust evidence—evidence obtained from a variety of different models, data sets and methodologies that yield the same conclusion. It is the cumulative effect of these studies that causes any neutral observer pause.

(ii) The verdict of recent history

Those who are not persuaded by statistical evidence and regression analysis may yet find evidence of the death penalty's deterrent effect in another area: the recent experience of individual States. To the citizens of those States that have been able to implement an effective death penalty since *Furman,* the results have been unmistakable.

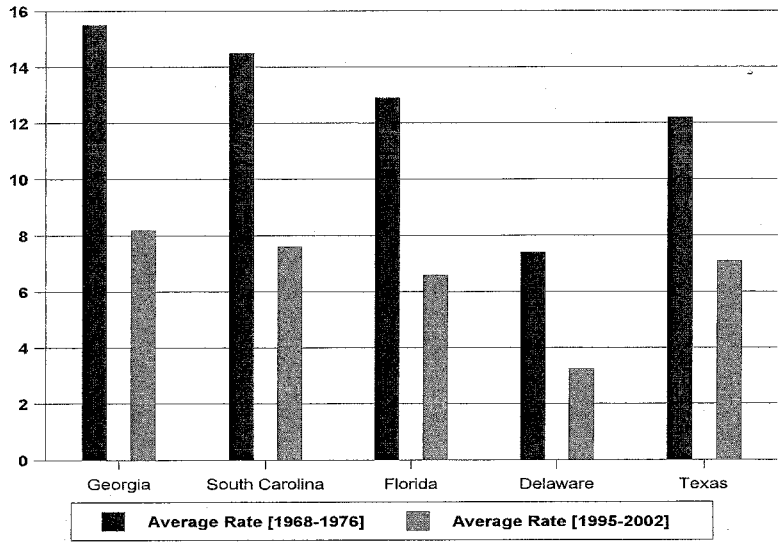
A favorite tactic of death-penalty opponents is to argue that the death penalty must not deter criminals because the 38 States that allow capital punishment still have higher murder rates than most non-death penalty States. What this simply reflects, of course, is that death-penalty laws largely have been enacted in those States where they are most needed. Non-death penalty North Dakota, for example, had only one murder in all of 1969, and one again in 1994, for a murder rate of 0.2 per 100,000 in those years. That State may be less concerned about deterring homicide than would

be California, which saw 3,411 murders in 1980—a State record rate of 14.5 victims per 100,000 people.[7]

A better measure of the death penalty's deterrent effect can be found in the experience over time of those States that have enacted death-penalty statutes. Thus, to take the simplest example: the five States showing the greatest relative improvements in murder rates for the years 1995–2000 compared to 1968–1976—the years of no executions in the United States—are, in order, Georgia, South Carolina, Florida, Delaware, and Texas. Each of these States has aggressively enforced the death penalty since *Furman*.

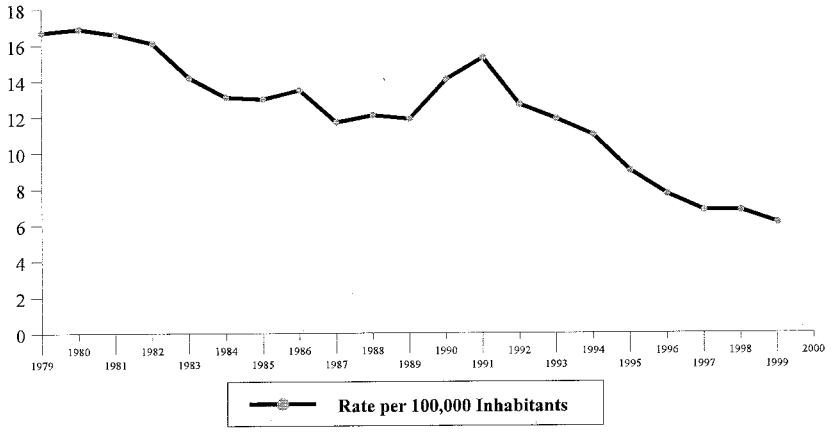
[7] The data cited in this section were obtained from the FBI website. See *www.fbi.gov/ucr/ucr.htm.*

Capital Punishment States with Largest Drop in Murder Rate since Moratorium Era

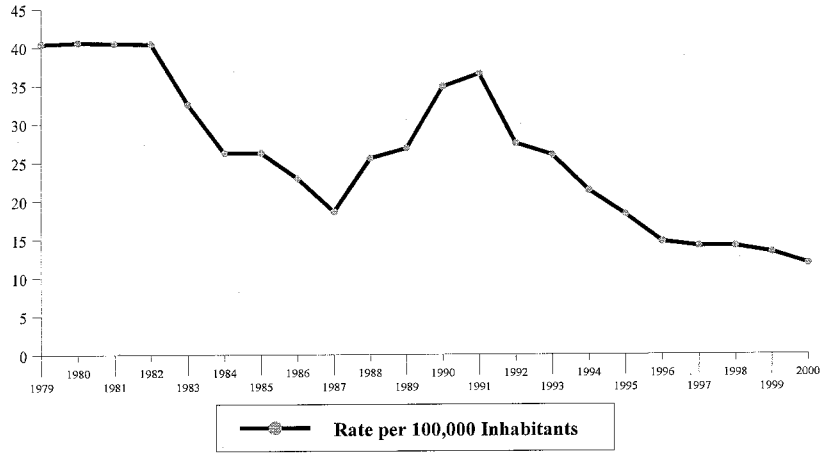


Texas, for example, carried out its first post-*Furman* execution in 1982. Its murder rate that year was 16.1 per 100,000, for a total of 2,466 murders in that State. Since then, Texas has led the nation in executions. By 1999, its murder rate had fallen to 6.1 per 100,000—a total of 1,217 murders, less than half the 1982 figure, despite Texas's strong population growth in the intervening years. Harris County, which contains Houston, has led Texas in executions. It has had 65 executions carried out since *Furman*, more than any State except Virginia. Since 1982, Houston's murder rate has fallen by 71%.

State of Texas Murder Rate from 1979 - 2000



Houston Murder Rate from 1979 - 2000



Still, death-penalty opponents might argue that Texas has simply been swept along in a national trend. Throughout the United States, the murder rate today is almost 40% lower than it was in 1991. According to the journalist William Tucker, however, Texas has not been carried along in a trend—rather, Texas and other death penalty States have generated that trend. Tucker examined the 1990s decline in murder rates for three groups of States: the 31 States that allow the death penalty and have carried out executions since *Furman*; the 7 States that allow the death penalty but have had no executions; and the 12 States that do not permit the imposition of the death penalty. Tucker's findings are remarkable:

> Homicide rates have since [1990] fallen steadily in States that have performed executions, with the downward arc beginning in 1994. States with capital punishment but no executions have lowered their homicide rate but in a more uneven pattern. States with no capital punishment saw a slight decline that was almost completely wiped out by an upswing in 1999. *Almost the entire drop in murder rates over the past decade has occurred in States with capital punishment, with the biggest decrease seen in States that are executing people.*

Tucker, supra at 28–29 (emphasis added in block quote).

Another way to isolate the death penalty's deterrent effect, while controlling for national trends, is simply to compare States' 1999 murder rates to those of 1966, the most recent year that the national rate was as low as that of 1999. In 1966, the national homicide rate was 5.6 per 100,000. In the years since that year, the death penalty was judicially abolished in 1972; 38 States reenacted death-penalty laws, the national murder rate peaked in 1980 at 10.2 per 100,000; and, in the 1990s, some States again began to carry out a substantial number of executions. By 1999, the national murder rate had fallen to a 32-year low of 5.7 per 100,000—the lowest rate since 1966. If death-penalty States have simply benefited from a national trend in recent years, one would expect that in 1999, they and the non-death penalty States would all have returned to the lower murder rates that each had experienced in 1966. But this is not what has occurred.

Focusing on those States with effective death penalty laws, the top six States in terms of total executions are, in order: Texas, Virginia, Missouri, Florida, Oklahoma, and Georgia. Of course, the criterion of total executions is biased against the smaller States. Another way to gauge how actively a State enforces the death penalty is to examine the rate of executions per murders in each State. By this measure—executions per total murders since 1976—by far the most aggressive death-penalty State in the nation is Delaware. In that State, 1.7% of all murders have resulted in an execution since 1976—more than twice the rate of second-ranked Oklahoma. Texas is only fourth by this measure. Also in the top six are Missouri, Virginia, and Arkansas.

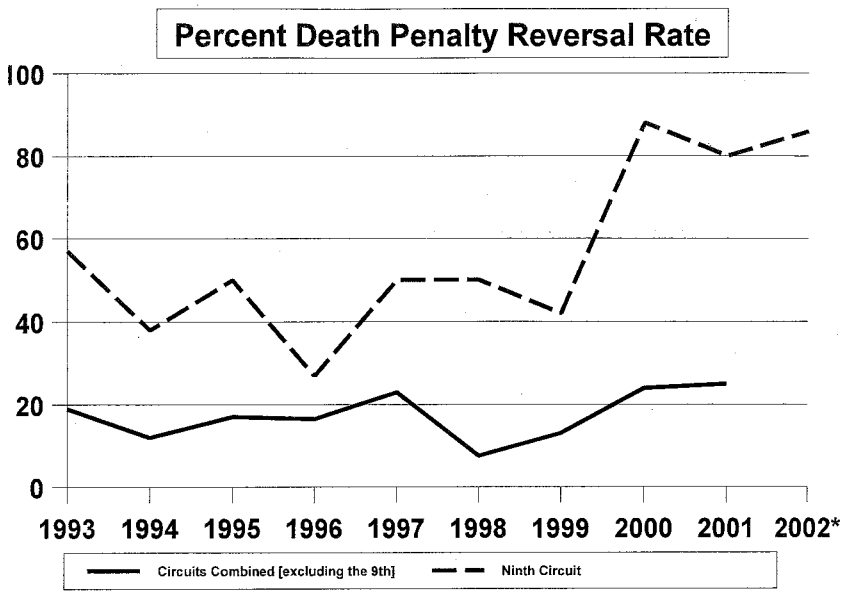
Among non-death penalty jurisdictions, nine are large enough to have at least two congressmen, and no wild swings in murder rates from year to year. These States are Wisconsin, Minnesota, Massa-

chusetts, Iowa, Michigan, West Virginia, Rhode Island, and Hawaii.[8]

Here is what has happened in each of these States in 1999, when national murder rates returned to their 1966 level:

Of the 8 top death-penalty States, 6 have seen their murder rates go down since 1966. Arkansas's murder rate is down by 1.5 percentage points, Virginia's rate is down 2.4 points, Texas is down 3.0 points, Georgia is down 3.8 points, Florida is down 4.6 points, and Delaware is down 5.8 points. The only States whose murder rates went up—Oklahoma and Missouri—went up by only 1.4 and 1.2 points, respectively. Of the 6 of these States with declining murder rates (Arkansas, Virginia, Texas, Georgia, Florida, and Delaware), the period between 1997 and 1999 saw all 6 reach their lowest murder rate since 1960, the first year for which FBI data are available. Indeed, 4 of these States—Virginia, Florida, Delaware, and Arkansas—went from having murder rates that were well above the national average in 1966, to murder rates below the national average in 1999.

[8] The two-congressmen standard excludes North Dakota, where, for example, the murder rate fell by 93% between 1966 and 1967, but then went up 700% the next year—for less than 10 murders across all three years. Also excluded are: the District of Columbia, whose average murder rate since 1980 has been 52.5 per 100,000; Alaska, which experienced a massive population influx during the 1970s oil boom and has had a persistently high murder rate; and tiny Vermont. Incidentally, Vermont's murder rate has almost doubled since 1966. Indeed, Vermont's still-relatively-low 1999 rate is nevertheless about six times its 1962–65 average.



* data current through September 2002

On the other hand, of the 9 biggest non-death penalty States, 6 have seen their murder rates go up since 1966 (Wisconsin, Minnesota, Michigan, West Virginia, Rhode Island, and Hawaii), one has stayed the same (Maine), and two have gone down slightly (Massachusetts by 0.4 of a percentage point, Iowa by 0.1 point).

Non-death penalty Michigan's murder rate is now 7.0 per 100,000—well above the national average. Of the top 8 death-penalty States, all 8 had a higher murder rate than Michigan in 1966. But by 1999, Michigan had a higher murder rate than 7 of these States—higher than Texas, Virginia, Florida, Delaware, Oklahoma, Missouri, or Arkansas.

To compare two otherwise-similar States over this time period, in 1966, non-death penalty Rhode Island had a murder rate of 1.4 per 100,000. Delaware's murder rate in that year was 9.0 and peaked at 10.3 in 1974. Yet by 1999, Rhode Island's murder rate had more than doubled, to 3.6. Meanwhile, Delaware's murder rate has fallen below Rhode Island's, to a 1999 rate of 3.2 per 100,000.

For the people of these States, these numbers are more than just statistics. These figures represent a substantial difference in human lives saved and lost. For example, had Texas simply followed national trends, and returned to its 1966 murder rate when the nation did so in 1999, in that year an additional 607 people would have been murdered in that State. In Georgia, doing no better than the national trend would have meant an additional 297 murders in 1999. Conversely, Minnesota would have seen 29 fewer murders in 1999 had it been able to return to its 1966 homicide rate, and Wisconsin would have seen 79 fewer people killed in that year. When opponents of capital punishment dismiss deterrence as a justification for the death penalty, they dismiss the serious consequences that the absence of an effective capital-sentencing system carries for large numbers of potential crime victims and their families.

(iii) In their own words

Perhaps the most probative evidence that capital punishment is a substantial deterrent of homicide—that is influences whether criminals will kill their victims, or even bring a loaded gun to a crime—comes from the statements of those in the best position to know.

John Coughlin, a retired New York City policeman, has recounted that when he "patrolled Flatbush Avenue in the 1950s"—a time New York regularly carried out executions—"at least half the time when we stopped an armed robbery, the gun turned out to be unloaded." Coughlin explains: "The criminals wanted the fear of the gun, but they didn't want even the slightest possibility that the gun might accidentally go off. That meant 'going to the chair.'" The Capital Question, National Review, July 17, 2000, at 4245.

The phenomenon described by Coughlin has been noted by several members of this Committee who have served as prosecutors in highly-populated jurisdictions. Senator Specter, who formerly served as District Attorney of Philadelphia, and has tried capital murder cases, has stated that "[b]ased on this experience, I am personally convinced that many professional robbers and burglars are deterred from taking weapons in the course of robberies and bur-

glaries because of the fear that a killing will result, and that would be murder in the first degree." 141 Cong. Rec. S7893 (June 7, 1995). Senator Specter has described a case in which three criminals

> decided to rob a grocery store in North Philadelphia. They talked it over, and the oldest of the group, Williams, had a revolver which he brandished in front of his two younger coconspirators. When Carter, age 18, and Rivers, 17, saw the gun they said to Williams that they would not go along on the robbery if he took the gun because of their fear that a death might result and they might face capital punishment—the electric chair.

Senator Feinstein has described the same deterrent effect at work in San Francisco. She has stated:

> There has been a lot of discussion as to whether the death penalty is or is not a deterrent. But I remember well in the 1960s, when I was sentencing a woman convicted of robbery in the first degree, and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: "Why was the gun unloaded?" She said to me: "So I would not panic, kill somebody, and get the death penalty." That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent.

141 Cong. Rec. S7662 (June 5, 1995).

Another account of the death penalty's direct inhibiting effect on criminal behavior is available from the State of Kansas. United States District Judge Paul Cassell quotes the following history, in a 1988 law-review article that he co-wrote while serving as a federal prosecutor:

> According to the Attorney General of Kansas, one of the contributing factors leading to the 1935 reenactment of the death penalty in Kansas for first-degree murder was the spate of deliberate killings committed in Kansas by criminals who had previously committed such crimes in surrounding states where their punishment, if captured, could have been the death penalty. These criminals admitted having chosen Kansas as the site of their crimes solely for the purpose of avoiding a death sentence in the event that they were captured.

Markman and Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121, 154 n.205 (1988) (citing Report of the Royal Commission on Capital Punishment 1949–53, at 275 in 7 Reports of Commissioners, Inspectors, and Others 677 (1952–1953)).[9]

[9] The highest rates of on-the-job murder are experienced by taxicab drivers, gas-station attendants, and convenience-store clerks. Murder rates for these workers are so high that the FBI separately tracks work-related homicide rates for these job categories. All of these workers serve the general public in commercial settings with little or no protection, and often work alone or at night. All are frequent targets of robberies. It is these providers of basic public accommoda-

Continued

(iv) The innocence tactic: Unreliable studies and disinformation

Tellingly, death penalty opponents no longer focus on the deterrence argument. Instead, they focus on the alleged risk that we will execute an innocent person or that we already have executed an innocent person. Such a minimal risk, even assuming it exists, must be balanced against the real benefits of the death penalty to society resulting from its deterrent effect and the incapacitation of murderers. See Markman and Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121, 153 (1988). Simply put, in our view, the overwhelming benefits of the capital-punishment system outweigh its risks—so long as we take care to keep those risks small.

Opponents of the death penalty are no doubt aware of the public's calculus. They perceive that while a small risk will be tolerated, a more substantial risk—one rising to a level at which mistaken executions are inevitable—would weigh on the public's conscience and eventually undermine popular support for the death penalty. If such a risk were shown to exist, a majority could be persuaded to reject the death penalty, even at the cost of a higher national murder rate.

Death penalty opponents have decided that, if a large enough risk of mistaken executions does not exist, they will invent it. The Majority has fully embraced this position. In particular, the Majority cites several cases from the Death Penalty Information Center's Innocence List to suggest that "innocent" individuals were convicted of crimes that they did not commit.[10] Majority Report at 9, 11–12, 15, 19–20. The Majority relies on the Liebman study of the capital punishment system to suggest that there is significant "error" and risk of executing the innocent in our capital punishment system (Majority Report at 8, 20). Of the several cases discussed in the Majority Report, most do not even clearly involve defendants who are factually innocent. As for the Death Penalty Information Center ("DPIC"), recent news stories and analyses of its list of 102 claimed "innocent" people who have been sentenced to death reveal that this list is far from trustworthy. The Minority's own examination of cases on DPIC's list, as well as recent admissions by DPIC's director in response to press scrutiny, indicate that DPIC has been misleading the public with its claims about the number of innocent people on death row. The Liebman study has suffered a similar fate. When subjected to close scrutiny, the Liebman study's flawed assumptions, unreliable data and unsupported conclusions are revealed. We submit that the DPIC's list and the Liebman study should no longer be cited or relied on as a source of probative factual information about the death penalty.

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tions who most depend on society to enforce capital punishment for felony murder. Criminals know that they already face substantial prison time for robbing a cab driver or a cashier. If the only possible penalty for killing the victim—and thereby eliminating the only likely witness to the crime—is additional prison time, the restraints on the armed robber amount to little more than his own scruples. In too many cases, this is not enough. For too many criminals, the prospect of increasing one's odds of never being caught by killing the witness will outweigh the threat of a longer prison term. For these felons, only the death penalty is an effective deterrent to committing felony murder.

[10] During hearings on S. 486, members referred to the Death Penalty Information Center Innocence List.

(a) The DPIC list: False claims of innocence

DPIC's widely touted "innocence list" has been aptly characterized in a recent article concluding that DPIC's claim that 102 innocent people have been released from death row should be rejected because:

> It's not true. DPIC counts people as "innocent" when they were released from death row for reasons wholly unrelated to any belief that they did not commit the crime charged. A man could be convicted of murder and sentenced to death, have his conviction overturned because of a technicality and when walk free because witness had died in the interim. According to DPIC, he would be an "innocent" who was "exonerated." Only a minority of the people on DPIC's list are innocent in any normal sense of the word.

Ramesh Ponnuru, Not So Innocent, National Review Online, October 1, 2002 (available at *www.nationalreview.com*). see also Ponnuru, Bad List, National Review, September 16, 2002, at 27.

These conclusions have been confirmed by an independent review of the DPIC list undertaken by Ward Campbell, a senior supervising attorney at the Office of the California Attorney General. Campbell's 41-page critique, which we have included as an attachment to this report in order to make it publicly available, analyzes the DPIC list case-by-case, and in considerably more detail than DPIC provides. For many of the cases on the list, particularly the older ones, very little public information is available. Nevertheless, from the information that Campbell has been able to retrieve, he has concluded that "it is arguable that at least 68 of the 102 defendants on the [DPIC] List should not be on the list at all." See Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice, The Truth About Innocence, pp. 8–24 (June 19, 2002) (Attachment A).

Several of the DPIC-list so-called exonerations clearly involve defendants who appear to be guilty of murder. These include:

> [Jonathan] Treadaway, [who] was convicted in 1975 for sodomizing and murdering a six-year-old boy. His palm prints were found outside the victim's bedroom window, and he said that he would not explain their presence. Pubic hairs on the victim's body were similar to his.
>
> But the Arizona supreme court reversed his conviction. The trial court had admitted evidence that Treadaway had committed sexual acts with a 13-year-old boy three years before the murder. The court held that to be irrelevant without "expert medical testimony" that this act demonstrated a continuing propensity to commit such acts. The court also ordered that a Treadaway's retrial, his statements about the palm prints not be admitted. Treadaway had made those statements voluntarily, but without being advised of his Miranda rights or waiving those rights. Finally, the court excluded some evidence that three months before the murder, Treadaway had been

> found naked in a young boy's bedroom trying to strangle the boy.
>
> Treadaway didn't get off Death Row because it was proven that the cops had the wrong man. Technicalities spared him.

Ponnuru, Bad List, supra.

> Jeremy Sheets, another of DPIC's "innocents," got off Death Row because the key witness against him couldn't testify. That was his best friend, Adam Barnett, who told the police that the two of them—both white men—had been angry about all the white women they knew who were dating black men. To get even, they kidnapped and raped a black highschool student. Barnett said that Sheets had then stabbed her to death. Barnett committed suicide in jail. Sheets was sentenced to death on the basis of Barnett's taped confession (and Sheets's own testimony, which the jury found unbelievable). The Nebraska supreme court reversed this conviction because Sheet's lawyer had not been able to cross-examine the dead Barnett. Sheets walked.
>
> The lead police investigator in the case called the result a "travesty," but it was probably the right legal call. What it wasn't was an "exoneration" of Sheets.

Id.

> [Jay] Smith, [who] was convicted and sentenced to death for killing a woman and her two children for money. Because the prosecution failed to disclose the existence of two grains of sand that might have lent credence to a far-fetched defense theory, the Pennsylvania Supreme Court overturned the sentence—and found that no retrial was permissible under state law. Smith then sued the state for wrongful imprisonment. The appeals court ruled against him: "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished * * *."

Ponnuru, Not So Innocent, supra.

> John Henry Knapp confessed to the arson-murder of his children and then recanted the confession, He was tried three times. Twice juries hung 7-5 for conviction; in between, he was found guilty and sentenced to death. Eventually the case was settled with a plea bargain. He's on the "Innocence List," too.

Ponnuru, Bad List, supra.[11]

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[11] In an effort to confirm Campbell and Ponnuru's findings, the Minority staff has reviewed several cases on DPIC's innocence list. For many of the older cases on the list, very little information is publicly available. Nevertheless, we have been able to confirm Ponnuru's account of the 1974 Treadaway case. DPIC makes the somewhat implausible claim that the six-year-old victim involved in that case had actually died of natural causes. Minority staff, through contacts in Arizona, have been able to locate John Todd, the lead prosecutor at Treadaway's second trial. Todd affirmed to the Minority staff that the theory that the victim died of pneumonia was totally inconsistent with the damage to private areas of the victim's body. Nor had the victim shown any symptoms of pneumonia prior to this death. Todd also affirmed that the identity of the killer was the principal issue at trial—and that Treadaway won an acquittal by successfully

The newest cases on the innocence list also raise serious doubts about DPIC's credibility. The last two "innocent" defendants on the list are Thomas H. Kimbell and Larry Osborne. Kimbell's initial conviction for killing a woman and three children was reversed because he was not allowed to cross-examine a key witness. See *Commonwealth* v. *Kimbell*, 759 A.2d 1273 (Pa. 2000). Kimbell knew unique facts about the case: that the mother was killed first, that the children's bodies had been stacked in the bathroom, and that the backdoor of the house where the killings occurred was inoperable. See Todd Spangler, "In New Trial, Pennsylvania Man Acquitted of Murdering Four", Associated Press Newswires, May 4, 2002. Kimbell had a history of violence, and had been seen near the scene of the murders. Spangler, "Family Slayings", Associated Press Newswires, July 7, 2002. Finally, Kimbell's first trial included testimony from a former friend and houseguest that he had heard Kimbell admit to the killing. This witness died prior to Kimbell's second trial. Cindi Lash, "From Death Row to Acquittal—Retrial Frees Suspect Convicted in '94 Murders", Pittsburgh Post Gazette, May 4, 2002, at A1.

Larry Osborne was convicted of robbing and murdering an elderly couple in their home and setting their house on fire. The principal evidence against him was taped statements from a companion who was with him at the scene of the crime. *Osborne* v. *Commonwealth*, 43 S.W.3d 234 (Ky. 2001). This witness, however, died before the trial. The Kentucky Supreme Court reversed Osborne's conviction on the ground that admission of the witness's pretrial taped statements violated Osborne's Sixth Amendment Confrontation Clause rights. Osborne was subsequently acquitted in a retrial at which the taped statements were excluded. The title of one local news story effectively summarizes the case: Gerth Joseph, "Some in Whitley County Convinced Man Got Away With Murder," The Courier-Journal Louisville, Ky., August 3, 2002, at 1A.

The Campbell analysis of the DPIC list indicates that many other cases on that list are of the same nature as the Treadaway, Kimbell, and Osborne cases. The frequency with which such cases appear on the list is too great to allow the possibility that their inclusion was an accident or an honest mistake. Instead, it appears that DPIC simply includes on its list any capital case that was reversed and in which either the defendant was acquitted at retrial or prosecutors declined to bring new charges—regardless of the reason for these results. DPIC apparently makes no inquiry into whether the people included on its list are, in fact, innocent.[12]

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moving to suppress evidence linking him both to the crime scene and to a near-identical crime that had occurred nearby several months earlier. In sum, the full available evidence strongly indicates that Treadaway broke into the Jordan family's home, sodomized their six-year-old boy, and strangled him to death. Yet, but for the fortuity that the Minority staff was able to locate John Todd, it would be impossible today to rebut DPIC's assertions that Treadaway is innocent. In this case, however, although Treadaway may have gotten away, DPIC has not. DPIC's misrepresentations regarding Treadaway also raise doubts what really happened in other old, unverifiable cases on the DPIC list.

[12] These conclusions about DPIC's list have been confirmed by DPIC itself. After the first Ponnuru critique of DPIC was published in National Review, DPIC's executive director wrote a letter to the editor of that magazine. He protested that "[p]eople accused of a crime have every right to claim innocence if they have been acquitted at trial or if the prosecution has decided to drop charges." National Review, September 30, 2002, at 2. Of course, this defense of DPIC's actions simply confirms that DPIC is using a standard of legal innocence, not actual innocence. As was noted in reply to DPIC's letter, O.J. Simpson qualifies as legally innocent, but few would

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More generally, the DPIC list inaccurately includes so-called exonerees who were not sentenced to death, did not establish their factual innocence, or resolved their cases by pleading guilty to lesser charges. See Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice, The Truth About Innocence, pp. 8–24.[13] For example, the DPIC list claimed that Florida has released 23 inmates from death row because of evidence of innocence. In fact, the Florida Commission on Capital Cases disputed that finding and specifically determined that only 4 out of the 23 inmates may actually be innocent. Florida Commission on Capital Cases, Case Histories: Review of Individuals Released from Death Row, (June 20, 2002) (available at *www.floridacapitalcases.state.fl.us/OPPAGA/Deathrow.pdf*.

Some of the defendants included in the DPIC list were sentenced to death in the early 1970s prior to the current capital punishment system. See e.g., Wilbur Lee and Freddie Pitts (convicted and sentenced prior to 1972); see Florida Commission on Capital Cases, Case Histories, supra, pp. 74–83 (2002) (noting that Pitts confessed and pointed out the remote area where the victims' bodies were found, both Lee and Pitts pleaded guilty to the 1963 murder of two gas station attendants, were found guilty in a 1972 retrial, and were pardoned by a 4–3 vote of the pardon board in 1975); David Keaton (convicted and sentenced prior to 1972 (pre-modern death penalty statute era); Samuel H. Poole (convicted and sentenced based on invalid North Carolina mandatory death sentence law); Peter Limone and Lawyer Johnson (convicted and sentenced based on pre-1972 death penalty law in Massachusetts). See Campbell, The Truth About Innocence, supra, at 8–24.

The list also includes defendants who were convicted of murder but who had their sentences reversed when the state capital sentencing statutes were later struck down. E.g., Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith (sentenced to death under a New Mexico statute later ruled invalid), see *State* v. *Beaty*, 553 P.2d 688 (Nev. 1976); Gary Beeman (Supreme Court reversed capital sentence in 1976 holding that Ohio's death penalty

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mistake him for actually innocent. See id. Moreover, it is highly disingenuous for DPIC to now claim that it meant all along only to highlight cases of legal innocence. As Ponnuru notes, DPIC "has done everything in its power to lead people to believe that the modern death penalty has put over 100 people on Death Row who did not commit the crimes with which they were charged." Id. Ponnuru also elsewhere properly points out that "DPIC's critique would have no political force if it were not misleading. The over-100 claim shocks people's consciences because they think that it represents death-row inmates who were innocent or may well have been." See Not So Innocent, supra.

[13] See e.g., James Cremer, *Cremer* v. *State*, 205 S.E.2d 240, 241 (Ga. 1974) (included in DPIC list but was convicted of murder and not sentenced to death); Jay C. Smith, *Commonwealth* v. *Smith*, 615 A.2d 321 (Pa. 1992) (reversal based on prosecutor's withholding of exculpatory evidence and retrial barred by Pennsylvania double jeopardy clause); Thomas H. Kimbell, Jr., *Commonwealth* v. *Kimbell*, 759 A.2d 1273 (Pa. 2000) (no showing of "actual innocence" but included on list since he was aquitted on retrial; Muneer Deeb, *Deeb* v. *Texas*, 815 S.W.2d 692 (1991) (no showing of "actual innocence" but included on list since he was acquitted on retrial); Delbert Tibbs, *State* v. *Tibbs*, 337 S.2d 788, 790 (1976)(no showing of "actual innocence"); Richard Neal Jones, *Jones* v. *State*, 738 P.2d 525 (Okla.Crim. 1987) (Jones death sentence and conviction reversed where trial court erred in admitting statements made by defendant to co-conspirators); Jerry Bigelow. *Bigelow* v. *Superior Court (People)*, 204 Cal.App.3d 1127 (1988) (death sentence reversed where jury returned inconsistent verdicts which suggested that Bigelow was accomplice to (and fully liable for) murder); see also, William Jent and Ernest Miller, *Jent* v. *State*, 408 So.2d 1024 (Fl.1981) (both plead guilty to lesser offenses after convictions were vacated for prosecutor's failure to disclose exculpatory evidence); John Henry Knapp, *Knapp* v. *Cardwell*, 513 F.Supp 4 (1980) (plead no contest to second degree murder after reversal of conviction and death sentence after second trial). See Campbell, The Truth About Innocence, supra, 8–24.

statute was unconstitutional because of limitations on presentation of mitigation evidence); James Richardson (convicted and sentenced under invalid Louisiana pre-1972 mandatory statute). See Campbell, The Truth About Innocence, supra, at 8–24.

The conclusion is inescapable that DPIC—an avowedly anti-death penalty activist organization—has been misrepresenting the nature of capital cases that have been reversed on appeal. DPIC exaggerates the number of death-penalty actual-innocence cases in order to undermine public support for the death penalty. As noted in the recent press critiques, see Bad List, supra, DPIC's data have been cited by Justices of the U.S. Supreme Court and members of this Committee as raising doubts about the death penalty. Because DPIC itself has admitted that its innocence list is not limited to defendants who are, in fact, innocent, that list should not be used to make arguments about actual innocence. And in light of DPIC's history mischaracterizing the nature of its data about the death penalty, that organization should not be relied on at all as a source of factual information about capital punishment.

(b) The Liebman Study

According to the Liebman study, during the period of 1976 to 1995, there is a 68 percent rate of reversal for "prejudicial error" in state capital cases. The Liebman study specifically identifies the three leading causes of appellate reversals as: (1) ineffective assistance of counsel; (2) trial judge error (e.g., exclusion of testimony, error in instructing jury), and (3) prosecutorial misconduct (e.g., withholding of exculpatory evidence, improper closing argument to jury). The Majority fails to acknowledge—let alone address—the methodological flaws, and the serious errors and inaccuracies in the Liebman study.

First, the 68 percent "error rate" cited in the Liebman study is misleading. The 68 percent "error rate" does not represent errors in findings of guilt—that is convictions of individuals who did not commit the specific crime. Under the score keeping system applied in the Liebman study, the error rates included any reversal of a capital sentence at any stage by any court, even if the courts ultimately upheld the sentence.[14]

For example, the Liebman report identified 64 cases in Florida which were reversed, even though over one-third of those cases ultimately resulted in a reimposed death sentence, and not one of the cases resulted in the dismissal of the murder charges. See Paul G. Cassell, We're Not Executing the Innocent, Wall Street Journal (June 16, 2000). By broadly defining "error rates" and failing to tailor the identification of cases to a more accurate measure of death penalty review, it appears that the study was designed not in the interest of true fact-finding but to support a disingenuous suggestion—that the death penalty system is so flawed as to call into question the reliability of the ultimate finding of guilt and sentence

[14] As an example, the Liebman study counted as "error" cases in which an appellate court reversed a capital sentence, remanded the case to a trial judge for additional findings on an issue, the trial court complied, and the appellate court affirmed the capital sentence. This example does not show that the defendant was innocent of the crime; rather, this example only reveals that there was a potential error committed by the trial court which was clarified (e.g. through further findings or explication of the trial record) which did not undermine the guilt of the defendant nor his responsibility for committing the charged crime.

of death. Even assuming that the 68 percent rate of error in capital convictions and sentences for the period of 1973 to 1995 is correct, which we do not concede, the Liebman data shows that the judicial system vigorously corrects any error in capital cases, and does not establish that any defendants were wrongly executed, or even actually innocent of the charged crime. The study and the obvious desire to trumpet claims of high error rates suggests that the agenda is one more of politics rather than accurate investigation of an important public policy issue.[15]

Second, and more significantly, the Liebman study is methodologically flawed. Liebman did not obtain his data from official sources. Instead, he relied on secondary sources, such as other criminal defense attorneys, the NAACP Capital Punishment Project, and newspapers and other secondary sources. Several states, including Montana, Alabama, Nevada and Florida, demonstrated that the "error" rates for their respective states cited by Liebman were wrong. See Press Release, State of Nevada Office of the Attorney General, Nevada's Death Penalty System is Working, September 19, 2000, available at *http://ag.state.nv.us/agpress/2000/00_0919a.pdf* (Liebman study found 38 percent error rate in Nevada while Attorney General corrected figure to 19 percent); Letter form Frankie Sue Del Pap, Attorney General of Nevada, June 25, 2002 (noting that "the Liebman study picked and chose their cases as a convenience, tailoring the study to get certain results," and "[i]ncredibly, the Study did not count eight men executed in Nevada since 1977"); Memorandum from Reg Brown to Frank R. Jiminez, Florida Governor's Office, Columbia Law School Death Penalty Study, June 13, 2000; Governor Jeb Bush, Death Penalty Concerns: Study Overstated Mistakes in Florida, The Tallahassee Democrat, June 20, 2000; Press Release, Attorney General Joe Mazurek, Guest Editorial on National Death Penalty Study, Montana Department of Justice, Office of the Attorney General, August 14, 2000, available at *http://www.doj.state.mt.us/ago/newsrel/00release/deathpen.htm* (Liebman study found error rate of 87 percent in Montana where actual reversal rate was 36 percent, none of which involved a defendant who was actually innocent of the crime); Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., (June 27, 2001) (statement of Alabama Attorney General William Pryor) (applying conservative estimate, error rate could be as high as 22 percent but is more likely to approximate 4 percent, rather than the near 80 percent rate cited in Liebman study for Alabama). To cite a specific example, the study claims that William Thomson's death sentence was set aside and a sentence less than death was imposed. That is not true. See Paul Cassell, We're Not Executing the Innocent, supra.

Third, despite assertions to the contrary, the Liebman Study counted as serious error trial cases that were conducted in accord-

[15] We would note that Liebman is a "long-time opponent of capital punishment." See Death Penalty Study Called Biased, Dishonest, Criminal Justice Legal Foundation, February 8, 2002; Bennett A. Barylyn, Deputy Attorney General, New Jersey, A Response to Professor Liebman's "A Broken System," Division of the Criminal Justice Appellate Bureau, Nov. 2000, available at *www.prodeathpenalty.com/Liebman/LIEBMAN2.htm.*

ance with the procedures existing at the time of trial, but were later reversed on appeal when new procedural rules were announced and applied retroactively. For example, the Liebman Study cites *Ex parte Floyd,* 571 So. 2d 1234 (Ala. 1990), as a reversal based on serious trial error. See Liebman Study, Appendix C, pp. C–5 to –6. An actual reading of that case, however, demonstrates that the trial was completed without error in 1983, but was later reversed after the 1986 Supreme Court decision in *Batson* v. *Kentucky,* 476 U.S. 79 (1986), imposed a new procedural rule for trials that was applied retroactively to all trials still on appeal. See also Barylyn, supra, (stating that the Liebman Study included reversals of death sentences based on retroactive application of new court-imposed procedural rules and noting that 27 percent of New Jersey's reversals were caused by retroactive application of a singled decision).[16] It is simply misleading to assert that trial courts committed serious errors based on subsequently announced procedural rules that did not exist when the trial court tried the case. Indeed, the Liebman Study tracks the most volatile period in the history of capital criminal procedure. Once the Supreme Court rules became more settled, States adjusted their procedural rules, and trial courts knew what rules to use in conducting capital trials, these types of procedural errors should substantially decline in the post-1995 time period.

Other basic flaws in the Liebman study were identified in an article authored by Barry Latzer and James Cauthen. See Barry Latzer & James Cauthen, Another Recount: Appeals in Capital Cases, The Prosecutor, January/February 2001, at 25. First, even assuming that the error rate is a relevant measure of the accuracy of the death penalty system, Latzer and Cauthen showed that the Liebman study 68 percent rate of "prejudicial error" in state capital cases was calculated incorrectly. Specifically, they point out that Liebman defined this 68 percent "overall-error rate" as the proportion of fully reviewed capital judgments that were overturned at one of three stages (state direct review, state habeas review and federal habeas review) due to serious error. In calculating this "prejudicial error rate," however, Liebman looked at the subset of cases in which federal habeas petitions were actually filed, following state convictions, rather than the total number of cases where federal habeas review was available but not sought. When the second, more accurate figure is used, Liebman's prejudicial error figure is reduced from 68 percent to 52 percent. Id. at 25–27.

Further, Latzer and Cauthen point out that the Liebman study made no attempt to distinguish between reversed convictions and reversed sentences. This distinction reveals that only 20 percent of the "prejudicial errors" noted in the Liebman study were reversed guilty convictions. Id. Further, after retrials or resentences are considered, in only 4 percent of the cases contained in the Liebman study were defendants ultimately found not guilty of murder after

[16] See Criminal Justice Legal Foundation, Death Penalty "Error" Study Has Errors of its Own, June 19, 2000, available at *www.prodeathpenalty.com/Liebman/LiebmanCJLF.htm*). At the June 18, 2002 hearing, Professor Liebman himself suggested that none of the broadly-applied Supreme Court cases (e.g. *Batson* v. *Kentucky*, 476 U.S. 79 (1986)) or others were included in his calculation of the error rate. See Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong. (June 18, 2002) (testimony of Professor Liebman in response to questions of Senator Sessions).

a previous conviction for capital murder. Id. Significantly, there is no analysis at all in the Liebman study of whether the defendants in capital cases were "actually innocent" of the charged crimes, even in the instances where the defendants were ultimately found not guilty. As Latzer & Cauthen conclude, "the [Liebman study] appellate reversal rate tells us nothing about the likelihood of an erroneous execution." Id. at 27.

Commentators have pointed out other flaws in the Liebman study. Half of the Liebman study's data on California's error rate, for example, is based on cases decided during the tenure of former Chief Judge Rose Bird, during which the California Supreme Court reversed nearly every death penalty case to come before it, including 18 cases in which it found improper jury instructions that were subsequently approved by the same court after Chief Judge Bird's departure.[17] Cassell, We're Not Executing the Innocent, supra; see Edward J. Erler and Brian P. Janiskee, Study Fails to Prove that Death Penalty is Unfair, July 19, 2000, *www.claremont.org/writings/000719erler_janiskee.html.*

To the extent that the Liebman study counts appellate reversals in cases decided in the Ninth Circuit, the reversal rate that he found may say less about the death penalty than the fact that the Ninth Circuit may be unique among the circuits in how it decides death penalty cases. The attached tables and graph compare the U.S. Court of Appeals for the Ninth Circuit's rate of reversing death sentences with reversal rates on other circuits.[18] See Attachment D. Data for the last ten years show that outside of the Ninth Circuit, usually 70 to 80 percent of death sentences are affirmed by a Court of Appeals on collateral review. In almost every year, however, the Ninth Circuit has reversed the majority of death sentences that it reviews.[19] Moreover, this percentage has climbed

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[17] During Rose Bird's tenure as Chief Justice, the California Supreme Court voted to reverse 64 of the 68 death-sentences that it reviewed—with Bird voting to reverse in every single case. See Philip Hager, "Justice Prevails—Cruz Reynoso Was Swept Off the State Supreme Court With Rose Bird, but Now He's Found New Causes and a New Career", Los Angeles Times Magazine, August 13, 1989, at 18; Cynthia Gorney, "Rose Bird and the Court of Conflict", Washington Post, April 8, 1986, at C1. All of these reversals are included in Liebman's study. Chief Justice Bird and Justices Reynoso and Grodin—all of whom had similar voting records in death-penalty cases—were removed from the California Supreme Court by an overwhelming majority of California voters in a 1986 retention election. Following this change in its membership, the California Supreme Court ended its roadblock of capital punishment in that State. See Jess Bravin, "Death Rare for Killers, Study Says", The Wall Street Journal, November 11, 1998, at CA1.

[18] As one scholar has noted, "the Ninth Circuit's reputation as a liberal court began during the presidential term of Jimmy Carter. The court expanded from thirteen to twenty-three judges, allowing Carter ten additional appointments plus five more due to normal vacancies." Marybeth Herald, "Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and Congress", 77 Or. L. Rev. 405, 457 (1998). (By contrast, President Reagan, despite serving two terms, was only able to appoint ten judges to the Ninth Circuit.) As early as 1983, the Supreme Court felt compelled to review 27 Ninth Circuit decisions in one year, and reverse 24. See Robert Marquand, "Reinhardt Versus Rehnquist: A War Between Two Courts", Christian Science Monitor, March 6, 1997, at 1. But the Ninth Circuit's most dramatic and embarrassing year before the Supreme Court came just recently, during the 1996–97 term. Professor Herald has summarized the results of that year:

> In the 1996–97 Term, the Supreme Court issued opinions in almost ninety cases. During this time, the Supreme Court took twenty-eight cases from the Ninth Circuit Court of Appeals, and reversed twenty-seven. In seventeen of those twenty-seven cases, the reversal was unanimous. In seven of the reversals, the Court did not even require briefing and oral argument. One of these summary reversals occurred in a decision of the Ninth Circuit en banc.

Herald, supra, at 407.

[19] Unfortunately, there is no source that collects all capital cases decided in the federal courts. Capital cases reviewed here were collected by searching on a computer-based legal research site for all cases that include the headnote "350HVIII"—the headnote for all capital sentencing

sharply in recent years, as a number of Clinton appointees were confirmed to that court. In the last three years, the Ninth Circuit has reversed 88 percent, 80 percent, and 86 percent of the death sentences that it has reviewed.

A breakdown of this data by judge reveals that death-sentence reversals on the Ninth Circuit have been driven by Democratic appointees. Republican appointees to that Court have cast a majority of their votes to affirm death sentences—140 votes in individual cases to affirm capital sentences or deny evidentiary hearings, and 61 votes to reverse death sentences or grant evidentiary hearings. No Republican appointee has voted to reverse more sentences than he has votes to affirm. Among Democratic appointees, several have moderate records—they affirm almost as many death sentences as they reverse, and in a few rare cases, more. Overall, however, Democratic appointees to the Ninth Circuit overwhelmingly vote to reverse death sentences.[20]

These numbers suggest a complete breakdown of objective decision-making in death-penalty cases on the Ninth Circuit. A judge who votes to reverse nearly every death sentence that he reviews is not applying the law to facts, but would instead appear to be legislating his anti-death penalty views from the bench.[21]

Given the current composition of the Ninth Circuit—17 Democratic appointees, 7 Republican appointees—it is likely that at least for the next decade, the seven death-penalty States under the Ninth Circuit's jurisdiction will be unable to enforce their capital-sentencing laws. For the people of these States, the deterrence and incapacitation effects of capital punishment—and even the right to decide for themselves whether or not to allow the death penalty—

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issues—or that include the word "death" preceded within at least three words by the word "sentence" with a root expander. Although this proved to be the most reliable of several methods tested for finding capital cases in the courts of appeals, there can be no guarantee that this or any other search term will retrieve every relevant case. There is no reason to believe, however, that this search method would bias relative results for different court of appeals or judges.

[20] Total votes since 1992 among Democratic appointees in death-penalty cases include 194 votes to reverse or remand for evidentiary hearings, and just 64 votes to affirm. See tables in Attachment D. This pattern is particularly marked in several judges. Based on cases that were retrieved, for example, Judge Ferguson apparently has sat on 17 death penalty cases and only voted to affirm one. Judge Betty Fletcher has decided 22 cases, affirming 2. Judge Pregerson has voted in 28 cases, and also affirmed only 2. And Judge Reinhardt apparently has voted to reverse every single one of the 31 death sentences that he has reviewed. Interestingly, one scholar who reviewed all of Judge Reinhardt's judicial decisions during a four-year period has discovered that when the losing party has requested Supreme Court review of a Reinhardt opinion, certiorari has been granted in over 30% of the cases. Marybeth Herald, supra, at 469 n.339. And for Judge Reinhardt, certiorari invariably means reversal. See id.

[21] Unfortunately, although Carter appointees have amassed the most extreme anti-death penalty records on the Ninth Circuit, it appears that the Clinton appointees—who now hold 14 of the 28 seats on that court—will soon catch up. Although all of the Clinton appointees have now sat on death-penalty panels, half have never voted to affirm a death sentence. Judge Tashima, a 1996 Clinton appointee, has voted to reverse 9 death sentences in a row. Judge William Fletcher, a 1998 Clinton appointee, has voted to reverse 6 capital sentences, remand 2 for evidentiary hearings, and affirm zero. Judge Berzon, though only a member of that court since 2000, has already vored to reverse 4 death sentences, remand 2 for evidentiary hearings, and affirm zero. Another Clinton appointee who joined the court that year, Richard Paez, has voted to reverse 2 death sentences, remand 2 for evidentiary hearings, and affirm zero. Judge Paez also recently wrote an opinion for a 6–5 en banc panel majority striking down California's 1978 death-penalty statute as unconstitutional as applied to post-crime mitigation evidence—a decision with the potential to invalidate the capital sentences of almost all of the 609 convicted murderers on California's death row. See *Payton* v. *Woodford,* 299 F.3d 815 (9th Cir. 1992). And even among the Clinton appointees who have on occasion voted to affirm capital sentences, individual records are not encouraging. Juge Thomas, for example, has voted to reverse 8 death sentences, remand 3 for evidentiary hearings, and affirm 2. Only one Clinton appointee has voted to affirm even half of the capital sentences that he has reviewed.

is being denied by a court that in practice appears to be imposing a de facto moratorium on the death penalty.

III. Access to DNA Testing

We agree with the Majority that there is a need to provide access to DNA testing for certain federal and states convicted defendants. In particular, we recognize that, in the last decade, DNA testing has evolved as the most reliable forensic technique for identifying criminals when biological evidence is recovered. DNA testing is now standard in pre-trial investigations. For convicted federal and state defendants, we contend that there is a need to ensure access to DNA testing where such testing was not previously available to the defendant and where such testing will establish the defendant's actual innocence. No one disagrees with the fact that post-conviction DNA testing should be made available to defendants when it serves the ends of justice. The integrity of our criminal justice system and in particular, our death penalty system, can be enhanced with the appropriate use of DNA testing.

Our differences with the Majority centers on several issues: when and how DNA testing should be made available; and the use of such testing information for inculpatory purposes. Unlike the majority, we believe that DNA testing should be limited only to those situations where the test results will conclusively determine guilt or innocence, and should not be permitted where such testing will be used by a convict to muddy the waters and seek additional rounds of litigation in order to frustrate the administration of justice. In contrast to the majority, we also believe that those convicts who falsely assert their innocence in support of DNA testing requests should suffer substantial adverse consequences for perpetrating a fraud against the court, for requiring prosecutors and law enforcement to devote resources to litigating the testing and the results, and for subjecting the victims families to greater delay and suffering. Further, we submit that there should be no restrictions on law enforcement use of DNA test results to solve crimes that a convict may have committed in the past, and that as a condition of such a testing request, a convict must agree to waive any statute of limitations defense that would otherwise bar a subsequent prosecution based on comparison of the DNA test results to any unsolved crime.

In affording access to DNA testing for convicted federal defendants, we believe that federal defendants should have access to DNA testing where such testing will demonstrate their actual innocence. For this reason, we supported S. 2739, The Death Penalty Integrity Act of 2002, which: provides access to DNA testing for federal defendants where such a test would support a legitimate claim of actual innocence; authorizes the prosecution of defendants for perjury, contempt and/or false statements when they make false claims of innocence in support of a DNA testing request; allows subsequent prosecution of a defendant for any crime matched through the comparison with the CODIS database and compared against unsolved crimes; and encourages states to create similar DNA testing procedures by providing funding assistance to those states that implement DNA testing programs.

With respect to the states, we believe that the Majority has failed to establish that there is a significant need for legislation to ensure that states provide access to DNA testing for state convicts. More importantly, to the extent that S. 486 relies on the 14th Amendment to impose DNA testing requirements on the states, it is unconstitutional. Aside from these significant infirmities, S. 486 inexplicably conditions existing DNA testing funds on states enacting statutes in compliance with federal mandates contained in S. 486, and fails to provide additional funding required for compliance with those costly mandates.

A. NEED FOR LEGISLATION TO ENSURE ACCESS TO DNA TESTING IN THE STATES

While recognizing the scientific value of DNA testing to exonerate defendants, the Majority paints a picture in which states are allegedly denying or frustrating access to DNA testing for convicted state convicts, and suggests that there are numerous "innocent" defendants either on death row or serving lengthy sentences without access to DNA testing. The Majority's picture, while compelling at first glance, is contradicted by the evidence. In fact, a close examination of the facts show that the majority has little beyond anecdotal descriptions of instances where DNA was, in fact, instrumental in demonstrating a defendant's innocence.[22] We do not mean to diminish the importance of the few cases where DNA testing has established the factual innocence of a convicted defendant. Our system should not tolerate any injustice, be it a small number or even one case, where someone innocent is unjustly convicted. However, we contend that the Majority's attempt to take these isolated instances of error to condemn the entire criminal justice system and impose an ill-designed legislative response on the states is unwarranted.

First, contrary to the Majority's unsupported assertions (Majority Rep. at 14–16), almost every state is providing access to DNA testing for post-conviction defendants, pursuant to state statutes, legal decisions or existing administrative procedures. A state-by-state analysis of such procedures reveals that there is no significant bar to access to DNA testing. To the contrary, the facts show that states are providing such access and adopting even broader measures to ensure that a defendant who has a legitimate claim of innocence will have access to such a test.

We have attached to this report a chart and detailed summary of state statutes relating to DNA testing and post-conviction procedures. See Attachment C. As the detailed analysis shows, of the 38 states which have the death penalty, 26 states have specific statutes which provide for post-conviction DNA testing; 8 states have general post-conviction statutes and/or caselaw which allow the defendant to seek post-conviction relief based on DNA testing; and 2

[22] In order to bolster its argument, the Majority contends that some of the 12 death row inmates who were exonerated by DNA testing "came within days of being executed." Majority Report at 9. The suggestion that a death row inmate was in grave danger of execution and saved at the last second is misleading. It is common in capital cases for an execution date to be set in order to complete further appeals. Stays of the execution date are routinely granted to ensure consideration of all appeals. Defense counsel are well aware that the execution date is routinely stayed pending any further appeals. See, e.g., 28 U.S.C. Section 2262. None of the 28 cases cited by the Majority (report at 9) involved a defendant who was in imminent danger of execution.

states, Alabama and Ohio, have administrative policies or programs to provide such testing on a case-by-case basis. The latter 2 states, Alabama and Ohio, have pending legislative proposals to create a specific right to post-conviction DNA testing.

Of the 12 states which do not have the death penalty, 5 states have specific statutes which provide for post-conviction statutes and/or caselaw which allows the defendant to make a claim in support of a request for DNA testing. Legislative proposals to create a specific DNA testing procedure are pending in 2 of the 12 states.

In the face of this specific analysis, the Majority's contention that the states are denying access to DNA testing for state convicts is simply unfounded. More specifically, the Majority's claim that "only about half of the states have provided for post-conviction DNA testing" (Majority Report at 14) is contradicted by the fact that, as shown above, 31 of the 50 states have specific DNA testing laws. Equally unpersuasive is the Majority's claim that "[m]any states legislatures have failed to act altogether." Majority Report at 14. The facts show otherwise and the Majority's broad and unsupported assertions have a hollow ring.

Second, the Majority's description of DNA access in the states suggests that there are a number of innocent defendants on death row awaiting execution, who desperately need access to DNA testing to demonstrate their factual innocence. That broad generalization is simply not true. Attached to our report is a detailed chart which lists the number of defendants in each state currently on death row and the number of those defendants who have requested DNA testing and been denied. See Attachment D. The chart shows that of the 3554 defendants on death row in the states, a total of only 18 have requested and been denied DNA testing, or .51 percent of all death row state convicts.[23] Even in these 18 cases, the denials were generally based on strong substantive reasons.

For example, Edward Moore was convicted in Illinois of raping, robbing, and burning to death a female victim. Evidence recovered at the crime scene included a semen sample from the victim and hair found in a bed. In 1991 results from a DNA test on the semen sample were found to be consistent with DNA from the defendant. During the appellate process, Moore asked for subsequent DNA testing on the semen sample and on the hair found in the bed at the crime scene. The semen sample was tested again in 2001 and was found to match Moore's DNA to a probability of one in nine quadrillion. Upon hearing this fact, the judge denied Moore's request for DNA testing on the hairs found in the bed because the test would not show Moore's innocence. Committee Telephone Interview with William Browers, Assistant Attorney General in the Illinois Attorney General's Office (Oct. 7, 2002). The semen sample DNA match was overwhelming evidence of Moore's guilt.

In South Dakota, Donald Moeller was convicted of the rape and murder of a nine-year-old girl who lived in his neighborhood. At his trial, Moeller was given the opportunity to have DNA tests preformed on the evidence taken from the victim, but declined to have the tests done. After Moeller was convicted and sentenced to

[23] There are also 23 federal defendants currently on death row. None of those defendants has sought a DNA testing claiming that such a test will exonerate them.

death because of the heinousness of the crime, he then asked for DNA testing as part of a federal habeaus corpus writ. DNA tests were performed on evidence including semen samples found in the victim, fluid found on the victim's thigh, and on fluid found on some fingernail clippings. The fluid on the victims thigh and on the fingernail clippings was determined to be from a female donor. The semen, however, matched a DNA sample taken from Moeller to a probability of 1 in 14.8 billion. Moeller then requested additional DNA testing on the fluid from the victim's thigh and the fingernail clippings to determine if they came from the same female donor. Committee Telephone Interview with Robert Mayer, Deputy Attorney General in the South Dakota Attorney General's Office (Oct. 8, 2002); id. with Scott Abdallah, Johnson Law firm in Sioux Falls, South Dakota (Oct. 8, 2002) (former Deputy Attorney General). Upon presentment of the match between the defendant's DNA and the DNA in the semen sample found on the victim, the judge denied Moeller further DNA testing on the thigh fluid and fingernail clippings because the tests already performed clearly established Moeller's guilt of the capital crime.

Richard Kutzner was convicted of the capital murder of the owner of a real estate business in Texas. The victim was found with her ankles locked by a cable tie and her wrists bound by red plastic coated wire. Kutzner was found to be in possession of wire and cable tie whose serial numbers matched the wire and cable tie found on the victim. He was also found to be in possession of items stolen from the victim's place of business. Kutzner was denied DNA testing of some hair and fingernail clippings found at the crime scene because he did not meet the threshold requirement for DNA testing. Under this threshold, a DNA test will be ordered if the convicted person establishes by a preponderance of the evidence that a reasonable probability exists that the convicted person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. Because the hair and fingernail samples were found at the crime scene which was a public place of business, and could belong to any customer, the Texas Court of Criminal Appeals reasoned that Kutzner could not meet the requirement. *Kutzner* v. *State,* 75 S.W.3d 427 (Tex. Ct. Crim. App. 2002); Committee Telephone Interview with Ed Marshall, Assistant Attorney General in the Texas Attorney General's Office (Oct. 8, 2002). The evidence directly connected Kutzner to the instruments used to kill the victim, and the DNA of a public businesses customers would not change that.

And finally in Idaho, George Porter was convicted of the first-degree, brutal beating murder of his ex-girlfriend. The manner of the beating, in which Porter pulled clumps of his girlfriend's hair out of her head was strikingly similar to previous beatings he had inflicted on his prior girlfriends in which he pulled clumps of hair out of their heads. In a post-conviction petition, Porter asked for DNA testing on some of the evidence introduced at his trial, including fingernail scrapings taken from the victim. The judge denied the petition using the post-conviction testing statute which was then in existence. Committee Telephone Interview with Lamont Anderson, Assistant Attorney General in the Idaho Attorney General's Office (Oct. 8, 2002). The Idaho legislature, like the legislatures of most

capital punishment States, subsequently enacted a more lenient post-conviction testing statute, and the state court is now reconsidering Porter's request under the more lenient standard. *See* Idaho Stat. 1949.02 & 1927.19 (2002). Accordingly, one of the key premises of S. 486—that hundreds of death row inmates are being denied DNA testing, thus risking the execution of innocents—is simply unfounded in fact.

In San Diego, California, for example, prosecutors reviewed 561 cases where convictions were obtained before DNA testing technology was fully developed, and found only three cases in which DNA testing might exonerate the defendant. In two of those cases, a murder and sexual assault, the convict turned down the free test without explanation. In New Jersey, a free DNA testing offer to convicted felons was suspended after fewer than a dozen applied and not one defendant was "exonerated" by the DNA test. Similarly, in Broward County, Florida, only 3 of the 29 death row inmates accepted offers to be tested. One test was completed and it was inconclusive. See Richard Willing, Few Inmates Seek Exonerations with Free DNA Tests, USA Today, July 30, 2002; Richard Willing, Program for DNA Testing of Inmates is Scrapped, USA Today, December 25, 2001. The small number of defendants seeking DNA tests to prove their actual innocence suggests that for the most part that our criminal justice system works well to convict the guilty and free the innocent.

B. TRAMPLING FEDERALISM

In Section 103, S. 486 relies on Congress' power under Section 5 of the 14th Amendment to require states to implement post-conviction DNA testing procedures under the standards set forth in Section 2291.[24] In support of this constitutional assertion of power under Section 5 of the 14th Amendment, Section 103 contains a number of "findings," many of which are incorrect or without evidentiary foundation. By stretching Section 5 of the 14th Amendment to encompass DNA testing for state inmates, and by failing to cite any reliable factual basis for such a measure, Section 103 is unconstitutional.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * * Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

As the Supreme Court has recognized, see *City of Boerne* v. *Flores,* 521 U.S. 507, 517, 117 S.Ct. 2157 (1997), Section 5 is an affirmative grant of power to Congress. See *Board of Trustees of the University of Alabama, et al.* v. *Patricia Garrett, et al.,* 531 U.S. 356, 265, 121 S.Ct. 955 (2001). Congress' power under Section 5 ex-

[24] Section 103(c) gives state prisoners the right to enforce this requirement in a civil action for declaratory or injunctive relief against the states.

tends only to "enforcing" the provisions of the Fourteenth Amendment, and does not include the power to determine what constitutes a violation of the 14th Amendment. The Court has described Congress' Section 5 power as "remedial." See *City of Boerne,* 521 U.S. at 519–24; *Board of Trustees,* 531 U.S. at 365. In distinguishing between the exercise of authorized "remedial" powers and prohibited enactments defining Fourteenth Amendment violations, the Supreme Court has looked to whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne,* 521 U.S. at 526; see *Kimel* v. *Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631 (2000); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank,* 527 U.S. 627, 639, 119 S.Ct. 2199 (1999). The appropriateness of remedial measures must be considered in light of the evil presented. See *United States* v. *Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803 (1966) ("the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience * * * it reflects").[25]

Recent cases have focused on Congress' attempts to exercise its Section 5 remedial powers under the 14th Amendment. See *Board of Trustees,* 531 U.S. at 365; *Kimel,* 528 U.S. at 82–83, 89–90; *Florida Prepaid,* 527 U.S. at 639p; *City of Boerne,* 521 U.S. at 525. In a number of cases, the Supreme Court has struck down attempts by Congress to exercise its Section 5 enforcement authority where there was an inadequate legislative record to justify such an exercise of its power. See *Board of Trustees,* 531 U.S. at 368–69 (Title I of America with Disabilities Act authorizing individual suits against states in federal court exceeded Congress' power under Section 5 of the Fourteenth Amendment where legislative record "fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled"); *Kimel,* 528 U.S. at 82–83, 89–90 (Age Discrimination in Employment Act struck down where Congress never identified any pattern of age discrimination by the States, much less any discrimination rising to the level of a constitutional violation, noting that there was insufficient evidence that "[unconstitutional age discrimination] had become a problem of national import"); *Florida Prepaid,* 527 U.S. at 640, 647 (Patent Remedy Act struck down where Congress identified no pattern of constitutional violations, and in any event, many of the acts of patent infringement by states were unlikely to be unconstitutional); *City of Boerne,* 521 U.S. at 530 (Religious Freedom Restoration Act struck down where legislative record contained no examples within past 40 years of instances of state laws passed because of religious bigotry which could constitute a widespread pattern of religious discrimination in this country; rather, legislative record showed that Congress identified numerous instances where state laws of general applicability placed incidental burdens on religion); Cf. *South Carolina* v. *Katzenbach,* 383 U.S. at 308 (legislative record contained evidence of pervasive discrimina-

[25] Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. See *City of Boerne,* 521 U.S. at 530; *South Carolina* v. *Katzenbach,* 383 U.S. at 308.

tory use of literacy tests to disenfranchise voters on account of their race).

Applying these principles here, Section 103's reliance on Section 5 of the Fourteenth Amendment to require states to implement post-conviction DNA testing for state inmates cannot pass constitutional muster. Significantly, the majority does not—and indeed could not—cite any credible record material to demonstrate the existence of a pervasive or widespread denial of access to DNA testing to state inmates. To the contrary, as detailed above, the record evidence shows that many states already have enacted post-conviction DNA testing programs—in fact, of the 38 states which have the death penalty, 26 have specific post-conviction DNA testing statutes; 8 states have general post-conviction statutes and/or caselaw which would permit the defendant to seek post-conviction relief based on DNA testing; and 2 states have administrative policies which permit such testing where appropriate, and legislative proposals to enact DNA testing are pending in these 2 states. Several states already provide DNA testing on an informal basis, and even where there is a statutory requirement, testing may be conducted on an informal basis, short of any litigation requirement. In the absence of a true factual basis and need for remedial measures, relying on Section 5 of the 14th Amendment to impose such a requirement on the states is plainly unconstitutional. See *Board of Trustees,* 531 U.S. at 368–69; *Kimel,* 528 U.S. at 82–83, 89–90; *Florida Prepaid,* 527 U.S. at 640, 647; *City of Boerne,* 521 U.S. at 530; Cf. *South Carolina* v. *Katzenbach,* 383 U.S. at 308.

In an attempt to create a constitutional basis for Congress to impose such DNA testing requirements on the states, Section 103 includes several "findings," which fail to justify use of the 14th Amendment to impose DNA testing requirements on the states. Section 103(a)(1)(J) attempts to identify a constitutional right under the Fourteenth Amendment based on the fact that five members of the Supreme Court "suggested" in *Herrera* v. *Collins,* 506 U.S. 390 (1993), that "a persuasive showing of innocence made after trial would render the execution of an inmate unconstitutional." While the language of the Court's opinion in *Herrera* is subject to differing interpretations, Chief Justice Rehnquist's plurality opinion stated that, even "assum[ing] for the sake of argument" that a "truly persuasive demonstration of "actual innocence" would render the execution of a defendant unconstitutional, the petitioner in that case had failed to make the "threshold showing for such an *assumed* right." *Herrera,* 506 U.S. at 417 (emphasis added); see id. at 427 (O'Connor, J., concurring). A more persuasive interpretation of Chief Justice Rehnquist's plurality opinion (along with Justice O'Connor's concurring opinion) is that, in reviewing the evidentiary record, the Court assumed the existence of such a constitutional right "for the sake of the argument," and disposed of the case based on the failure to meet the required threshold showing without specifically finding that such a constitutional right existed. Under these circumstances, Section 103(a)(1)(J)s "finding" of

a constitutional injury—which embraces both capital and noncapital defendants—is simply unsupported by the *Herrera* decision.[26]

Section 103(a)(1)(H) and (I) assert generally without specific support that "it is difficult" to obtain DNA testing in "many" states, and that "a number of states have adopted post-conviction DNA testing procedures, but some of the procedures are unduly restrictive, and many states have not adopted such procedures." These general characterizations, which are contrary to the record evidence, cannot supply the constitutional basis for Congress to assert its Section 5 power. Moreover, such a general and conclusory showing, without more, cannot satisfy the requirement of a showing of a "pattern of unconstitutional" actions by States to justify "remedial" legislation requiring every state to implement DNA testing requirements, particularly where many states already provide for such testing and where others are currently considering proposals to do so. See *Board of Trustees,* 531 U.S. at 368–69; *Kimel,* 528 U.S. at 82–83, 89–90; *Florida Prepaid,* 527 U.S. at 640, 647; *City of Boerne,* 521 U.S. at 530; Cf. *South Carolina* v. *Florida Prepaid,* 527 U.S. at 640, 647; *City of Boerne,* 521 U.S. at 530; Cf. *South Carolina* v. *Florida Prepaid,* 527 U.S. at 640, 647; *City of Boerne,* 521 U.S. at 530; *South Carolina* v. *Katzenbach,* 383 U.S. at 308. In the absence of a showing of a patter of state transgressions with respect to denial of access to DNA testing, which has lead to execution (or incarceration) of actually innocent defendants, and assuming that such a pattern would constitute a constitutional injury protected by the Fourteenth Amendment, Congress' exercise of legislative authority in this area lacks a sufficient legislative record to justify imposition of detailed DNA testing requirement on each state. See *Board of Trustees,* 531 U.S. at 365; *Florida Prepaid,* 527 U.S. at 640; *Kimel,* 528 U.S. at 89.

The majority cites Judge Luttig's opinion in *Harvey* v. *Horan,* 285 F.3d 298 (4th Cir. 2002) as support for the claim that the 14th Amendment includes a right to post-conviction access to DNA testing of evidence. While Judge Luttig's concurring opinion argues that such a constitutional right may exist, Chief Judge Wilkinson's concurring opinion rejected such a view, and pointed out many of the difficult questions that the court would have to resolve if such a right was found to exist in the constitution. See *Harvey,* 285 F.3d at 300–02. Moreover, Chief Judge Wilkinson specifically noted that many state legislatures were adopting DNA testing statutes, and warned that "[t]o constitutionalize this area, as [Judge Luttig's] opinion would, in the face of all of this legislative activity and variation is to evince nothing less than a loss of faith in democracy." Id. at 302.

The implications of S. 486's unconstitutional reliance on the 14th Amendment is significant for future Supreme Court review of Congress' legislative authority. By stretching the 14th Amendment to address yet another perceived constitutional injury covered by the 14th Amendment, and by doing so with no legislative record to justify such an action, S. 486 provides the Supreme Court with one

[26] Section 103(a)(1)(E) provides that DNA evidence has led to the "exoneration" of "innocent" defendants in over 100 cases. This finding inaccurately characterizes these cases as determinations of "actual innocence" (factual innocence), as opposed to "legal innocence" (insufficient evidence to meet government's burden of proof beyond a reasonable doubt).

more instance to justify a future denial of Congress' entitlement to a presumption of constitutionality when enacting legislation. As Justice Antonin Scalia pointed out:

> My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. That presumption reflects Congress's status as a coequal branch of government with its own responsibilities to the Constitution. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution * * * then perhaps that presumption is unwarranted.

See Remarks of Justice Antonin Scalia, United States Supreme Court, speaking at the Telecommunications Law and Policy Symposium (April 18, 2002); A Shot from Justice Scalia, Washington Post, May 2, 2000, at A–22.

S. 2739 offers a constitutional alternative to that set forth in Section 103 of S. 486. Congress has the ability to encourage states to establish DNA testing procedures for post-conviction defendants, and a responsibility to provide increased funds to support timely DNA testing for certain defendants. S. 2739 adopts such an approach. By contrast, S. 486 conditions receipt of federal grants for DNA-related programs (DNA Analysis Backlog Elimination Grants, Paul Coverdell National Forensic Sciences Improvement Grants, DNA Identification Grants, Drug Control and System Improvement Grants, and Public Safety And Community Policing Grants) on state adoption and implementation of procedures for preserving DNA evidence and making DNA testing available to state inmates.[27] These grant programs are critical to ongoing state efforts to implement DNA testing programs at the investigative and pretrial stages, as well as providing post-conviction testing. Strengthening the DNA testing system at every stage is critical for the effective protection of the innocent and the prosecution of the guilty. The funding eligibility conditions contained in S. 486 would deny states the very federal funding which is provided for that purpose, unless and until they were willing to adopt specific federally-mandated standards for post-conviction DNA testing. Such an approach could perversely create serious risks to the innocent as well as shielding the guilty in cases where DNA testing is used in the investigative or pretrial stage. This amounts to nothing more than an unfunded federal mandate on the states, because states will be compelled to conform to the new federal requirements in order to maintain their current eligibility for DNA grant funding, with no additional federal funds to help defray costs from the expanded post-conviction DNA testing requirements.

Moreover, this heavy-handed approach does nothing to further the dual and equally important—purposes of DNA testing: exonerating those defendants who are actually innocent of a crime and inculpating those defendants who may have committed previously unsolved crimes. States are not seeking to avoid their responsibil-

[27] The Majority's attempt to minimize S. 486's direction to the states to provide access to DNA testing or lose important federal funding is unpersuasive. Majority Report at 16. The Majority suggests that the states have "some flexibility" to design and implement such programs, but provides only specific examples where state DNA testing programs would not comply with the federal mandates set forth in S. 486.

ities in this area; they recognize the value and importance of providing DNA testing where appropriate. Rather than threatening states to implement a federally-mandated DNA testing program or face significant DNA funding reductions, states should be provided with additional funding grants needed to implement DNA testing programs.

A letter signed by 30 state attorneys general, dated June 8, 2000, which was sent to the Judiciary Committee, addresses these specific concerns relating to DNA testing and the role of the states to enact such measures without federal mandates:

> As attorneys general of our respective states, we urge you to be cautious in enacting federal legislation to address the use of DNA identification technology in state proceedings. In our role as prosecutors and appellate advocates, we believe in our ethical obligation to ensure that no person is ever unjustly charged, convicted or condemned. DNA identification technology is an invaluable tool for fulfilling this obligation and we support a thoughtful effort in the states of refine actions already taken or to take action to sensibly and fairly utilize the opportunity for justice presented in those cases where DNA evidence is available, and relevant to guilt or innocence.
>
> We ask that Congress not preemptively short-circuit this process with legislation that imposes mandatory obligations on the states.
>
> We have serious concerns about federalism, and about Congress prematurely intruding into and trying to displace an ongoing process in our states through enactment of the "Innocence Protection Act of 2000".
>
> While we have reservations about certain specific features of the bill, our overarching concern is the extent to which this bill intrudes on the responsibility of the states to define crimes, their punishment and the procedures to be followed in their courts. At the same time, the proposed legislation fails to provide what the states need to ensure the protection of innocent people—support for laboratory and prosecutorial resources dedicated to DNA testing.

C. FRUSTRATING JUSTICE BY PROMOTING GAMESMANSHIP

While we generally support the goal of providing DNA testing of defendants where such testing will establish the defendant's factual innocence, we are concerned that S. 486, as currently drafted, is unfairly skewed to afford DNA testing to convicted defendants who have no reasonable chance of establishing their innocence through DNA testing, and who may be motivated by a desire to frustrate justice and game the system through frivolous litigation. In our view, S. 486 does not adequately protect against convicted criminals filing frivolous post-conviction applications in order to "game" the system, delay their sentence, or even seek a new trial where DNA testing has no remote possibility of establishing the defendant's factual innocence.

We submit that convicted offenders serving lengthy sentences will exploit the provisions of S. 486 to file frivolous motions that

would squander the resources of courts, prosecutors and law enforcement. Each of these entities has limited resources and those valuable resources will be committed to resolving motions from defendants who have no reasonable chance of demonstrating their factual innocence through DNA testing. We are also concerned that the post-conviction remedy provided by this bill could be used by convicted criminal defendants not merely as a means to correct a false conviction, but as a way to establish another layer of criminal litigation beyond trial and appeal that simply gives them a third "bite at the apple."

Most significantly, S. 486 will undermine any notion of finality of criminal convictions. Finality is important not only to the police and prosecutors who should not be required to reassemble criminal cases years after trial and conviction. It is also vitally important to crime victims, and the families of crime victims, who often do not start down the path to emotional healing until after the perpetrator is adjudged guilty and his conviction is affirmed. A crime victim's emotional healing, or "closure" would be delayed or denied altogether if the perpetrator has the unlimited right to challenge that conviction in perpetuity.

(i) Section 2291

Section 2291 authorizes DNA testing requests for convicted federal defendants under certain circumstances. As drafted, Section 2291 will encourage frivolous litigation by convicted defendants seeking DNA testing who are not actually innocent of a crime but who are only seeking to "game" the system. It is important to remember that a convicted offender seeking DNA testing, by definition, has lost his or her right to the presumption of innocence. Simply requesting a DNA test does not entitle such a defendant to a "renewed" presumption of innocence. A defendant seeking to challenge his or her conviction must carry a heavy burden, or else defendants will simply use frivolous and unnecessary litigation to their tactical advantage.

Section 2291 skews this balance between finality and post-conviction motions for DNA testing by ignoring the fundamental distinction between a charged defendant who is entitled to a presumption of innocence and a convicted defendant who is not entitled to such protections. As an example, we submit that a defendant should not be able to obtain DNA testing where such a test was available at the time of the trail, but the defense declined to seek it. S. 486 authorizes defendants in this situation to obtain such testing notwithstanding an earlier decision not to seek such evidence.[28]

Moreover, Section 2291 places onerous burdens on the government when opposing a defendant's post-conviction motion for DNA testing, while broadly affording convicted defendants access to DNA testing with little justification, and without any meaningful

[28] See Section 2291(d)(1)(B). We note that many states require a petitioner to show that the technology for the DNA testing was not available at the time of trial. See Ark. Code § 16–112–125(a)(1)(B); Conn. Gen. Stat. § 52–582; Del. Code tit. 11 § 4504(a)(2); Idaho Code § 19–4902(b); Ill. Stat. ch. 725 § 5/116–3(a); Md. § 8–201(C), added by Senate Bill No. 694 (enacted May 15, 2001); Minn. Stat. § 590.01(1a)(a)(2); Mo. R. Crim. P. 29.17(b)(3); Neb. Senate Bill No. 659 § 5(5) (enacted May 25, 2001); N.M. Senate Bill No. 337 (enacted March 14, 2001); N.Y. Crim. Proc. Law § 440.30(1–a); Tenn. Code § 49–26–106(a); Utah Code § 78–35aa–301(4); Wash. Rev. Code § 10.73.170(1).

disincentives to filing frivolous or false claims. This is simply contrary to any notion of finality and fundamentally unfair to law enforcement, prosecutors, and most importantly, victims and their families.

For example, Section 2291(a) does not require a convicted defendant seeking DNA testing: to specifically assert under oath that he or she is "actually innocent" of the crime, to identify the specific evidence which he or she is requesting to be tested; to identify a theory of defense, which is not inconsistent with previously asserted theories, that the testing will support; and to specify how the DNA test would substantiate the defendant's claim of innocence. Instead, Section 2291 stands the presumption of innocence on its head by placing various burdens on the government to establish why the defendant is not entitled to DNA testing, and specifically limits the court's authority to deny an offender's request for DNA testing only where the government shows by a preponderance of the evidence that the defendant's application was made to interfere with the administration of justice.[29]

In meeting its burden, the government—not the defendant—required to supply evidence that the defendant has failed to explain any delay in seeking such a test (although there is no requirement that the defendant make such an explanation in his application), and that the defendant's attorney or the defendant presented a theory of defense or testimony inconsistent with the current application (although there is no requirement that the defendant explain what his or her theory of defense was at the original trial and how the current claim is consistent with any prior defense asserted at trial).

Consistent with the principles explained above, we believe that the defendant should have to assert under oath his "actual innocence" of the crime for which he was convicted, and that the burden should rest squarely on the convicted offender to show how the DNA testing will prove his or her innocence. Rather than placing the burden on the government to disprove the value of a DNA test, we submit that a convicted defendant should simply be ineligible for DNA testing unless the defendant: (1) asserts in a sworn affidavit under penalty of perjury that he or she is actually innocent of the crime,[30] (2) identifies the exact piece of evidence that he is requesting to be tested and how such testing will demonstrate his actual innocence;[31] and (3) establishes that he or she did not rely at trail on a defense (through testimony or defense counsel) such as consent, insanity, intoxication, self-defense or some other defense that conceded the issue of identity. By placing the burden on

[29] See Section 2291(d)(2).

[30] Various existing state provisions explicitly require that a post-conviction DNA testing application include a claim of actual innocence. See Ark. Code § 16–112–125 (motion to demonstrate actual innocence); Del. Code tit. 11 § 4504 (same); Ill. Stat. ch. 725 § 5/116–3(c)(1) (assertion of actual innocence); La. Code Crim. Proc. art. 9261.(B)(4) (affidavit of factual innocence); Minn. Stat. § 590.01(1a)(c)(2) (assertion of actual innocence); Mo. R. Crim. P. 29.17 (motion to demonstrate innocence); New Mexico Senate Bill No. 337 (enacted March 14, 2001) (claim that DNA evidence will establish innocence); Okla. Stat. tit. 22 § 1371.1 (presentation of claims to prosecutorial agency that DNA evidence will demonstrate factual innocence); Tenn. Code § 40–26–106(c)(1) (assertion of actual innocence); Utah Code § 75–35a–301 (assertion of actual innocence under oath).

[31] See, e.g., La. Code Crim. Proc. art. 926.1(B)(3) ("particular evidence"); Or. Senate Bill No. 667 (enacted July 2, 2001) ("specific evidence"); Utah Code § 78–35a–301(2)(c) ("specific evidence").

the government, Section 2291 will have the unintended consequence of permitting a defendant to raise one defense at trial and then assert an inconsistent theory of defense in post-conviction litigation in the hope that the government will not successfully meet its burden for opposing a defendant's DNA testing request.[32] Defendants will have every incentive to game the system through the filing of frivolous post-conviction motions where the government cannot meet its burden and where defendants are hopeful that they can succeed in winning at a new trial.

For example, in a hypothetical situation involving a gang rape where semen was recovered from the victim, it is conceivable that post-conviction DNA testing would reveal that the defendant was not the source of the semen. This, however, does not mean that the defendant did not commit the crime. He could have participated in the assault without having sex with the victim or he could have had sex with her without ejaculating—neither of which would exonerate him from criminal responsibility. Without more, DNA testing in these circumstances would not provide sufficient evidence of the defendant's actual innocence, but would be permitted under the standard set forth in Section 2291(d)(1)(D). On the other hand, in the case of a defendant convicted of raping a small child, for example, the defendant should be afforded DNA testing where there is a single perpetrator, semen was recovered from the child and the only possible source of the semen was the rapist. In this circumstance, we believe that DNA testing should be allowed under an actual innocence standard.

Section 2291 also encourages delay and gamesmanship by failing to set time limits for the filing of DNA testing applications. Given the widespread availability of pre-trial DNA testing in the last few years, the number of convicted offenders who did not receive DNA testing will diminish over time. In recognition of the limited number of defendants who did not have access to DNA testing when it was available, Section 2291 should include a time limit on the filing of requests for DNA testing. While it is not unreasonable to permit a limited amount of time for actually innocent persons to file for relief, we suggest that five years should be the outside limit. An actually innocent person will not delay; while actually guilty defendants will wait to delay a scheduled execution or hope that the government will be unable to retry their cases. Section 2291 only promotes more delay and gamesmanship, and does so at the expense of public safety and the rights of victims.[33]

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[32] Several states require a petitioner to demonstrate that identity was at issue at trial. See Ark. Code § 16–112–125(b)(1); Idaho Code § 19–4902(c)(1); Ill. Stat. ch. 725 § 5/166–3(b)(1); Me. Rev. Stat. tit. 15 § 2138(4)(E); Md. § 8–201(C)(4), added by Senate Bill No. 694 (enacted May 15, 2001); Minn. Stat. § 590.01(1a)(b)(1); Mo. R. Crim. P. 29.17(b)(4); N.M. Senate Bill No. 337 (enacted March 14, 2001); Tenn. Code § 40–26–106(b)(1); see also Utah Code § 78–35a–301(2)(c), (4) (prohibiting defense switching).

[33] A number of existing state provisions impose time limits on the duration and availability of their post-conviction DNA testing remedies. See Del. Code tit. 11 § 4504(a) and Del. Senate Bill No. 329 § 4 (enacted June 20, 2000) (until September 1, 2002, or within three years of final judgment); Idaho Code § 19–4902(b) (by July 1, 2002, or within one year of conviction); La. Code Crim. Proc. art. 926.1(A)(1) (until August 31, 2005, and thereafter subject to normal limits on post-conviction relief applications); N.M. Senate Bill No. 337 (enacted March 14, 2001) (DNA testing application must be filed before July 1, 2002); Okla. Stat. tit. 22 §§ 1371, 1371.1 (provision until July 1, 2005, for investigation and presentation to prosecutorial agencies of DNA claims); Or. Senate Bill No. 667 § 1(2) (enacted July 2, 2001) (motion for DNA testing must be filed within 48 months of effective date of act); Wash. Rev. Code § 10.73.170 (DNA testing requests may be presented to prosecutors until December 31, 2002).

The capital murder case of Loyd Winford Lafevers in Oklahoma illustrates the dangers of gamesmanship and delay using DNA testing. Lafevers and co-defendant Cannon burglarized, beat, kidnaped and doused with gasoline and set on fire, an 84-year-old woman in Oklahoma City. They were tried together, convicted and sentenced to death. The appeals court reversed and ordered they be tried separately, which was done in 1993. At the 1993 retrial, the defense chose not to conduct DNA tests of blood on two pairs of pants with type A blood (matching Canon and the victim) seized from the Canon's house. Each was convicted and sentenced to death again. Once his state and federal appeals were exhausted, Lafevers sought DNA testing of the blood on the pants, despite the fact that, if excluded, the results would not establish his innocence, and that he specifically declined to request such testing at his 1993 retrial. Given the strength of the evidence in the case against Lafevers, the minuscule probative value of DNA testing results, and the suffering to the victim's family, authorizing DNA testing, as would be required under S. 486, would frustrate, not further justice. See Post-Conviction Testing: When is Justice Served?: Hearing Before United States Senate Committee on the Judiciary, June 13, 2000 (W.A. Drew Edmondson).[34]

The Majority pays lip service to the fact that DNA testing can help solve crimes and lead to the incarceration of dangerous defendants. Majority Report at 1, 9–10. Its pro-law enforcement statements are contradicted by the details of S. 486.[35] Specifically, Section 2291(d) unreasonably restricts the government's use of DNA test results. First, if the test results are exculpatory to the defendant, Section 2291 does not authorize the government to use the results of the DNA test for any other investigative purposes, including connecting the defendant to other crimes for which he could be prosecuted through the national CODIS system.[36] Further, if a defendant successfully moves for DNA testing and is identified as the source of biological evidence in any other case, Section 2291 includes no provision waiving the statute of limitations for subsequent prosecution of the defendant.[37] If Rule 33's normal time limit for filing of new trial motions is waived in light of the exculpatory results of a DNA test, the same principle should apply to the incul-

[34] The Majority cites three specific cases where DNA exonerations occurred years after the defendants were convicted as support for its contention that no time limits should be imposed. Majority Report at 14. In fact, the three cases underscore the need for encouraging prompt testing and time limits to encourage such requests. By citing these older cases, the Majority ignores the fact that DNA technology was not available at the time the defendants were convicted; indeed, the Majority does not specifically identify when the defendants first made their requests for DNA testing.

[35] The Majority incorrectly describes the facts involved in the case of Jerry Frank Townsend and Eddie Lee Mosley by suggesting that prosecutors would not accede to a request for DNA testing to confirm Townsend's guilt. Majority Report at 9. In fact, the Florida prosecutors agreed to such testing but the testing was delayed by Smith's defense counsels' demand that the result only be given to them and concealed from the state. See Jackie Halifax, Evidence Comes Too Late, Associated Press, December 14, 2000, *http://abcnews.go.com/sections/us/DailyNews/dna001214.html.*

[36] Cf. La. Code Crim. Proc. art. 926.1(I) (DNA profile of petitioner to be sent to state police for inclusion in DNA database); New Mexico Senate Bill No. 337 (enacted March 14, 2001) (district attorney may use result of DNA testing of petitioner to investigate or prosecute any case); Tex. Gov't Code § 411.142(g)(4) (results of post-conviction DNA testing may be included in DNA database); Utah Code § 78–35a–302(2) (data from DNA samples or test results may be entered into law enforcement DNA databases).

[37] Cf. Utah Code §§ 78–35a–301(2)(f), 78–35a–302(3) (similar waiver provisions for statute of limitations).

patory use of DNA evidence, notwithstanding the normal time limit for prosecution.[38]

Section 2291(a)(2) authorizes a defendant to request DNA testing for "any other offense" which was relied upon by the sentencing court to make a defendant eligible for the federal death penalty or sentencing as a career offender or armed career criminal.[39] This provision will allow federal defendants to obtain DNA testing in federal court relating to prior state convictions used to enhance their federal sentence, even though the federal judge knows nothing about the state case, has no access to the state trial record or the evidence maintained by the state.[40] Federal courts are not the proper forum to resolve claims of innocence relating to prior state convictions no matter how old the state conviction. In these circumstances, defendants should first seek redress in the state of conviction (used to enhance the federal sentence), and if successful, they should then seek federal habeas review of their sentence.[41]

While much of the hearing record focused on the need for DNA testing in death penalty cases, Section 2291 inexplicably does not prioritize DNA testing in capital cases. It is obvious that defendants sentence to death who claim actual innocence, when justified, should have their cases prioritized for DNA tests. Section 2291 omits nay distinction between federal capital and noncapital cases, and fails to place these important cases on a testing fast track (such as 120 days) to ensure that these tests are conducted quickly.

Finally, in order to discourage a flood of baseless claims, Section 2291 does not clearly set out the requirements that a defendant assert under penalty of perjury that they are actually innocent of the federal crime (or any other offense used to enhance their federal sentence), and does not specifically provide for full prosecution of defendants who make false claims of innocence in support of a DNA testing request. Section 2291(g)(2)(D) allows a court to hold a defendant in contempt (18 U.S.C. § 401) but does not authorize federal prosecution of other applicable crimes such as perjury or false statements.[42]

In Michigan, for example, the first DNA test conducted pursuant to a then new Michigan law, confirmed that a defendant, Michael Hicks, raped and kidnaped a woman in Calhoun County, notwith-

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[38] Some states have extended or eliminated the limitation periods for the prosecution of certain offenses, such as rapes, which are likely to be solved through DNA matching. See, e.g., Ga. Code § 17–3–1(b); Idaho Code § 19–401; La. Code Crim. Proc. art. 571. A number of states have adopted provisions which toll, extend or eliminate limitation periods for prosecution in cases involving identification through DNA evidence. See Ark. Code § 5–1–109(b)(1); Conn. House Bill No. 5903 § 1 (enacted May 16, 2000); Del. Code tit. 11 § 205(i); Ind. Code § 35–41–4–2(b); Kan. Stat. § 21–3106(7); Mich. Comp. Laws § 767.24(2)(b); Minn. Stat. § 628.26(m); Or. Rev. Stat. § 131.125(8); Tex. Crim. Proc. Code art. 12.01(1)(B). Some states have no limitation period for the prosecution of certain felonies. See, e.g., Ala. Code § 15–3–5 (no limitation period for prosecution of felonies involving violence, drug trafficking, or other specified conduct); Ariz. Rev. Stat. § 13–107(E) (limitation period for prosecution of a serious offense tolled during any time when identity of perpetrator is unknown); Ky. Rev. Stat. § 500.050 (generally no limitation period for prosecution of felonies); Md. Cts. & Jud. Proc. Code § 5–106 (same); N.C. Gen. Stat. § 15–1 (same); Va. Code § 19.2–8 (same).

[39] See 18 U.S.C. §§ 924(e)(1), 3592(c)(2)(3)(4)(10)(12), and (15); 21 U.S.C. §§ 848(n)(2)(3)(4), and (10); United States Sentencing Commission, Guidelines Manual, § 4B1.1 (Nov., 2001).

[40] Recognizing the practical difficulties in requiring federal judges to order post-conviction DNA testing of evidence in prior state cases, the Judicial Conference of the United States specifically opposes this provision for non-capital cases. See Letter from Secretary, Judicial Conference of the United States, Leonian Ralph Mecham to Chairman Patrick J. Leahy, June 20, 2002.

[41] See 28 U.S.C. § 2255.

[42] See 18 U.S.C. §§ 1001, 1621, and 1623.

standing his contention that semen found on a pillowcase could not be his. The Innocence Project, founded by Barry Scheck, pursued Hick's request for a DNA test. After the test confirmed Hicks' guilt, Calhoun County Prosecutor John Hallacy responded by stating that Hicks "perpetrated a fraud on the court * * * and there's no penalty for it."[43] To be fair, our justice system must ensure that those who would abuse it suffer a consequence. The Majority ignores this concern in the drafting of S. 486.

The potential for gamesmanship and unnecessary delay was highlighted by the actions of the Innocence Project who represented death row inmate Danny Joe Bradley in Alabama courts. In a letter to the Judiciary Committee dated June 11, 2002, Alabama Attorney General Bill Pryor documented abuses by the Innocence Project, and its conduct in Alabama court proceedings.

Bradley was convicted of the 1983 rape and murder of his twelve-year-old stepdaughter and sentenced to death. Nuclear DNA testing was not available when he was convicted. During the following 15 years, Bradley appealed his conviction and death sentence in state and federal courts. Starting in 1995, the Innocence Project and the Attorney General's Office communicated concerning the evidence in the case. During this time period, Bradley had a pending federal habeas petition pending before a federal district court, but Bradley never asked for a DNA test or claimed that he was actually innocent of the crime.

After the habeas proceeding was concluded in the district court, on November 14, 2000, the Alabama Attorney General offered to conduct nuclear DNA testing on any of the available items in the Bradley case. Bradley waited until February 2001, when the State moved for an execution date, to respond to the state's offer. Bradley's attorneys objected to the testing of bed sheets stained with fecal matter and semen from the bed where the victim was raped, sodomized and strangled.

Bradley filed a law suit in federal court after the state set an execution date. The lawsuit successfully delayed his execution so that DNA testing could be completed, even though he waited six years to request such testing. Mr. Scheck represented to the court that the testing was not being sought to delay Bradley's execution. Bradley's expert conducted DNA tests of the bed sheets but Bradley would not disclose the results until forced by a court order. The test revealed that the fecal stains were from the victim and that semen was from Bradley.

Despite these findings, Bradley continued to seek additional DNA testing using a less useful and less discriminating DNA testing technique. Bradley's lawyers and the Innocence Project misled the Alabama Supreme Court for six months by representing that such testing was being conducted. In January 2002, the Attorney General found out that the testing had never been started, and Barry's attorneys claimed that they were not required to correct the past misrepresentations to the court. Subsequently, the Alabama Attorney General learned that the DNA testing was actually completed in late March, and neither the Innocence Project or

[43] Dawson Bell, New DNA Law Gets its First Test, Detroit Free Press, July 17, 2001.

Bradley's attorneys contacted the Attorney General to inform them of the results.

One month before his scheduled execution Bradley filed suit in federal court. His federal habeas suit was dismissed as untimely, and the magistrate specifically noted that Bradley waited five years to seek DNA testing. While we do not suggest that the Innocence Project regularly engages in such misconduct, we only note the specific concerns documented in Alabama Attorney General Pryor's letter, which have never been refuted by the Innocence Project, to support our concerns about the potential for abuses in affording convicted defendants a right to DNA testing.

(ii) Section 2292

Section 2292 imposes burdensome evidence retention requirements on law enforcement requiring the government to "preserve all evidence that was secured in relation to an investigation or prosecution of a Federal crime" that "could be subjected to DNA testing" for the period of time that any person "remains subject to incarceration." The provision includes a civil penalty for failures to comply, requires the Attorney General to implement regulations governing retention of evidence, and creates a new criminal penalty for destruction or altering of DNA evidence.

While there are certain exceptions to the evidence retention requirements, this provision is unnecessarily broad and will burden the government with preserving mountains of evidence with little to no relevance to the defendant's actual innocence. for example, this section could be construed to require the preservation of items that are largely irrelevant but fall within the ambit of the statute applicable to all evidence obtained in connection with a federal investigation. For example, an automobile that was seized and searched might have to be preserved because DNA might be found on the steering wheel, the upholstery or the windows. Blood, saliva, hair roots, semen, fingernail scrapings—biological materials that are shed or left during the commission of the crime—are the most obvious sources of DNA and the most likely to be probative of the perpetrator. Incidental DNA on a steering wheel or upholstery that could have been left at any time and has no obvious connection to the crime is not likely to be probative of the identity of the perpetrator. The presence of another person's DNA inside an apartment or automobile or the absence of the defendant's DNA would not shed light on whether he had committed the crime.[44]

IV. Defense Counsel in State Capital Cases

We strongly disagree with the Majority on the need for, and the means chosen in, S. 486 to ensure that indigent defendants are afforded competent counsel. If such a need exists, then we would agree that additional funding to the states and state courts for such purposes would be appropriate. However, the Majority has not

[44] The Majority's citation of older individual cases to justify imposing burdensome evidence retention requirements is misguided. Majority Report at 18. These cases, while dramatic, have little relevance to determining what evidence should be preserved prospectively when DNA testing is now routinely made available prior to trial. The older cases occurred during a time when DNA testing was not routinely conducted. That situation has changed. States now conduct such testing and there is no reason to impose costly requirements in this situation, particularly when doing so without providing adequate funding to comply with these requests requirements.

demonstrated that there is a significant, systemic problem in the quality of representation in state capital cases which would justify the provisions in Title II of S. 486. Indeed, the Majority ignores the significant protections which already exist in the Sixth Amendment guarantee of competent counsel. See, e.g., *Strickland* v. *Washington,* 466 U.S. 668 (1984). Moreover, as discussed herein, even assuming that such a problem exists with the competence of counsel in state capital proceedings, we oppose the means by which S. 486 seeks to "improve" the quality of representation.

A. THE CLAIMED NEED FOR FEDERAL INTERVENTION

The Majority asserts—with little factual support—that "the prevalence of incompetent counsel in state death penalty proceedings, particularly at the trial level, has been well documented. Majority Report at 20. The Majority provides no credible evidence to support this claim. The Majority relies on the Liebman study, recommendations of organizations whose members are generally opposed to the death penalty, newspaper reports, as well as anecdotal or erroneous claims of individual instances of ineffective assistance of counsel, to justify the claimed need for improvements in the quality of representation of indigent defendants in capital cases. As we have explained above, the Liebman study has been so thoroughly discredited that it cannot justify the federal intrusion and burdens imposed by S. 486 on the state judicial and criminal justice systems. Second, the recommendations of the Constitution Project and the American Bar Association, while significant, are not based on any analysis of performance of counsel in state capital proceedings, and may reflect the influence of organization's political opposition to the death penalty.[45]

The Majority is left with little justification beyond isolated, individual instances where there was clearly a deficient performance by defense counsel (e.g. sleeping or intoxicated defense counsel). We are all aware of such horror stories and we submit that they are the exception, not the rule. The Majority seeks to portray these stories as "par for the course." This view ignores the hundreds of capital cases in which no flaws was found in the quality of legal representation. It also ignores the hundreds of capital cases in which defendants were either acquitted, or sentenced to a penalty less than death, many times the result of outstanding representation by defense counsel.

Contrary to the Majority's characterization of the competence of state capital defense counsel, several witnesses provided testimony during hearings on S. 486 that supports a completely different picture of state capital litigation—prosecutors in state capital cases are typically out-manned and out-gunned by defense teams funded by a combination of public and private sources. See Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001 (statement of Alabama Attorney General William Pryor, statement of Philadelphia Deputy District

[45] The Majority also fails to note that almost every state which has capital punishment already has implemented the Constitution Project Committee's recommendation that each state enact competency of counsel standards in capital cases. See Effective Counsel Recommendations Number 2.

Attorney Ronald Eisenberg, and statement of South Carolina District Attorney Kevin S. Brackett); Post-Conviction Testing: When is Justice Served?: Hearing Before United States Senate Committee on the Judiciary, June 13, 2000 (responses of Joshua K. Marquis to questions from Chairman Leahy), pp. 143–44; Letter from Sue Kiorth to Chairman Patrick J. Leahy, July 10, 2002 (noting that S. 486 is "an effort to out-gun" already over-taxed prosecutors offices). Kevin Brackett explained:

> I am not aware of any sleepy or drunken capital defense attorneys in South Carolina. No judge I know would tolerate it.
>
> Nor have I seen any incompetent attorneys take up the cause of a man on trial for their life. South Carolina already imposes minimum standards for capital defense counsel and the judges are required to find affirmatively that any prospective capital defense attorney is qualified. Five years of recent felony trail experience is the minimum requirement for the lead attorney. In most cases the actual level of experience far surpasses this. South Carolina law requires indigent defendants be appointed at least two attorneys.
>
> I have also had the pleasure of meeting many fine defense experts over the last 10 years. South Carolina provides ample funding for retaining expert witnesses and private investigators. This year's budget provides $2.75 million for use in paying appointed counsel and hiring experts and investigators. In addition, state law allows for part of every dollar pain in criminal fines to be deposited into the same account. When you consider that South Carolina tries approximately 15 capital cases per year you realize that our legislature is not stingy in this regard.

Mr. Brackett's view was also supported by the testimony of Ron Eisenberg, Deputy District Attorney, Philadelphia Pennsylvania, who stated:

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

> after the case has already moved through the state courts. In my jurisdiction, however, capital defense lawyers paid by the federal government have spent at least as much of their time in state court as in federal court. At the very minimum, the federal millions free up considerable resources for direct use in state court, at the trial, appeal and post-conviction level.

The Majority ignores a Department of Justice study released in November 2000, Defense Counsel in Criminal Cases, which found that, in criminal cases, there was no significant difference in the quality of representation between retained and publicly-financed defense counsel:

> In both Federal and large State courts, conviction rates were the same for defendants represented by publicly financed and private attorneys. Approximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties were found guilty, regardless of type of attorney.

Bureau of Justice Statistics, Defense Counsel in Criminal Cases, (November 2000). The study also noted that during 1996, 75 percent of defendants in state court represented by appointed counsel either pled guilty or were convicted, while 77 percent of defendants with privately retained counsel either pled guilty or were convicted. With the exception of State drug offenders, Federal and State inmates received about the same sentence on average with appointed or private legal counsel. Id. at 1.

A Department of Justice survey conducted in 1999 of indigent defense services shows that an estimated $1.2 billion was spent on indigent criminal defense in the nation's largest 100 counties during 1999, and that approximately 73 percent was spent on public defender programs, 21 percent by assigned counsel programs, and 6 percent on awarded contracts. In the 50 counties with comparable data, 1982 expenditures totaled about $464 million. In 1999, these same 50 counties spent approximately $877 million on indigent criminal defense services, an increase of 47 percent from 1982. See Carol DeFrances, Marika F.X. Litras, Bureau of Justice Statistics, Indigent Defense Services in Large Counties, 1999 (November 2000).

Aside from these Justice Department studies, the Majority ignores the very substantial reforms that have already been enacted by almost every state. Nearly all of the capital punishment states now have competency standards for appointed counsel. See Herman, Indigent Defense & Capital Representation (National Center for State Courts, No. IS01–0407, July 17, 2001); see also Office of Justice Programs, Compendium of Standards for Indigent Defense Counsel (December 2000) (study found 17 states have statute or rule setting standards for appointment of defense counsel in capital cases; 14 other states have public defender systems for capital representation; and study predated Texas indigent defense system). In most cases, those standards exceed the qualifications that Congress required for appointment of counsel in federal capital cases. See 21 U.S.C. §§ 848(q)(4)(A) and (5)–(7); Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before

the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001 (statement of Philadelphia Deputy District Attorney Ronald Eisenberg).[46]

More specifically, the Majority cites five cases in which it claims that ineffective counsel resulted in "innocent" defendants being convicted. Majority Report at 19–20. A closer examination of these cases reveals the weakness in the Majority's claim.[47] Of the five cases, in three it is far from clear that the defendant is, in fact, innocent. In a fourth case, the defendant was never even sentenced to death. And in all of these cases, any flaws in the conviction have little to do with the system by which the State appoints its defense attorneys. In two of the cases, prosecutors withheld evidence that would have seriously undercut hair-analysis testimony that was used against the defendant. In a third case, prosecutors failed to reveal that they had reduced a prison informant's sentence in exchange for his testimony. In another case, although the court found ineffective assistance, it also concluded that trial counsel was one of the best lawyers in the city. And in the last case—from Cook County—defendant's trial was undermined by police and prosecutors' gross misconduct, including witness intimidation, concealment of benefits granted in exchange for testimony, and concealment of evidence of other suspects. No defense lawyer can be blamed for not using evidence that the prosecution has wrongfully failed to surrender.

Further, two of the States implicated in the Majority's examples have substantially upgraded their indigent-defense systems—increasing lawyer's pay and expert-witness allowances—since the time of those examples. (Most of the examples cited by the Majority are at least twenty years old). See Diane Jennings, "Indigent Defense Bill Passes Senate," The Dallas Morning News, April 11, 2001, at 1A; Beth Kuhles, "County Overhauls Indigent Defense—Changes Bring More Money, Speeder Representation," Houston Chronicle, January 3, 2002, at 1; *State* v. *Lynch,* 796 P.2d 1150 (Okla. 1990). Despite its ready use of examples from these States, the Majority neglects to even mention these important changes. This is not surprising, since those changes under cut any remaining legitimate justification for this bill.

Finally, it bears describing the posture of this Minority Report. Once the Minority issues this dissent, the Majority will have a chance to respond, and that will end the debate. We assume that the Majority will try to find some more credible cases to support its argument—and may discretely delete from its report some of the more ridiculous examples reviewed here. We will not have a chance to respond, even to any new examples. Such examples may seem impressive—as the initial examples no doubt did to some—

[46] Equally unpersuasive is the Majority's claim that there exists a "crisis" in post-conviction representation of capital defendants. Majority Report at 21. That view is contradicted by the testimony of Ronald Eisenberg cited above which suggests that, despite Congress' attempt to defund capital resource litigation centers, many of the attorneys assigned to these groups have continued to represent capital defendants in state court proceedings. In addition, Alabama Attorney General Bill Pryor outlined that significant appellate post-conviction resources are made available to Alabama death row inmates. See Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001 (statement (and attachments) of Alabama Attorney General William Pryor).

[47] A more detailed analysis of each of the five cases is set forth in Attachment E.

when not all of the facts have been presented. Regardless of what may appear in the final draft, we simply ask observers to keep in mind that "[t]he Innocence Protection Act was first introduced * * * on February 10, 2000, by Senators Leahy" et al., Majority Report at 2. It thus speaks volumes that today—over two-and-a-half years later—the proponents of this bill do not have readily available even a single credible example that plausibly supports their argument that States mast be forced to restructure their indigent counsel systems (or fund capital resource centers) in order to protect "innocence."

B. FEDERAL INTRUSION ON STATE AUTHORITY

In response to the perceived deficiencies in state judicial systems and appointment of indigent defense counsel, S. 486 presents the states with a Hobson's choice: either accept federal grants, which diminish over time, establish "independent" agencies (separate from the state executive, legislative and judicial branches) responsible for complying with federally-mandated competency and appointment standards, agree to allow private civil suits against state officers organizations. This Hobson's choice is nothing more than a veiled attempt to resuscitate the private capital litigation resource centers that Congress defunded in the middle 1990s. Given the mandates and burdens imposed on the states through the grant program, many, if not all, states will forego possible federal grants. S. 486 is structured to deter states from applying for such grants in order to advance the clear intent of S. 486—resuscitate and renew the federal funding of private capital litigation organizations.

(i) Section 201

Even assuming that there exists a problem with the quality of representation in state capital cases, the means for addressing the problem are misguided. Section 201 creates a federal grant program, administered by the Department of Justice, which requires states to create a new entity (independent of the executive, legislative and judicial branches) to set qualifications for attorneys who represent indigent defendants in capital cases; to establish and maintain a roster of qualified attorneys;[48] and appoint 2 attorneys from the roster to represent an indigent in a capital case. S. 486's approach simply ignores the traditional role of the states and state courts in administering systems for the appointment of competent counsel in state criminal courts. This is a province legitimately reserved to the states and the state courts, and one that should be protected from unnecessary federal intrusions. In effect, Section 201 would strip states and state courts of their traditional role in establishing a system for appointing counsel to represent indigent defendants.

Section 201 would impose significant costs on the states. For example, Section 201 requires that the new independent state entity would have to pay qualified attorneys at a rate "typically paid to

[48] In qualifying attorneys for the appointment roster, the independent entity is required to consider whether, in the past 5 years, an attorney has been sanctioned for ethical misconduct, found to have rendered ineffective assistance of counsel, or asserted in 3 or more cases that he or she rendered constitutionally ineffective assistance of counsel.

attorneys" in the federal system, and would have to provide "reasonable reimbursement for costs" for staff and support services comparable to such reimbursement rates in federal capital cases. While federal grants are authorized to assist the states in creating and administering this new competency of counsel program, the federal share of such costs in future years is reduced and the state will increase.[49]

Even more troublesome is the fact that, under Section 201(1), if Congress fails to appropriate sufficient funds in any fiscal year, up to 10 percent of a state's Byrne block grant money for state and local law enforcement can be used to fund the state's defense counsel program. Such a reallocation of critical state and local law enforcement and victim funding is unwise. While many are concerned about the FBI's need to focus on terrorism and its ability to continue to investigate local crimes, this is not the time to reduce, or even threaten to reduce, critical federal funding to support state and local law enforcement.

(ii) Section 202

While the Attorney General is authorized to enforce state compliance with the grant program, Section 202 inexplicably requires states to agree to submit to private enforcement suits in federal district court. See Section 201(i)(1)(2). If they choose to do so, states will be required to devote significant resources to defend against civil enforcement suits which will be churned by a cottage industry fueled by private death penalty opposition groups, prisoners and other interested parties, challenging state compliance with federal competency of counsel mandates. States will have to devote money to defend these suits, leading to settlements and allocation of even more state funds to implement such settlements.

C. FEDERALLY-FUNDED CAPITAL RESOURCE CENTERS: A MISTAKE WE HAVE MADE BEFORE

Given the number of federal mandates in the Section 201 grant program and the potential exposure to private enforcement suits authorized in Section 202, many states will choose not to apply for federal funding. In that situation, Section 203 authorizes the Department of Justice to grant funds to a qualified capital defender organization in a state. Such a defender organization must consist of attorneys qualified to handle capital cases. Grants to the organization may be used to recruit and train attorneys, and expand the organization's resources for providing representation in capital cases. Funds may not be used to sponsor political activities.

(i) Section 203

We strongly oppose this provision which would, in effect, re-fund private capital defense litigation centers like those which were shut down in the mid-1990s because of ethical and obstructionist tactics. See Departments of Commerce, Justice, and State, the Judiciary,

[49] See Section 201(g). Federal Funding levels are authorized for grants under this program as follows: Fiscal year 2003—$50 million; Fiscal Year 2004—$75 million; Fiscal Years 2005 and 2006—$100 million per year; Fiscal Year 2007—$75 million; Fiscal Year 2008—$50 million. In subsequent years, the federal government's percentage share decreases and the state's share increases.

and Related Agencies Appropriations for Fiscal Year 1996: Hearing Before the United States Senate Subcommittee of the Committee on Appropriations, 104th Cong., March 29, 1995, pp. 270–73. When Congress discontinued public funding for the capital-resource centers seven years ago, it had good cause. The past several years' experience had shown that these groups, which were not accountable to the courts or any other branch of government, had engaged in a consistent pattern of unethical behavior, misconduct, and abuse of the legal process. These incidents included:

• In New York, an employee of the taxpayer-funded Legal Aid Society sent letters to prisoners throughout the State seeking to "incite a prison strike commemorating the 1971 Attica revolt," in which 11 prison guards were killed. Legal Aid Unit Investigated Over Mailing—A Two-Week Strike Was Proposed in a Leaflet Sent to a State Prisoner in Auburn, The Post-Standard Syracuse, September 6, 1995, at C1. See also Prison Strike Urged at Taxpayer's Expense, The Record, Northern New Jersey, September 6, 1995, at A4. The letter, which noted that its author had "been asked to circulate [it] among prisoners in the maximum-security prisons," was written on Legal Aid Society stationery and sent through the organization's privileged legal mail. Only one letter was caught. On the appointed day, "[h]undreds of prisoners were locked in their cells * * * after refusing work assignments in an apparent commemoration" of the Attica riot. Lockdown at Attica on Strike Anniversary, The Record, Northern New Jersey, September 14, 1995, at A4. As one state Senator noted after the letter was discovered, "taxpayers cannot afforded to subsidize groups that put correctional employees at risk by encouraging civil disobedience in maximum-security prisons."

• In Virginia, the Virginia Capital Resources Representation Center was accused of pressuring the wife of a murder defendant into making a false videotape statement recanting her trial testimony. See Bennett's Defenders Said to Break Law—Changed Story Fuels Dispute, Richmond Times-Dispatch, November 21, 1996, at A1. See also Bennett Dies for Chesterfield Slaying, Richmond Times-Dispatch, November 22, 1996, A1; Kellers Seek Solace, Pray, Richmond Times-Dispatch, November 21, 1996, A1. The Center declared that it was "not responsible" for the incident, although the videotape was made under oath at the Center's offices. The witness later told police that "she was told by the investigator [from the Resources Center] that Virginia never would prosecute her and that making the videotape was the only way to save [the defendant's] life." The witness also told police that "someone for the Resource Center is now calling her on a daily basis, asking her to" reaffirm the videotape. Chesterfield County authorities described the incident as "clear evidence of suborning perjury on the part of [the resource center]." Although the videotaped statement was more than two years old—and had been disavowed by the witness more than a year ago—it was "kept secret by [the defendant's] lawyers until" just before the scheduled execution. See Recanted Testimony is Disclosed—Ex-Wife's Conflicting Statements Surface as Execution Date Nears, Richmond Times-Dispatch, November 20, 1996, at B1.

• In Illinois, employees of the Capital Resource Foundation smuggled paintings by death-row inmates out of prison for an ex-

hibit at a fashionable art gallery in downtown Chicago. The President of the Foundation—whose own office "is decorated with some of the Death Row paintings the foundation had planned to exhibit and sell"—explained the exhibit as "an attempt to show the public that condemned killers are human beings," noting that prisoners "who are on Death Row have a very difficult time." See From Death's Door—Promoter Defends Killers' Art Exhibit, Chicago Sun-Times, November 21, 1996, at 24. The Foundation had previously staged a smaller but financially successful exhibit, which featured paintings by a man who had murdered six people in Rockford, Illinois and Beloit, Wisconsin. State prison officials were not informed of either exhibit, despite state laws requiring that inmates' profits from such activities be used to compensate victims.

• In Texas, the District Attorney of Harris County described an incident in which the Texas Resource Center, "in lieu of timely seeking federal habeas review, issued news releases" to the media announcing "their recent discovery of 'astounding proof of [the defendant's] innocence.'" See Letter from John B. Holmes, District Attorney, Harris County, Texas to The Honorable Henry A. Politz, Chief Judge, United States Court of Appeals, Fifth Circuit, March 23, 1992. The Resource Center then filed a nine-count petition for a writ of habeas corpus, one day before the defendant's scheduled execution. As the District Attorney noted, the Resource Center's "'astounding evidence' of innocence was subsequently characterized by the Fifth Circuit as 'so riddled with holes that it will not hold water.'" Quoting *Ellis* v. *Collins,* 956 F.2d 76, 79 (5th Cir. 1992). See also *Ellis* v. *State,* 726 S.W.2d 39, 40–41 (Tex. Crim. App. 1986). The District Attorney emphasized that this incident was simply one event in a pattern of "highly questionable practices by the Resource Center"—practices that included "late Friday afternoon filings prior to a three-day holiday weekend; recurrent claims of lack of counsel even though withdrawal of counsel was reasonably foreseeable or, in many cases, arranged by the Resource Center; and misrepresentation to the court as well as opposing counsel." See, supra, Letter from John B. Holmes, March 23, 1992.

• In Louisiana, the District Attorney of Jefferson Parish described a case in which the Loyola Death Penalty Resources Center helped a defendant clearly guilty of a brutal torture-murder to draw out his post-conviction proceedings for 13 years. According to the District Attorney, this delay was not accomplished through legitimate means. The Resource Center "misstated medical reports from [the defendant's] medical history, misstated [the defendant's] current mental condition, * * * fabricated an alleged immunity statement based on hearsay, fabricated physical evidence in the form of a silver cigarette case, intimidated the eyewitness [to the crime], * * * attempting to change her testimony, and badgered jurors, as reported by two jurors, until they found a juror who would make claims regarding coercion during jury deliberations." Oversight Hearing on Habeas Corpus, House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Statement of John Mamoulides, District Attorney, Jefferson Parish, Louisiana, February 24, 1994. See also *State* v. *Sawyer,* 422 So.2d 95, 97–98 (La. 1982).

• In California, the State's Supreme Court is believed to have taken over the recruitment of capital defense lawyers from the California Appellate Project—the state's capital resource center—because "it felt the center was delaying recruitment in order to delay litigation." Marcia Coyle, Death Penalty Resource Centers Are "Obstructionist," Say Their Enemies—Judges Call Them Vital, NAT'L L.J., September 18, 1995, at A1, col. 2. Such tactics by resource centers are inevitable, according to Charles Hobson of the Sacramento-based Criminal Justice Legal Foundation: "You're always going to have that problem when people's avowed goal is to abolish the death penalty."

• One South Carolina prosecutor has also emphasized the need for independent supervision of all criminal-justice attorneys—especially in the politically charged context of capital appeals. Kevin Brackett noted that it is "the opinion of many prosecutors who spend any time in capital litigation that some defense attorneys will deliberately infect a record with error or, confess to error at a later habeas hearing in order to secure a new trial for their client." See Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the United States Committee on the Judiciary, 107th Cong., June 27, 2001 (statement of statement of South Carolina District Attorney Kevin S. Brackett).

In the early 1990s, the Texas Resource Center engaged in a regular pattern of abusive conduct. The following are examples of unethical and improper conduct:

• In July of 1993, an attorney, from the Texas Resource Center, representing convicted murderer Richard Wayne Jones in Tarrant County Texas, presented a Motion to Vacate Order Setting Execution Date ex parte, to the judge in the case. Neither the prosecutors nor the victim's family were notified, and therefore were not present in the judge's chambers. These actions were a violation of Texas Rules of Professional Conduct and Texas Rules of Appellate Procedure. (Letter from Sharen Wilson, District Court Judge, Criminal District Court No. 1, Fort Worth, Texas, August 16, 1992).

• Investigators and interning law students from the Texas Resource Center regularly represented themselves to jurors who served on capital cases, as law enforcement officials, district attorney investigators, and law students researching trials for college credit, in an attempt to gain affidavits from the former jurors containing information to be used in the appellate defense of convicted murderers. (Letter from James Elliot, First Assistant District Attorney, Bowie County Criminal District Attorney's Office, Texarkana, Texas, August 6, 1993).

• Attorneys from TRC made up and filed false allegations of prosecutorial misconduct in a capital murder case in Potter County Texas in 1992. The prosecutor was forced to litigate the claims against him, thus allowing the TRC attorneys to delay the appellate procedure and subsequent execution of the defendant. The claims against the prosecutor were unsubstantiated and the findings of the trial court, that the prosecutor engaged in no prosecutorial misconduct, were affirmed by the Texas Court of Criminal Appeals. The prosecutor was forced to withdraw from the case and a special prosecutor was appointed, at taxpayer expense, which re-

sulted in an additional cost of at least $4,500.00 to the taxpayers in Texas. (Letter from Danny E. Hill, District Attorney for the 47th Judicial District of Texas, Amarillo, Texas, July 19, 1993).

• In Navarro County, Texas, the TRC attorney for convicted murderer Gary Starling requested items from prosecutors during the discovery process. Many of the items were non-discoverable under Texas law. The TRC attorneys, undeterred by the law, attempted to obtain the items from a lower level employee at the Sheriff's Office. When this attempt failed, due to the diligence of the sheriff's office employee, the TRC then asked for personnel records of all of the sheriff's office employees, pursuant to the Texas Open Records Act. Much of the requested information was exempt from discovery under the Open Records Act and most of the employees had not even worked on the Starling case. The request was deemed to have been made to harass the sheriff's office in retaliation for not handing over the requested items from the Sterling case. (Letter from Patrick C. Batchelor, Criminal District Attorney of Navarro County, Corsicana, Texas, July 15, 1993).

• One of the jurors in the Starling case was contacted by a TRC member who tried to convince her that she did not do the right thing by convicting Starling. (Letter from Patrick C. Batchelor, Criminal District Attorney of Navarro County, Corsicana, Texas, July 15, 1993).

• In 1993, a paralegal for an attorney contracted by TRC telephoned a former juror in the case of a convicted murderer. The paralegal identified himself as Joseph Ward and arranged an appointment with the former juror to review an already prepared statement. The juror had discussed the case with two people the previous year who identified themselves as students interviewing former capital murder jurors for a research project on the death penalty. Information that she had given to the "students" was the basis for Ward's prepared statement. When the juror expressed discomfort at the fact she had been deceived by the "students" as to the purpose of their interview, Ward asked the juror if she wasn't interested in seeing an innocent man's plight be addressed. (Letter from Luis V. Saenz, Cameron County Criminal District Attorney, Brownville, Texas, July 9, 1993).

• In 1992, Eden Harrington, director of TRC, informed the Fifth Circuit Court of Appeals that the trial court in Harris County, Texas, in the case of convicted murderer Joe Angel Cordova, entered findings of fact and scheduled Cordova's execution without notice to Cordova or his attorney. The Presiding Judge of Harris County Criminal District Courts subsequently informed the Fifth Circuit that Harrington's statements were not true and provided documentation of the notice to Cordova's attorney to the Fifth Circuit. (Letter from John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, July 12, 1993).

• In 1993 a TRC attorney tried to elicit a "confession" from the co-defendant of a TRC client in an attempt to "exonerate" the client. The co-defendant refused to change his true trial testimony. (Letter from John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, July 12, 1993).

• TRC delayed the appellate process and execution of a death row inmate by hiring two attorneys to represent the inmate's co-

defendant and then claiming a conflict of interest at a hearing in which an execution date was to be set. (Letter from Deena McConnell, Assistant District Attorney for Brazos County, Bryan, Texas, February 21, 1994).

• TRC represented convicted murderer Robert Black. Grady Deckard, who testified on behalf of Black at an evidentiary hearing, was charged with aggravated perjury in connection with that testimony. At Deckard's perjury trial, the State called Eden Harrington, Director of TRC, believing that Deckard committed perjury at the request of TRC, was bonded out of jail with TRC money, and had an attorney provided for him by TRC. Deckard's attorney subsequently became Harrington's attorney, which caused a delay because the issue of attorney client privilege had to be resolved. (Letter from Deena McConnell, Assistant District Attorney for Brazos County, Bryan, Texas, February 21, 1994).

• TRC continued to pursue reversal of death row inmate Johnny Cockrum's capital murder conviction despite Cockrum's admission of guilt, request to TRC to end the appellate procedure, and desire to be executed as soon as possible. Cockrum claimed that TRC attorneys lied in court pleadings regarding his alleged claims of actual innocence. (Letter from Texas Death Row Inmate Johnny Cockrum, August 22, 1994).

Capital resource centers found ways to abuse even the most basic elements of the habeas process. One death-row inmate—represented by the Illinois Capital Resource Center—managed to delay his execution simply by repeatedly abandoning and then refiling his appeals. Convicted of bludgeoning an elderly couple to death in a 1982 murder for hire, Robert St. Pierre, "has asked judges to waive his appeals—and then asked to reinstate them—seven times." See Alex Rodriguez, Inmate Resumes Appeal of Dealth Sentence, Chicago Sun-Times, August 4, 1995, at 19.

Sometimes, even the inmates themselves have had no role in resource centers' delaying tactics. One Florida prisoner, who had raped and murdered an eleven-year-old girl, murdered two prisoners while on death row, and indicated that he would kill again in the future, attempted to waive his appeals. The Capital Collateral Regional Counsel (CCRC) of Florida nevertheless filed a federal habeas corpus petition on his behalf. Dismissing the case, the Eleventh Circuit chastised the CCRC for filing the petition without the inmate's "consent and without even telling him [CCRC] was going to do it. In fact, [no one at CCRC] made any attempt to speak with [the inmate] about his case until after he had learned of the petition they had filed in his name and [he] had sent the court a pro se motion to dismiss it." *Sanchez-Velasco* v. *Secretary of Dep't of Corrections,* 287 F.2d 1015, 1017, 1021, 1022, 1024 (11th Cir. 2002). At the district-court hearing in his case, even the inmate—CCRC's supposed client—asked that "CCRC to stop 'play[ing] games with the system and the taxpayers' money.'"

These incidents cannot be ignored, nor can the consistent complaints of state and local prosecutors be dismissed. This troubling pattern of behavior by the resource centers—their repeated unethical conduct and abuse of the legal process—is endemic to their structure. The resource centers were created to litigate against death sentences, a highly ideologically charged subject matter. Yet,

despite, the fact that they were taxpayer funded, the resource centers' lawyers were allowed to operate with virtually no accountability to the courts and justice system that they served. The inevitable result of such a system is aptly described by Kent Scheidegger, the Legal Director of the Criminal Justice Legal Foundation:

> We know from experience with the resource centers that specialized capital defense agencies are usually, if not invariably, captured by the hard core of death penalty opponents. We also know that the hard core regards obstruction as a legitimate means toward their goals, and that they feel unconstrained by the ethical rules against such tactics.
>
> Keeping the appointment authority in the hands of the local courts provides an important check on unethical conduct by defense lawyers. This check is badly needed. The prosecution alone, of all litigants in our courts, cannot appeal after an adverse verdict. The prosecution's evidence, witnesses, arguments, and tactics are examined with a fine-toothed comb on appeal and habeas corpus, and a conviction may be reversed for misconduct. In contrast, even the most outrageous violations of professional standards by the defense side cannot endanger a verdict of acquittal. Once that verdict comes in, the defendant walks, no matter how clear his guilt may be. Bar discipline and contempt proceedings are available in theory, but in practice they provide little deterrent threat.
>
> Because most murder defendants have appointed counsel, the simplest and most practical way to deal with unethical defense lawyers is to not give them any more appointments.

Kent Scheidegger, The Death Penalty Trojan Horse, Criminal Justice Legal Foundation, August 16, 2002.

The Majority cites Indiana's system for appointing defense counsel to capital cases as an example of an effective system of representation, noting that a study of Indiana's reforms, "concluded that since their adoption in 1994, 'no person has been released from the state's death row because of innocence. Nor has there been a case in which lawyers were appointed pursuant to the Supreme Court's rule, complied with its requirements, and were held to be ineffective." Yet the rule in question, Indiana Rule of Criminal procedure 24(B) states quite clearly "it shall be the duty of the judge presiding in a capital case to enter a written order specifically naming two (2) qualified attorneys to represent" the indigent defendant.

By stripping state courts—and all other branches of state and local government—of their appointment power and supervisory authority over publicly funded counsel, S. 486 virtually guarantees a return to the abuses of the past. Indeed, S. 486 promises to make the problem much worse. In the last year that they were funded by Congress, the capital resource centers received only $20 million. Yet under S. 486, the new resource centers are authorized to poten-

tially receive as much as $100 million a year from the federal government.

Moreover, under S. 486, the States' only alternative to allowing the funding of the resource centers would be for States to suspend supervision of their existing indigent defense counsel systems. Under the bill, federal grants would be given to the resource centers unless a State creates "an entity to identify and appoint capital defense lawyers" that functions "independently of the three branches of state government." Majority Report at 22. The Majority makes clear that S. 486 would require States to give "functional independence from the elected branches of government for the entity that appoints capital defense lawyers." Id. In other words, States would have to restructure their indigent-defense systems so as to suspend their supervision of public defenders. S. 486 would force the States to eliminate their current means of ensuring accountability and ethical behavior by their own defense attorneys. The bill truly presents States with a Hobson's choice: they would have to either allow federal funding of the abuse-plagued resource centers, or allow their own indigent-defense systems to turn into the very same thing.

As discussed in the Minority Report, the Majority's own examples fail to demonstrate that inadequate defender systems have caused innocent defendants to be sentenced to death. Moreover, it is far from clear that funding ideologically driven, scandal-plagued resource centers would actually improve the quality of capital defense in this country. S. 486's capital-representation grants program does not protect innocence. Instead, what the program appears to be designed to do is to frustrate the States' administration of their criminal-justice systems. Resource centers may do little to aid the truth-finding function of the courts, but their frequent, repeated, and baseless filings are an effective means of slowing down appellate review, and they do make it expensive for States to implement an effective death penalty.

Unfortunately, the Majority Report simply confirms that S. 486 would allow resource centers to employ obstructionist tactics against the States. In an effort to reach some compromise on this legislation, members of the Minority proposed a number of reforms designed to improve the bill and prevent recurrence of past abuses by the resource centers. One of the few proposals that the Majority would even consider, albeit in weakened form, was an amendment allowing the Attorney General to bar grants to a group if he finds that it has filed "large numbers of frivolous claims." While this provision, standing alone, would not fix all the flaws in S. 486, it would allow the Attorney General some discretion to decline to fund the worst of the resource centers.

The Majority Report now attempts to take away even this limited discretion. The Report states that the new provision's use of the term "frivolous" implies that the Attorney General would have to find that a resource center acted with "some measure of bad faith" before he could deny it funding. Majority Report at 29. As every trial attorney knows, a finding of bad faith is an extremely high threshold. While it is always clear what an attorney actually did during litigation, and it is possible to discover what that attorney knew or should have known before filing a claim, it is virtually im-

possible to divine an attorney's subjective intentions in filing a claim. A bad-faith requirement would effectively nullify the already very modest anti-abuse provision added to S. 486. Indeed, a bad-faith requirement would be indistinguishable from the standard for attorney sanctions that already applies to lawyers appearing before a court—a standard that has in the past proven woefully inadequate to regulate the resource centers' behavior.[50]

Finally, lest there be any doubt about the purposes behind S. 486, the Majority Report explicitly invites the resource centers to engage in "artillery barrage" litigation, in which numerous baseless claims are filed simply in order to overwhelm prosecutors and the courts. The Majority Report specifically "recognizes" that resource centers "may legitimately assert a large number of claims" that, as the Report obliquely states, "may become viable at a later stage in the litigation." Majority Report at 30. Elsewhere in the same paragraph, the Report makes clear what is meant by "viable at a later stage": claims that are predicated on a "reversal of existing law." In other words, the Majority Report specifically invites the resource centers to file claims that are precluded by existing law. Nor need such claims be limited to the occasional, much-anticipated imminent reversal of Supreme Court precedent, as when the Court grants certiorari to review a question that it had previously settled. The Majority Report emphasizes that a defense lawyer may file "a large number" of such claims.

We recognize that the Supreme Court may overrule its precedent. The same criminal-justice procedure that it specifically endorses in one decade, see *Walton* v. *Arizona,* 497 U.S. 639 (1990), it may bar in the next. See *Ring* v. *Arizona,* 122 S.Ct. 2428 (2002). Nevertheless, it would be an abuse of the courts' process to allow criminal defendants to pursue every claim that has already been rejected by binding precedent, simply on the hope that the Supreme Court might someday change its mind. Indeed, the Supreme Court itself has made very clear that defendants generally should not be allowed to assert newly announced rules on federal collateral review. See *Horn* v. *Banks,* 122 S.Ct. 2147, 2150 (2002) (reiterating general rule that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). With a possible exception for precedents that are cast into doubt by a recent grant of certiorari—an exception that, in any event, does not occur in "large

[50] Moreover, it is doubtful that the Majority Report is even correct in asserting that the word "frivolous" requires a finding of bad faith. The frivolous-litigation standard—one of the standards applied in the alternative to prevailing Title VII defendants seeking to recover attorneys fees by *Christianburg Garment Co.* v. *E.E.O.C.,* 434 U.S. 412 (1978)—has been construed by the Supreme Court to not require a showing of bad faith. *See Independent Federation of Flight Attendants* v. *Zipes,* 491 U.S. 754, 759–60 (1989) (concluding that fees may be awarded against suits that were "brought in good faith, but only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation"). The Majority Report's odd attempt to alter the meaning of this provision after its adoption should not override the basic interpretive rule that "Congress expects its statutes to be read in conformity with the [Supreme] Court's precedents." *United States* v. *Wells,* 519 U.S. 482, 495 (1997). And to the extent the matter is in dispute and S. 486 can be deemed facially ambiguous, the Attorney General would be well within the discretion he enjoys in interpreting a statute that he is charged with administering to construe "frivolous" in conformity with *Christianburg.* Under that standard, he would be entitled to deny funding to any group that has filed a large number of claims for which it knew or should have known of those facts that would require rejection of the claim as a matter of law (see, e.g. *Bill Johnson's Restaurants* v. *N.L.R.B.,* 461 U.S. 731, 746 (1983); *Wrech* v. *City of Berlin,* 673 F.2d 192, 195–96 (7th Cir. 1982)), or that rest on a legal theory that is clearly precluded by binding precedent. See *Reeves* v. *Harrell,* 791 F.2d 1481, 1485 (11th Cir. 1986).

numbers"—criminal defendants should not be allowed to sue on claims that are clearly precluded by binding precedent. The Majority Report's purported authorization to do so casts doubt on assertions that S. 486 has anything to do with innocence.[51] Artillery-barrage filings do not aid the fair and efficient administration of the States' criminal justice systems, or any other legitimate object of federal legislation.

The historical record, the current practices of delay, see Post-Conviction DNA Testing: When is Justice Served?: Hearing Before United States Senate Committee on the Judiciary, June 13, 2000 (statement of Oklahoma Attorney General W.A. Drew Edmonson), and the overall structure of S. 486, create a significant risk that funding of private capital litigation organizations will repeat a lesson we learned from the past—these organizations will seek to sabotage and derail the death penalty and the overall administration of justice in our country. Rather than leaving this issue to be resolved by each state, in light of the available resources and the needs of the state, S. 486 does not rely on the hand of justice but seeks to skew justice in order to frustrate the administration of the death penalty.

D. OPPOSITION FROM CONFERENCE OF CHIEF JUSTICES AND STATE ATTORNEYS GENERAL

The Majority suggests that the Conference of Chief Justices supports S. 486. (Majority Report at 24–25). In fact, the Conference of Chief Justices has made it clear that the Conference opposes S. 486, and in particular the competency of counsel provisions. In a Resolution addressing both DNA testing and Competent Counsel, the Conference of Chief Justices stated in pertinent part:

> Whereas, the provision of competent legal representation and the use of scientific evidence in state courts are first and foremost a state responsibility, and particular provisions included in legislative proposals recently introduced in Congress raise substantial federalism concerns and intrude upon the responsibilities of state courts and the independence of the judiciary; and
>
> Be it resolved that the Conference also reaffirms its interest in working cooperatively with the federal government to adequately fund defender programs in capital cases but opposes any attempt by Congress to impose on state courts standards related to the competence of counsel, or the conduct of state court proceedings, in addition to those required by the Constitution.

The concerns of the Conference of Chief Justices have been echoed by various state attorneys general. In a letter to the Senate Judiciary Committee dated June 8, 2000, 30 state attorneys general registered their opposition to the original version of the Innocence Protection Act, citing federalism concerns. Several state attorneys general have filed letters reiterating their opposition to S. 486. See letter dated July 17, 2002, from Alabama State Attorney

[51] Again, we would emphasize that such a construction of the anti-abuse provision would appear to be inconsistent with language adopted by the Judiciary Committee, and in any event would not be binding on the Attorney General. See supra.

General Bill Pryor to the Senate Judiciary Committee; and letter dated July 18, 2002, from Nevada Attorney General Frankie Sue Del Papa to the Senate Judiciary Committee. For example, M. Jane Brady, Attorney General for the State of Delaware, stated in her July 23, 2002 letter:

> The proposed [new requirements for legal representation in capital cases] would override federal and State precedent, as well as statutory law, and intrude upon the states' exclusive responsibility to define crimes, punishments, and the procedures for administering criminal justice in State courts. This proposal is an affront to State sovereignty in that it requires that state court proceedings be conducted in conformity with a Congressional mandate.

Lynne Abraham, District Attorney for Philadelphia, Pennsylvania explained in pertinent parts of her July 12, 2002 letter to the Senate Judiciary Committee that:

> [S. 486] would directly mandate jobs and high pay for cadres of criminal defense attorneys in all state capital prosecutions. Currently, states appoint lawyers for indigent defendants according to local court rules and state statutes. [S. 486] would completely federalize this process by overriding existing state law and instead requiring the states to set up panels who will themselves decide which attorneys get these lucrative appointments.
>
> Under the bill, those chosen few defense lawyers must be paid at rates comparable to those in federal court, which generally means $125 an hour, or assuming a 40-hour work week, $250,000 over the course of a year.
>
> Moreover, if the lawyers seeking these desirable appointments don't like the way the states set up the new appointing panels, they can sue in federal court for that too, and once again secure attorneys fees for having sued.
>
> If a state tries to opt out by not setting up appointing panels, at all, then under this bill the federal government would pay millions of dollars directly into the hands of capital defense lawyer groups, and the money for those payments, if not specifically appropriated by Congress, would be diverted from federal "Byrne" grants used now to promote safe streets for citizens.
>
> In light of all of these provisions, it appears the so-called "Innocence Protection Act" is not really about protecting innocent defendants at all. Instead, it could more appropriately be known as the "Attorney Protection Act" for lawyers opposed to capital punishment.

V. Supreme Court Review and Stay of Execution

Section 301 amends title 28 of the United States Code to require the Supreme Court to grant a stay of execution, which requires five votes, when the Court grants a petition for certiorari, which requires only four votes. The purpose of this provision is to ensure that a defendant is not executed while the Supreme Court reviews the defendant's case and the specific issues raised in the petition.

Chief Justice Rehnquist submitted a letter to the Committee dated August 6, 2002, commenting on this specific proposal.[52] The Chief Justice points out that the Court's existing practice is to issue a stay of execution upon the grant of a petition for certiorari. In addition, the Chief Justice notes that the decision of whether and when to issue stays of execution should be left to the discretion of the Court. Finally, the Chief Justice explains that the current provision, requiring the Court to treat a motion for stay of execution as a petition for certiorari, would significantly change the Court's current practice which limits such treatment to rare situations where immediate action may be required or when the stay application contains enough information to allow the Court to make an informed decision about the case. By requiring the Court to treat motions for stay of execution as a petition for certiorari, the Chief Justice notes that it will be very difficult for the Court to determine whether or not to grant certiorari where the stay application fails to provide sufficient information to make such a determination.

We agree with the specific concerns set forth in Chief Justice Rehnquist's August 6, 2002 letter. First, since the Supreme Court's practice is to issue a motion for stay of execution when the Court grants a petition for certiorari, there is no need for legislative action in this area. Second, the provision unnecessarily intrudes into the inner decision-making process of the Supreme Court. Third, as noted by Chief Justice Rehnquist, the provision as drafted would have the unintended consequence of limiting the information available to the Court when deciding whether or not to grant a petition.

VI. Other Provisions

A. COMPENSATION FOR THE WRONGFULLY CONVICTED

Section 401 increases the maximum amount of damages that the United States Court of Federal Claims may award against the United States under certain circumstances where a defendant obtains reversal of his conviction from a cap of $5,000 to $10,000 per year. While we agree that an increase in possible compensation may be required, we suggest limiting any such increase to capital cases. Such a modification would be consistent with the sense of Congress expressed in Section 402 which is limited to reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death.

B. STUDENT LOAN REPAYMENT

Section 501 provides for assistance to state and local prosecutors and public defenders to repay Stafford loans who agree to remain employed for not less than 3 years. We agree that additional incentives are needed to encourage prosecutors and public defenders to continue in their public service positions. The National District Attorneys Association ("NDAA") supported this proposal as a way to encourage prosecutors to remain in public service and thereby improve the quality of state and local prosecutions. See Protecting the

[52] Letter from Supreme Court Chief Justice Rehnquist to Chairman Patrick Leahy, August 6, 2002.

Innocent: Proposals to Reform the Death Penalty: Hearing before the Senate Committee on the Judiciary, 107th Cong., June 18, 2002 (statement of Paul A. Logli). It should be noted, however, that even with such a significant benefit offered to members of the NDAA, the organization continues to oppose S. 486 for many of the reasons outlined above.

VII. CONCLUSION

We reiterate our commitment to the common goals that we all share—a fair and just death penalty system which provides for post-conviction DNA testing where such testing will determine whether or not the defendant is actually innocent, and which ensures that all capital defendants are represented by competent counsel and receive a fair trial. These important goals cannot and should not be used as vehicles for hidden agendas to undermine the American public's interest in maintaining a fair and swift death penalty which saves innocent lives, justly punishes the guilty, and vindicates the rights of all victims to heinous and horrible crimes.

Equally troublesome in our view is the fact that S. 486 shows little regard, if any, to traditional notions of federalism. Chief Justice Rehnquist outlined the basic federalism principles in *United States* v. *Lopez*

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, Section 8. As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined.' Those which are to remain the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Id. at 549, n.3 (1995) (internal citations and quotations are omitted).

S. 486 is replete with instances in which the federal government intrudes in areas legitimately reserved to state control. In its brazen and unjustified attempts to impose DNA testing requirements on states through the 14th Amendment, to strip states and state courts of control over their criminal justice systems, and to require compliance with burdensome and unnecessary federal mandates on competency of counsel in state capital criminal proceedings, S. 486 irresponsibly undermines the "healthy balance of power between the States and the Federal Government." For all of the above-stated reasons, we oppose S. 486.

ORRIN HATCH.

ATTACHMENT—A

CRITIQUE OF DPIC LIST ("INNOCENCE: FREED FROM DEATH ROW")

(By Ward A. Campbell)[1]

The Death Penalty Information Center (DPIC) Innocence List ("Innocence: Freed from Death Row") is frequently cited as support for the claim that 102 innocent prisoners have been released from Death Rows across the nation.[2] This list is uncritically accepted as definitive. However, an examination of the premises and sources of the List raises serious questions about whether many of the allegedly innocent prisoners named on the List are actually innocent at all.

Analysis of the cases on the List suggests that the List exaggerates the number of inaccurate convictions. For many of its cases, the List jumps to conclusions and misstates the implications of what has happened in the various cases that it cites as involving "actually innocent" defendants. The DPIC "falsely exonerates" many of the former Death Row members on its List and misleads the public about the frequency of wrongful convictions in terms of appraising the current capital punishment system in this country.

In fact, it is arguable that at least 68 of the 102 defendants on the List should not be on the List at all—leaving only 34 released defendants with claims of actual innocence—less than ½ of 1% of the 6,930 defendants sentenced to death between 1973 and 2000.

A. BACKGROUND OF DPIC LIST

The year 1972 marks the beginning of modern death penalty jurisprudence in this country. That year, the United States Supreme Court declared all death penalty statutes unconstitutional. *Furman* v. *Georgia* 408 U.S. 238 (1972). The states immediately responded by enacting various statutes tailored to meet the concerns expressed in *Furman.* In 1976, the United States Supreme Court approved new death penalty laws that narrowed the class of murderers eligible for the death penalty and permitted the presentation of any mitigating evidence to justify a sentence less than death. The Court also abrogated so-called "mandatory statutes" that did not permit presentation of mitigating evidence. There is no proof that since the reinstatement of the death penalty in 1976 that an innocent person, convicted and sentenced under these statutes, has been executed. Not even the DPIC makes this claim.

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[1] Supervising Deputy Attorney General, State of California. Member, Association of Government Attorneys in Capital Litigation (AGACL). The writer represents the State in death penalty appeals and is a supporter of the death penalty. This paper was the basis for a presentation at an annual meeting of AGACL during 2002. However, this work represents solely the views of its author and is not an official publication of the California Department of Justice nor does it represent the views of AGACL.

[2] The DPIC List is located at its website: *http://www.deathpenaltyinfo.org/innoc.html*

Nonetheless, death penalty opponents claim that numerous innocent persons have been sentenced to death, only to escape that ultimate punishment when subsequently exonerated. The current source of this claim is the DPIC List. The DPIC describes itself as "a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment." In actuality, the DPIC is an anti-death penalty organization that was established "to shape press coverage of the death penalty." The American Spectator, April 2000 at 21; Washington Post (12/9/98). Its Board of Directors is comprised of prominent anti-death penalty advocates and defense lawyers.

The DPIC now claims that its standard for including "innocent" capital defendants on its List "is to count those whose convictions are reversed and who are then either acquitted at retrial or have charges formally dismissed." The List also includes any cases in which a governor grants an absolute pardon. Under its current standards, the DPIC no longer lists defendants who plead guilty to lesser charges. Washington Times (9/12/99); The Record, Bergen County, N.J., (4/14/02). However, as will be shown, the DPIC's standards as a whole are inadequate and misleading.

The DPIC List was first assembled in 1993 at the request of the House Subcommittee on Civil and Constitutional Rights. The List has its roots in a series of studies beginning with Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stanford Law Rev. 21 (1987) [hereinafter Stanford]. This article was followed by the 1992 publication of the book, In Spite of Innocence, by Bedau, Radelet, and Putnam. The most recent article is Radelet, Lofquist, & Bedau, Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt, 13 T.M. Cooley L. Rev. 907 (1996) [hereinafter Cooley].

1. The Stanford study

The Stanford article presented 350 cases "in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent." Thus, the article included cases during the twentieth century in which the defendants were not actually sentenced to death. The Stanford authors acknowledged that their study was not definitive, but only based on their untested belief that a majority of neutral observers examining these cases would conclude the defendants were actually innocent. Stanford, at 23–24, 47–48, 74.

The article limited the cases it discussed to defendants in cases in which it was later determined no crime actually occurred or the defendants were both legally and physically uninvolved in the crimes. The focus was primarily on "wrong-person mistakes." The article did not include defendants acquitted on grounds of self-defense. Id. at 45. The article relied on a variety of sources, including the "unshaken conviction by the defense attorney * * *" that his or her client was innocent. Id. at 53.[3]

[3] The Stanford study includes historically controversial defendants such as Bruno Hauptmann, executed for the kidnapping and murder of the Lindbergh baby, and Dr. Sam Sheppard, ultimately acquitted on retrial for the murder of his wife, as examples of wrongfully convicted murderers. However, the most recent study of Hauptmann's case supports the evidence of his conviction. Fisher, The Ghosts of Hopewell (Southern Ill. Univ. Press 1999). Similarly, the most recent

The Stanford study was criticized in Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stanford L. Rev. 121 (1988). In a reply, Bedau and Radelet acknowledged that their analyses were not definitive. Bedau & Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stanford L. Rev. 161, 264 (1988) [hereinafter Stanford Reply].

2. In Spite of Innocence

The book which followed the Stanford study, In Spite of Innocence (1992), was a "less-academic" popularization of the cases presented in the Stanford article. The book purportedly corrected some unidentified errors from the Stanford article.

Significantly, In Spite of Innocence referred to the new post-*Furman* death penalty statutes and conceded that "[c]urrent capital punishment law already embodies several features that probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence." Id. at 279.

3. The Cooley article

The recent Cooley article is the principal source for the DPIC List.[4] Two of its authors, Bedau & Radelet, also wrote the original Stanford study and In Spite of Innocence. The Cooley article ostensibly continued the Stanford focus of identifying "factually innocent" defendants—wrongly convicted persons who were not actually involved in the crime. Cooley, at 911.

Cooley, however, had a narrower time focus than the Stanford article or In Spite of Innocence. The Cooley list of 68 condemned, but allegedly innocent prisoners is supposedly limited "to cases since 1970 in which serious doubts about the guilt of a death row inmate have been acknowledged." Cooley, at 911. The "admittedly somewhat arbitrary" cutoff date of 1970 appears to be directed at eliminating cases that were disposed of no earlier than 1973, after *Furman* v. *Georgia,* 408 U.S. 238 (1972). Cooley, at 911 fn. 27. As the authors had indicated in their earlier book, In Spite of Innocence, current death penalty law included features that probably reduced the likelihood that an innocent person would be sentenced to death.

Accordingly, earlier cases under old statutes would not add much to analyzing the contemporary problem of "wrongful convictions." Nevertheless, the Cooley cutoff date of 1970 was still flawed for purposes of assessing our current capital punishment system since it still included prisoners convicted under the pre-1972, pre-*Furman* statutes.

The Cooley article purported not to include inmates released because of "due process errors" unrelated to allegations of innocence.

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civil litigation concerning the conviction of the late Dr. Sheppard rejected evidence of his innocence. Cleveland Plain Dealer (4/13/00).

[4] Cooley itself only lists 68 defendants. The DPIC does not explain how it has otherwise learned of the cases or defendants it has since added to its current list of 102 defendants.

Cooley, at 911–912. Finally, Cooley excluded inmates who were found to be guilty of lesser included homicides or not guilty by reason of mental defenses. Cooley, at 912–913.

However, Cooley expanded the original Stanford study to include allegedly "innocent" defendants who actually committed the crime or were involved in the murder. Unlike the Stanford article, Cooley included cases in which the defendant was ultimately acquitted on grounds of self defense. Cooley, at 913. The Cooley article also included cases in which defendants pled to lesser charges and were released "because of strong evidence of innocence." Id. at 914. The DPIC has since disavowed inclusion of cases in which prisoners pled to lesser charges, although it has not removed such prisoners from its List.

The Cooley article failed to mention at least one significant change from the previous studies—the inclusion of accomplices mistakenly convicted as actual perpetrators. The Stanford study excluded such defendants. "We also do not consider a defendant innocent simply because he can demonstrate, in a case of homicide, it was not he but a co-defendant who fired the fatal shot * * * because the law does not nullify the [accomplice's] culpability merely because he was not the triggerman, we do not treat him as innocent." Stanford, at 43. Cooley and the DPIC List abandoned that limitation and included supposedly innocent defendants who were still culpable as accomplices to the actual triggerman. Thus, unlike its predecessor studies, Cooley cited cases in which there were no actual "wrong person" mistakes—a practice which the DPIC has continued.

Finally, *and most importantly,* Cooley "includ[ed] cases where juries have acquitted, or state appellate courts have vacated, the convictions of defendants because of doubts about their guilt (*even if we personally believe the evidence of innocence is relatively weak*)." Cooley, at 914. [emphasis added]. However, except for defendant Samuel Poole, Cooley does not otherwise identify the defendants which the authors themselves believe have relatively weak evidence of innocence. Nevertheless, a comparison of the Cooley list with the names omitted from the Stanford study and In Spite of Innocence suggests which cases even the authors of the Cooley article believe only have "weak" evidence of innocence.

Thus, the Cooley article and the DPIC List differ from the original Stanford article and In Spite of Innocence because they both expand the categories of allegedly innocent defendants. The Stanford article was "primarily concerned with wrong-person mistakes" and only included defendants whom the authors believed were legally and physically uninvolved in the crimes. Stanford, at 45. As will be shown, neither Cooley nor the DPIC List conforms to these original limitations. The result is a padded list of allegedly innocent Death Row defendants that overstates the frequency of wrongful convictions in capital cases.

B. THE DPIC LIST: MISCARRIAGES OF JUSTICE OR MISCARRIAGES OF ANALYSES?

Using the Cooley article as a starting point, this paper explains that as many as 68 of the 102 names on the DPIC List (⅔ of the List as of September 17, 2002) should be eliminated. In several re-

spects, the methodology of the DPIC List as explained in the Cooley article is deficient. The premises used in selecting and pronouncing particular defendants as "actually innocent" do not in fact support that conclusion or do not assist in determining the actual number of allegedly mistaken convictions under current capital punishment jurisprudence.

1. Time frame: Relevance of DPIC list to current death penalty procedures

In terms of the risk of condemning the innocent to death, the "admittedly somewhat arbitrary" time frame used by the DPIC List of 1970 is over-inclusive. Although the United States Supreme Court's *Furman* decision did abrogate all of the completely discretionary, standardless death penalty statutes in 1972, it was not until 1976 that the Court upheld new death penalty statutes. As noted in the book In Spite of Innocence, numerous features of these new laws "probably reduce the likelihood of executing the innocent".

Among the features which decreased the likelihood that an innocent person would be sentenced the death, these statutes (1) narrowed the range of death penalty eligible defendants and (2) permitted convicted murderers to produce any relevant mitigating evidence supporting a penalty less than death. Mitigating evidence may frequently include evidence that will raise so-called "residual doubt" or "lingering doubt" about the defendant's guilt or otherwise raise doubts about a defendant's level of culpability due to mental impairment or some other factor.

In 1976, the Court abrogated statutes with so-called "mandatory" death penalties which did not permit consideration of mitigating evidence. As the Stanford study acknowledged, it has only been since those decisions that "juries have been permitted to hear any evidence concerning the nature of the crime or defendant that would mitigate the offense and warrant a sentence of life imprisonment." These mitigating factors include lingering doubt about guilt, mental impairments, and limited culpability. Stanford, at 81–83.

To the extent that the DPIC List includes defendants convicted and condemned under old statutes that did not meet the Court's 1976 standards, those defendants are irrelevant in terms of assessing contemporary capital punishment statutes and should be excluded from the List. Since those defendants were not tried under today's "guided discretion" laws, they were sentenced to death without the appropriate finding of eligibility or the opportunity to present mitigation. They were not provided the modern protections which "probably reduce the likelihood of executing the innocent." Their sentences are not reliable or pertinent indicators for evaluating the effect of today's statutes on the conviction and sentencing of the "actually innocent." There is no assurance they would have been sentenced to death under today's statutes.

Implicitly, the Cooley article accepted this premise by limiting its time frame to cases that were actually disposed of after the 1972 *Furman* decision. The mistake in Cooley, however, was in not further limiting the time frame to defendants sentenced to death after their state enacted the appropriate post-1972, post-*Furman* "guided discretion" statutes. See also Markman & Cassell, Protecting the

Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 147–152 (1988).

In addition, the United States Supreme Court has from time to time invalidated other state death penalty statutes or issued rulings which would have affected the penalty procedures in various states. To the extent that those changes affected the eligibility for or selection of the penalty, it is inappropriate to include inmates who may not have had the benefit of those procedures.[5]

2. The concept of "actual innocence"

To analyze the DPIC List, it is necessary to distinguish between the concepts of "actual innocence" and "legal innocence." The former is when the defendant is simply the "wrong person," not the actual perpetrator of the crime or otherwise culpable for the crime. The latter form of innocence means that the defendant cannot be legally convicted of the crime, even if that person was the actual perpetrator or somehow culpable for the offense.

The United States Supreme Court and appellate courts have discussed the concept of "actual innocence." "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley* v. *United States,* 523 U.S. 614 (1998). "Actual innocence" does not include claims based on intoxication or self defense. *Beavers* v. *Saffle,* 216 F.3d 918 (10th Cir. 2000). Proof of "actual innocence" also involves considering relevant evidence of guilt that was either excluded or unavailable at trial. *Schlup* v. *Delo,* 513 U.S. 298 (1995). At a minimum, any showing of actual innocence would have to be "extraordinarily high" or "truly persuasive." *Herrera* v. *Collins,* 506 U.S. 390 (1993).

Although the DPIC and the Cooley article purported to limit their lists of the "innocent" to defendants who were "actually innocent," not just "legally innocent," the available information from the case material and media accounts they rely upon indicate that many defendants on the List were not "actually innocent." These are not cases in which it can be concluded that the prosecution charged the "wrong person."

As noted, the DPIC currently limits the cases on the List to those in which a prisoner has been acquitted on retrial or charges have been formally dismissed. However, the DPIC List also includes other cases in which the conviction was reversed because of legally insufficient evidence or because the prisoner ultimately pled to a lesser charge. As will be shown, inserting these cases on the List is misleading in terms of assessing whether truly innocent defendants have been convicted and sentenced to death. In actuality, the DPIC List includes a number of "false exonerations".

To begin with, defendants are only convicted if a jury or court finds them guilty of murder "beyond a reasonable doubt." Implicit in the "reasonable doubt" standard, of course, is that a conviction does not require "absolute certainty" as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather

[5] For example, just recently the United States Supreme Court abrogated statutes in at least four states. *Ring* v. *Arizona,* ____U.S.____, 122 S. Ct. 2428 (2002). The Court also held that mentally retarded defendants could not be sentenced to death. *Atkins* v. *Virginia,* ____U.S.____, 122 S. Ct. 2242 (2002). For purposes of assessing whether innocent defendants have been sentenced to death, both of these cases may indicate that certain defendants currently on the DPIC List would not have been or should not have been eligible for the death penalty at all.

than convicted, because the proof does not eliminate all "reasonable doubt." *Smith* v. *Balkcom,* 660 F.2d 573, 580 (5th Cir. 1981).

An acquittal because the prosecution has not proven guilt beyond a reasonable doubt does not mean that the defendant did not actually commit the crime. *Dowling* v. *United States,* 493 U.S. 342, 249 (1990). Even an acquittal based on self defense does no more than demonstrate the jury's determination that there was a reasonable doubt about guilt, not that the defendant was actually innocent. *Martin* v. *Ohio,* 480 U.S. 228, 233–234 (1987). A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." *Gregg* v. *Georgia,* 428 U.S. 153, 225 (1976) (White, J. conc.). An acquittal means that the defendant is "legally innocent", but not necessarily "actually innocent."

"Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt. A defendant may be acquitted if critical evidence of his guilt is inadmissible because the police violated the Constitution in obtaining the evidence by unlawful search or coercive interrogation * * * More remarkable is the spectacle of jury acquittal because the jury sympathizes with the defendant even though guilt clearly has been proven by the evidence according to the law set forth in the judge's instructions ." Schwartz, "Innocence"—A Dialogue with Professor Sundby, 41 Hast. L.J. 153, 154–155 (1989) cited in Bedau & Radelet, 1998 Law & Contemporary Problems 105, 106 fn. 9. As the authors of Stanford, In Spite of Innocence, and Cooley agree, reversals, acquittals on retrial, and prosecutorial decisions not to retry cases are not conclusive evidence of innocence. Stanford Reply at 162.

Modern examples of this distinction between acquittal and innocence (or between "actual" and "legal" innocence) include O.J. Simpson who was acquitted of criminal charges, but was later found responsible for his wife's and Ron Goldman's deaths in a civil proceeding in which it was only necessary to prove his responsibility by a preponderance of the evidence. Or, to cite another recent example, the acquittal of the police officers in the Rodney King beating case obviously did not establish their "actual innocence" given their subsequent conviction in federal court for violating King's constitutional rights. Or, as an Ohio jury just demonstrated in a civil case, Dr. Sam Sheppard's acquittal in the 1960's for murdering his wife did not mean he was actually innocent. Cleveland Plain-Dealer (4/13/00). The DPIC itself removed one case from its List when it was pointed out that a supposedly innocent defendant, Clarence Smith, was convicted in federal court of charges which included the murder for which he had been acquitted in the Louisiana state court.

No matter how overwhelming the evidence of a defendant's guilt, the prosecution cannot appeal if a jury finds the defendant "not guilty". Nor may the prosecution retry an acquitted defendant. *Jackson* v. *Virginia,* 443 U.S. 307, 317 fn. 10 (1979). Due to the Double Jeopardy Clause, the prosecutor does not get a "second chance" to improve his evidence or present newly discovered evidence of guilt. The defendant, no matter how guilty, goes free. The defendant is "legally innocent", but not "actually innocent".

Similarly, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the Double Jeopardy Clause. *Burks* v. *United States,* 437 U.S. 1, 16–18 (1978). However, the judges on the appeals court cannot reverse or uphold convictions because they personally believe the convicted defendant is guilty or innocent. Ordinarily, the judges cannot substitute their opinion for the jury's guilty verdict. They cannot second guess how the jury resolved conflicts in the evidence or the inferences the jury drew from the evidence. *Jackson* v. *Virginia,* 443 U.S. at 319.[6]

Rather, when an appeals court finds that the evidence was legally insufficient, it is only finding as a matter of law, not fact, that the prosecution did not present enough evidence to prove guilt beyond a reasonable doubt, i.e. the evidence of guilt was not sufficient as a matter of law for a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Burks* v. *United States,* at 16 fn. 10. Courts will frequently be compelled legally to reverse these cases, even if the evidence signals strongly that the defendant is guilty. The defendant is "legally innocent", but not "actually innocent".

As will be noted in the discussions of some of the various cases on the DPIC List, some individual states themselves have their own unique and more demanding standards for sufficiency of evidence or double jeopardy. Accordingly, a reversal in one state is not representative of the potential disposition of the case under the United States Constitution or other states' laws. In other words, a prisoner may have had his case reversed for insufficient evidence in one state when that conviction might have been upheld in federal court or another state.[7]

Thus, the "reasonable doubt" standard represents the determination that the prosecution will pay the price if the evidence is insufficient and that any errors in fact-finding in criminal cases will be in favor of the defendant, i.e., that the guilty will be acquitted because of insufficient proof. *Schlup* v. *Delo,* 513 U.S. 298, 325 (1995). Indeed, evidence of guilt is frequently excluded and never presented to the jury if the prosecution or police have violated the defendant's constitutional rights in obtaining that evidence even if the evidence proves the defendant's guilt. Id., at 327–328.

For instance, a technical violation of the rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966) may lead to the exclusion of powerful evidence of guilt such as a defendant's confession or other damaging statements. If evidence is seized from the defendant in violation of the Fourth Amendment's rule against unreasonable searches and seizures, the evidence which was taken will not be presented to the jury even though that evidence demonstrates the defendant's guilt. As a result, the jury may be deprived of sufficient convincing evidence of guilt even though the defendant is undoubt-

[6] As will be shown, in some states there are some exceptions to this general rule of appellate review which favor the defendant.

[7] An example of such a difference relates to convictions based on accomplice testimony. A conviction based solely on accomplice testimony is insufficient for a conviction of California unless it is corroborated by some other evidence. However, a conviction on accomplice testimony would be sufficient in federal court even without corroboration. *Laboa* v. *Calderon,* 224 F.3d 972 (9th Cir. 2000).

edly guilty or the prosecution may no longer have sufficient evidence to try the defendant.[8]

Finally, a prosecutor's decision whether to retry a case that has resulted in a "hung jury" or has been reversed on appeal (for reasons other than lack of sufficient evidence) is not necessarily motivated by a prosecutor's personal belief that a defendant is guilty or innocent. Prosecutorial discretion is an integral part of the criminal justice system. The decision not to retry is not ipso facto a concession that the defendant is actually innocent. Rather, it frequently represents the prosecutor's professional judgment that there is simply not enough evidence to persuade an entire jury that the defendant is guilty beyond a reasonable doubt or that for some other reason, such as the fact that the defendant is now serving time for other convictions, further prosecution is not appropriate. If an earlier trial has ended in a mistrial because the jury could not unanimously agree on guilt or innocence, the prosecutor may simply conclude as a practical matter that the evidence is insufficient to persuade a jury of guilt beyond a reasonable doubt.

Local prosecutors have discretion to decide whether to seek the death penalty. That discretion is motivated by such factors as the strength of the case, the likelihood of conviction, witness and evidence problems, potential legal issues, the character of the defendant, the case's value as a deterrent to future crime, and the Government's overall law enforcement priorities. *United States* v. *Armstrong,* 517 U.S. 456, 463–464 (1996); *Gregg* v. *Georgia,* 428 U.S. 153, 225 (1976) (White, J. conc.); *People* v. *Gephart,* 93 Cal.App.3d 989, 999–1000 (1979). Prosecutors have the discretion to decline to charge the defendant, to offer a plea bargain, or to decline to seek the death penalty in any particular case. *McCleskey* v. *Kemp,* 481 U.S. 279, 311–312 (1987.)

"Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or go to trial. Witness availability, credibility, and memory also influence the results of prosecutions." *McCleskey,* at 306–307 fn. 28. As even the authors of the Stanford study concede, "[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a reasonable doubt', but for reasons wholly unrelated to guilt or innocence." 1998 Law & Contem-

[8] Furthermore, when a defendant secures a new trial on grounds of ineffective assistance of counsel or because the prosecution has improperly withheld material, exculpatory evidence, he is not required to prove that he is innocent or even that he would have been acquitted. In fact, he does not need to even prove that it is "more likely than not" that he would be acquitted—found not guilty under a "reasonable doubt" standard. He need only show a "reasonable probability" that the outcome would have been different—he need only undermine confidence in the guilt verdict in his case. *Strickland* v. *Washington,* 466 U.S. 668, 693–694 (1984); *United States* v. *Bagley,* 473 U.S. 667, 679–682 (1985). If a prosecutor presents perjured testimony, the conviction is reversed if there is any reasonable likelihood the verdict would be different. *Bagley,* at 679–680. Although a defendant may get a new trial because of these claims, none of these standards amount to a finding of the defendant's "actual innocence".

porary Problems at 106. When a conviction is reversed, this discretion will also be affected by the toll that the passage of time has taken on the witnesses and the evidence. *United States* v. *Mechanik,* 475 U.S. 66, 72 (1986).

C. CASES ON DPIC LIST: ACTUALLY INNOCENT OR FALSELY EXONERATED?

After examination of the DPIC List and available supporting materials including appellate opinions, newspaper reports, and academic articles, it is submitted that the following 68 defendants should be stricken from the current DPIC List of 102 allegedly innocent defendants "freed from Death Row."[9] The DPIC List fails to take into account many of the factors mentioned above that may lead to an acquittal or a prosecutorial decision not to retry a case even though a defendant is not actually innocent. As a result, it includes defendants whose guilt is debatable to say the least and whom it is hard to believe that a majority of neutral observers would conclude were innocent. The List also includes cases that should not be considered in terms of assessing the overall effectiveness of today's post-1972 death penalty procedures in reliably and accurately imposing the ultimate punishment on defendants who legitimately deserve that sanction, procedures that "probably reduce the likelihood of executing the innocent."

For ease of cross-referencing, the cases which should be omitted from the DPIC List are discussed in the same numerical order as they currently appear on the DPIC's website.[10]

1. David Keaton—Conviction and sentence occurred prior to 1972 (pre-modern death penalty statute era). *Anderson* v. *Florida,* 267 So.2d 8 (Fla. 1972).

2. Samuel A. Poole—Convicted of rape and sentenced under a defunct mandatory sentencing law which precluded consideration of mitigating evidence. *Woodson* v. *North Carolina* (1976) 428 U.S. 280. The United States Supreme Court has also declared the death penalty for rape to be cruel and unusual punishment. *Coker* v. *Georgia,* 433 U.S. 584 (1977). Moreover, Cooley concedes that evidence of Poole's innocence is "weak". Cooley, at 917.

3. Wilbur Lee.

4. Freddie Pitts—Conviction and sentence occurred prior to 1972. *In re Bernard R. Baker,* 267 So.2d 331 (Fla. 1972).

5. James Creamer-Creamer was mistakenly sentenced to death for a 1971 murder. According to Cobb County court records, his initial death sentence was imposed on February 4, 1973, but was then reduced to life on September 28, 1973. This reduction is understandable since the Georgia death penalty law had been declared unconstitutional in 1972 in *Furman* and could not be applied to offenses occurring prior to the passage of the new Georgia death pen-

[9] The author has also been aided by information recently compiled by the Florida Commission on Capital Crimes, the Journal of the DuPage County Bar Association, and the Philadelphia District Attorney's office.

[10] This study is not exhaustive, but is based on materials available to the author. These materials are cited in the summaries and also include the Stanford study, In Spite of Innocence, the Cooley article, and the summaries available on the DPIC website. It is not conceded that other defendants on the DPIC List who are not mentioned in this study are actually innocent. For that matter, the writer is always interested in additional information bearing on a defendant's claim of "actual innocence".

alty law in March, 1973. *Jackson* v. *State,* 195 S.E.2d 921 (Ga. 1973); *Clemmons* v. *State,* 210 S.E.2d 657 (Ga. 1974); *Creamer* v. *State,* 205 S.E.2d 240 (Ga. 1974) (Creamer sentenced to four consecutive life terms); *Emmett* v. *Ricketts,* 397 F.Supp. 1025 (N.D.Ga. 1975). By the time the case was appealed, Creamer was serving a life sentence. There was some initial confusion about the actual sentence in this case since the original Stanford study and the reviewing courts' decisions simply stated that Creamer had received a life sentence. Of course, Creamer's case is not relevant to assessing today's post-*Furman* capital punishment system.

6. Thomas Gladish.

7. Richard Greer.

8. Ronald Keine.

9. Clarence Smith—These four defendants were tried and convicted under New Mexico's invalid mandatory death penalty law which precluded consideration of mitigating evidence. *State* v. *Beaty,* 553 P.2d 688 (N.M.1976). It is complete speculation whether they would have been sentenced to death under a "guided discretion" statute.

10. Delbert Tibbs—*Tibbs* v. *State,* 337 So.2d 788 (Fla. 1976) (Tibbs I); *State* v. *Tibbs,* 370 So.2d 386 (Fla.App. 1979) (*Tibbs II*); *Tibbs* v. *State,* 397 So.2d 1120, 1123 (Fla. 1981) (*Tibbs III*); *Tibbs* v. *Florida,* 457 U.S. 31 (1982) (*Tibbs IV*). Tibbs was convicted of raping a woman and murdering her boyfriend. The chief witness was the surviving rape victim who identified Tibbs as her boyfriend's murderer.

Tibbs' conviction was reversed by a 4–3 vote of the Florida Supreme Court. The majority applied an anachronistic review standard that "carefully scrutinized" the testimony of the prosecutrix since she was the sole witness in the rape case "so as to avoid an unmerited conviction." *Tibbs I* at 790. The conviction was not even reversed because the Florida court found the evidence legally insufficient, but merely because the Florida court found the "weight" of the evidence was insubstantial. The court found the prosecutrix's testimony to be doubtful when compared with the lack of evidence (other than her eyewitness testimony) that Tibbs was in the area where the rape-murder occurred. Id. at 791.

Subsequently, in a later opinion, the Florida Supreme Court repudiated this "somewhat more subjective" rule that permitted an appellate court to reverse a conviction because of the weight of the evidence, rather than its sufficiency. In hindsight, the Florida Supreme Court candidly conceded that it should not have reversed Tibbs' conviction since the evidence was legally sufficient. *Tibbs III* at 1126. The old review standard applied to Tibbs' original case was a throwback to the long discarded rule that a rape conviction required corroboration of the rape victim's testimony—an unenlightened rule which inherently distrusted the testimony of the rape victim. Id. at 1129 fn. 3 (Sundberg, C.J. dis. & conc.); see e.g. *People* v. *Rincon-Pineda,* 14 Cal.3d 864 (Cal. 1975). The reversal of Tibbs' conviction was a windfall for Tibbs, not a finding of innocence.

Subsequently, a debate in the Florida courts as to whether or not Tibbs could be retried under the Double Jeopardy Clause made its way to the United States Supreme Court. Justice O'Connor's opin-

ion explained that the rape victim gave a detailed description of her assailant and his truck. Tibbs was stopped because he matched her description of the murderer. The victim had already viewed photos of several single suspects on three or four occasions and had not identified them. She examined several books of photos without identifying any suspects. However, when she saw Tibbs' photo, she did identify Tibbs as the rapist-murderer. She again identified Tibbs in a lineup and positively identified him at trial. *Tibbs IV* at 33 & fn. 2. At trial, the victim admitted drug use and that she used drugs "shortly" before the crimes occurred. She was confused as to the time of day that she first met Tibbs. Although not admitted as evidence, polygraphs showed however that the victim was truthful. Tibbs denied being in the area during the time of the offense and his testimony was partially corroborated. However, the prosecution introduced a card with Tibbs' signature which contradicted his testimony as to his location. Tibbs disputed that he had signed the card. Id. at 34–35. O'Connor's opinion also noted the evidence that the Florida Supreme Court had originally believed weakened the prosecution's case. However, since the evidence of guilt was not legally insufficient, the Double Jeopardy Clause did not bar Tibbs' retrial. Id. at 35.

Ultimately, due to the current status of the surviving victim—a lifelong drug addict—the original prosecutor concluded the evidence was too tainted for retrial. In Spite of Innocence, at 59. Nonetheless, the evidence recounted in the United States Supreme Court decision hardly supports a claim that Tibbs is actually innocent.

The state prosecutor who chose not to retry Tibbs recently explained to the Florida Commission on Capital Crimes that Tibbs "was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free."

12. Jonathan Treadaway—*State* v. *Treadaway,* 568 P.2d 1061, 1063–1065 (Ariz. 1977); *State* v. *Corcoran (Treadaway I)* 583 P.2d 229 (Ariz. 1978) (*Treadaway II*). Treadaway was convicted of the sodomy and first degree murder of a young boy in the victim's bedroom. His conviction was reversed and he was acquitted on retrial.

Treadaway's two palmprints were found outside a locked bedroom window of the victim's home. When Treadaway was arrested, he had no explanation for these palmprints. Treadaway admitted being a peeping tom in the victim's neighborhood, but did not remember ever looking in the victim's house. He denied being at the victim's house the night of the murder. However, the victim's mother testified she washed the windows the day before the murder, "raising an inference that the palm prints found on the morning after the murder [were] fresh" and also raising the inference that Treadaway was lying. Pubic hairs on the victim's body were similar to Treadaway's. His conviction was reversed by the Arizona Supreme Court in a 3–2 decision because the trial court erroneously admitted evidence that Treadaway committed sex acts with a 13-year old boy three years before the murder.

When Treadaway's retrial began, the Arizona Supreme Court reviewed several pretrial evidentiary rulings. It admitted evidence that Treadaway sexually attacked and tried to strangle a boy three months before the murder at issue in the boy's bedroom. However, the court excluded the interrogation in which Treadaway failed to

explain his palmprints outside the victim's bedroom window, specifically refused to provide information any information, and made other incriminating statements. The exclusion was based on the police failure to comply with the technical requirements of the *Miranda* decision, not because Treadaway's statements or failure to explain the palmprints on the window were somehow unreliable or involuntary.

This decision to exclude Treadaway's interrogation was a crucial difference between his two trials. Although there was defense evidence that the victim died of natural causes, the jurors who acquitted Treadaway on retrial later stated that they were actually concerned about the lack of evidence that Treadaway had been inside the boy's home. Stanford, at 164; In Spite of Innocence, at 349. Therefore, Treadaway's failure to explain the palmprints at the window could have been critical evidence since those palmprints at the very least would have connected Treadaway with a location just outside the boy's home on the night of the murder. Treadaway's inability to explain the suspicious presence to the police of his fingerprints would ordinarily indicate a "consciousness of guilt" about his presence at the boy's home. However, the jury was never permitted to know that Treadaway had had no explanation for those palmprints—a circumstance consistent with his guilt. Thus, significant probative evidence of Treadaway's consciousness of guilt about the palmprints on the windowsill, directly relevant to the jury's concern about the case, was never disclosed to the jury at his second trial. Since it cannot be known what the impact of that excluded evidence would have been on the second jury, Treadaway's acquittal on retrial did not demonstrate that he was innocent.

Furthermore, in light of the recent United States Supreme Court decision in *Ring* v. *Arizona* it is speculation whether a jury would have found Treadaway eligible to be sentenced to death.

13. Gary Beeman—Convicted and sentenced under Ohio's invalid death penalty statute which limited mitigating evidence. *Lockett* v. *Ohio,* 438 U.S. 586 (1978). Accordingly, it is speculative that he would have received a death sentence under appropriate law.

16. Charles Ray Giddens—In 1981, the Oklahoma appellate court reversed Giddens' conviction for insufficient evidence, not actual innocence, because the testimony of his alleged accomplice was "replete with conflicts". In 1982, the state court held that retrial was barred under the Double Jeopardy Clause. In Spite of Innocence, at pp. 306–307. Thus, this was a case in which the evidence was found insufficient to prove guilt, not a case in which the defendant was exonerated.

17. Michael Linder—This defendant was acquitted on retrial based on grounds of self-defense. Cooley, at 948. Thus, this was not a case involving a "wrong person" mistake as originally defined in the Stanford study.

18. Johnny Ross—*People* v. *Ross,* 343 So.2d 722 (La. 1977). This defendant's name should be removed since he was sentenced under the unconstitutional mandatory Louisiana death penalty statute which precluded consideration of mitigating evidence.

19. Annibal Jaramillo—*Jaramillo* v. *State,* 417 So.2d 257 (Fla. 1982). This defendant's double murder conviction and death judgment were reversed for legal insufficiency of evidence. The male

victim had been bound with cord and then shot. Near the body was a coil of cord and near that coil was the packaging for a knife. Jaramillo's fingerprint was found on the packaging and the knife, but not on the knife wrapper. A nearby grocery bag had Jaramillo's fingerprint. Jaramillo testified that he was helping the victims' nephew stack boxes in the garage the day before the murder. He asked for a knife to help cut the boxes. The nephew directed him inside to a grocery bag with a knife. According to Jaramillo, he removed the knife from the wrapper and returned to the garage. He claimed he later left the knife on the dining room table where it was found after the murder. Thus, Jaramillo's testimony conveniently explained the fingerprints on the incriminating objects. According to the recent report of the Florida Commission on Capital Cases, the victims' nephew who could have either corroborated or contradicted Jaramillo's version of events was unavailable to testify at trial since his whereabouts were unknown.

Although there was circumstantial evidence of Jaramillo's guilt in the double murder, the conviction could not be sustained under Florida law unless the evidence was inconsistent with any reasonable hypothesis of innocence. Proof of Jaramillo's fingerprints on several items at the scene associated with the murder was not inconsistent with Jaramillo's reasonable explanation of the fingerprints (helping the nephew stack boxes in the garage).

This Florida case illustrates a key point about our federal-state criminal justice system. Florida's "sufficiency of evidence" rule in this case was more stringent than the standard required under the Federal Constitution and applied by the majority of other states. See, e.g., *Fox* v. *State,* 469 So.2d 800, 803 (Fla.App. 1985); *Geesa* v. *State,* 820 S.W.2d 154, 161 fn. 9 (Tex.Crim. 1991). Ordinarily, it is not necessary for the prosecution to eliminate every hypothesis other than guilt. *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979). Thus, in both federal court and the majority of states, the evidence would have been sufficient to support Jaramillo's conviction notwithstanding his alternative explanation for his fingerprints. The presence of Jaramillo's fingerprints on items associated with the murder would have been sufficient for conviction. See, e.g., *Taylor* v. *Stainer,* 31 F.3d 907 (9th Cir. 1994); *Schell* v. *Witek,* 218 F.3d 1017 (9th Cir. en banc 2000).

However, under Florida law, Jaramillo's innocent explanation was not inconsistent with the presence of the fingerprints on those objects. Accordingly, under state law, the conviction was reversed since Jaramillo's innocent explanation for the prints could not be eliminated. The Florida Commission on Capital Cases described this case as an "execution-style" robbery and noted information that Jaramillo was a Colombian "hitman". Jaramillo was subsequently deported to Colombia, where he was murdered. It was the opinion of local law enforcement that Jaramillo "got away with a double homicide."

20. Lawyer Johnson—Convicted under pre-*Furman* death penalty law in Massachusetts. *Stewart* v. *Massachusetts,* 408 U.S. 845 (1972); *Commonwealth* v. *O'Neal,* 339 N.E.2d 676 (Mass. 1975); *Limone* v. *Massachusetts,* 408 U.S. 936 (1972).

24. Joseph Green Brown—*Brown* v. *State,* 381 So.2d 690 (Fla. 1980); *Brown* v. *State,* 439 So.2d 872 (Fla. 1983); *Brown* v. *Wain-*

wright, 785 F.2d 1457 (11th Cir. 1986). Brown was convicted and sentenced to death based primarily on the testimony of potential accomplice Ronald Floyd, a witness who subsequently went through a series of recantations and retractions of his recantations. Associate Justice Brennan actually relied on Brown's case to note: "Recantation testimony is properly viewed with great suspicion." *Dobbert* v. *Wainwright,* 468 U.S. 1231 (1984) (Brennan, J. dis.) (citing *Brown* v. *State,* 381 So.2d 690). Brown was not granted a retrial because Floyd's testimony implicating Brown was false, but because Floyd and the prosecution did not disclose that Floyd was testifying in return for an agreement that he would not be prosecuted in the case. Floyd initially flunked a polygraph test about his general involvement in the murder, but then passed the test three times in terms of whether or not he was an actual perpetrator in the crime. However, Floyd also recanted his testimony implicating Brown, then recanted that recantation during an evidentiary hearing. Subsequently, Floyd again repudiated his initial trial testimony and the prosecution was unable to retry Brown. Given the inherent unreliability of the sequence of Floyd's multiple recantations (which are "properly viewed with great suspicion"), Brown cannot be deemed actually innocent.

27. Henry Drake—*Drake* v. *State,* 247 S.E.2d 57 (Ga. 1978); *Drake* v. *State,* 287 S.E.2d 180 (Ga. 1982); *Drake* v. *Francis,* 727 F.2d 990 (11th Cir. 1984); *Drake* v. *Kemp,* 762 F.2d 1449 (11th Cir. en banc 1985); *Campbell* v. *State,* 240 S.E.2d 828 (Ga. 1977). This case is yet another example of release due to witness recantation, not actual innocence. Drake and William Campbell were tried separately for the murder of a local barber.

The elderly barber was violently assaulted in his shop with a knife and a claw hammer. There were pools of blood and blood smears on the wall of his barber shop. There were two pocket knives on top of the blood on the floor. One of the knives was similar to one owned by Drake.

When first arrested, Campbell implicated Drake as the murderer and stated he (Campbell) was not present. Campbell then told his own attorney that he (Campbell) alone was guilty of the murder and that Drake was innocent. Campbell actually offered many different versions to his lawyer before settling on a story that did not implicate Drake. However, Campbell then took the stand at his own trial (which occurred before Drake's) and testified, to his attorney's surprise, that Drake attacked the barber while Campbell was getting a haircut. Campbell was nonetheless convicted of the barber's murder and sentenced to death.

Subsequently, Campbell reluctantly testified at Drake's trial and implicated Drake. The prosecution's theory was that Campbell, an older man in ill-health with emphysema, could not have murdered the barber by himself. After Drake was convicted and sentenced to death, Campbell recanted his testimony against Drake. However, his newest version of events also differed from Drake's own testimony. Furthermore, the testimony of Drake's girlfriend had also differed from Drake's testimony. The trial court rejected Campbell's recantation and Campbell died soon thereafter.

Drake's first conviction was reversed and in two subsequent retrials, two different juries heard Campbell's recantation and also

heard forensic evidence that was offered to contradict the prosecution's theory that the barber was attacked by two assailants. One jury hung in favor of acquittal, but a second jury convicted Drake again. Five former jurors from Drake's original trial also advised the parole board that Campbell's recantation would not have changed their verdict convicting Drake at his first trial. Nevertheless, in a decision uncritically accepted by the DPIC, the state parole board "simply decided Drake was innocent." Atlanta Journal-Constitution, 12/24/87; Los Angeles Times, 12/22/88, 12/23/88. Notwithstanding the parole board's decision, Campbell's numerous statements and recantations, which did not even always agree with Drake's version of events, do not establish Drake's actual innocence.

28. John Henry Knapp—Knapp had three trials for the house fire murder of his daughters. Knapp stood outside and cooly watched his daughters be incinerated while sipping hot coffee. In the first trial, the jury hung 7–5 for conviction. The second trial resulted in a conviction and death sentence, but was reversed because of newly-developed evidence that indicated that the fatal fire could have been accidentally set by his dead daughters. Nonetheless, the third trial still ended in a mistrial with the jury hung 7–5 for conviction. The evidence included Knapp's recanted confession which he claimed he made because he suffered a migraine headache and was trying to protect his wife.

Finally, the prosecution concluded that the evidence was insufficient to obtain a unanimous jury verdict of guilt or innocence. The case was 19 years old and there had been losses in "some key evidence and witnesses." Knapp then pled "no contest" to second degree murder and received a sentence of time served. The judge who presided at Knapp's first two trials indicated doubts about Knapp's guilt, but still said that the fire was purposely set by either Knapp or his wife. "Given the original evidence and subsequent proceedings in the case, we may never know if Knapp was guilty * * *". 33 Ariz.T.L.J. 665, 666 (2001). Under the DPIC's current standards, Knapp's name should not be on the DPIC List since he pled to a lesser offense. *Arizona Republic* (8/27/91,11/19/92, 11/20/92,8/11/96); Phoenix Gazette (12/6/91, 11/20/92); Associated Press (11/19/92).

Moreover, given the recent United States Supreme Court decision in *Ring* v. *Arizona,* it is speculative now whether a jury would have found Knapp death penalty eligible under the now applicable law.

29. Vernon McManus—*McManus* v. *State,* 591 S.W.2d 505 (Tex. 1980). McManus' conviction was reversed because of jury selection issues unrelated to his guilt or innocence. Ultimately, the prosecution chose not to retry the case, but there were no widespread allegations of innocence. Accordingly, his case was not even included in the Cooley article as an "actually innocent" defendant. Cooley, at 912. There is no explanation for its inclusion on the DPIC List. Dallas Morning News (6/4/00).

30. Anthony Ray Peek—*Peek* v. *State,* 488 So.2d 52 (Fla. 1986). Peek was acquitted after his two prior convictions for this 1977 murder were reversed for various evidentiary errors, including the admission of an unrelated rape. He was prosecuted for raping and

strangling to death an elderly woman in her home. She lived a mile from the halfway house where Peek resided. Her car was found also found abandoned even nearer the halfway house. Two of Peek's fingerprints were lifted from inside the victim's car window. Blood and seminal stains on the victim's bedclothes were consistent with Peek's identity as a type-O secretor. A hair with features similar to Peek's was recovered in a cut stocking in the victim's garage area. Peek claimed that his fingerprints got on the victim's car when he was out of his halfway house in the morning and tried to burglarize her abandoned car. Peek presented evidence that the periodic night checks at the halfway house did not indicate any unauthorized absences the night of the murder.

The acquittal represents a finding of reasonable doubt, not actual innocence. Prosecutors attributed the acquittal to the passage of time and loss of evidence. In particular, the state attorney told the Florida Commission on Capital Cases: "Mr. Peek is also on the List, as are several others from other circuits who got new trials and then were acquitted. I fail to see the rationale for including these people."

32. Robert Wallace—Acquitted on retrial based on either self defense or accidental shooting defense. Accordingly, this is not a "wrong person" mistake.

33. Richard Neal Jones—*Jones* v. *State,* 738 P.2d 525 (Okla.Crim. 1987). Jones' defense was that he was passed out in a car while three other men beat up the victim, shot him, and threw his weighted body in the river. Jones' conviction was reversed in a 2–1 decision because the trial court erroneously admitted incriminating post offense statements by Jones' non-testifying codefendants, a violation of the hearsay rule. The dissent noted that the only hearsay statement which actually implicated Jones should still should have been admitted as a prior consistent statement. At the very least, Jones was present at the murder scene and a party to the conspiracy leading to the murder. Accordingly, he would not have been considered "actually innocent" under the standards of the original Stanford study. His culpability would appear to be no less than that of the actual murderers. See *Mann* v. *State,* 749 P.2d 115 (1988); *Thompson* v. *Oklahoma,* 487 U.S. 815, 817, 859 (1988); *Thompson* v. *State,* 724 P.2d 780 (Okla. Crim. App. 1986) (separate trial of co-defendant with evidence directly implicating Jones).

34. Jerry Bigelow—*Bigelow* v. *Superior Court (People),* 204 Cal.App.3d 1127 (1988). Bigelow's conviction and death sentence were reversed for a reasons unrelated to his guilt. On retrial, the jury convicted Bigelow of robbery and kidnaping. The jury also found true that the murder occurred while Bigelow was committing or was an accomplice in the robbery and kidnaping of the victim. In short, the jury found true beyond a reasonable doubt all the facts necessary to convict Bigelow of first degree felony murder under California law. Nonetheless, the jury did not actually convict Bigelow of the separate charge of first degree murder. The trial judge made the mistake of excusing the jury without clarifying its inconsistent verdict. Therefore, under California law, the verdict had to be entered and Bigelow was not eligible for the death penalty. However, rather than establishing that Bigelow was innocent, the jury's verdicts still indicated that the jury totally rejected

Bigelow's defense and found that he was at least an accomplice to the murder. An inconsistent verdict, such as Bigelow's, is not an exoneration. "Inconsistent verdicts" are often a product of jury lenity, rather than a belief in innocence. The prosecution cannot appeal an inconsistent verdict. *United States* v. *Powell,* 469 U.S. 57, 65–66 (1984). As noted, the jury's verdict also indicates that, at a minimum, it believed that Bigelow was an accomplice to the murder. Originally, this factual distinction between actual perpetrator and accomplice was not considered proof of "actual innocence". Stanford, at 43.

35. Willie A. Brown.

36. Larry Troy—*Brown* v. *State* and *Troy* v. *State,* 515 So.2d 211 (Fla. 1987). This is a prison murder. Three inmates testified against Brown and Troy. At least one defense witness was impeached with prior statements implicating Brown and Troy. The convictions of these two defendants were reversed because of a prosecutorial discovery error—the failure to timely disclose a prior taped statement by a witness which contradicted another state witness. Ultimately, the state dropped charges because one of the prison witnesses recanted. However, the witness made the the offer to recant his testimony against Brown to Brown's girlfriend in return for $2000. Cooley, at 930. The "recantation for hire" hardly inspires confidence that Brown and Troy are "actually innocent."

37. William Jent.

38. Earnest Miller—These co-defendants entered pleas to lesser offenses of second degree murder and were sentenced to time served after their convictions were vacated because of the prosecution's failure to disclose exculpatory evidence. Although Jent and Miller proclaimed their innocence, they inconsistently asked for the "pardon" of the victim's family. It appears that the passage of time made a second trial problematic for both the prosecution and the defense. The prosecution had lost its key physical evidence and witnesses were scattered. Several witnesses had changed their testimony. Associated Press, 1/15/88, 1/16/88; St. Petersburg Times, 1/16/88, 1/19/88. Under the DPIC's current standards, these cases should not be on the DPIC List since the two men pled to lesser charges. In a statement to the Florida Commission on Capital Cases, the prosecution cited conflicting statements from Miller and Jent about their alibi to contradict assertions that the defendants did have an alibi for this murder.

40. Jesse Keith Brown—*State* v. *Brown,* 371 S.E.2d 523 (S.C. 1988). This defendant was acquitted at his second retrial because evidence also pointed to his half brother as the "actual killer". However, the jury also convicted Brown of armed robbery, grand larceny, and entering without breaking in connection with the homicide. The verdict indicates, therefore, that Brown was involved in the murder even if he was not actual perpetrator. Indeed, at his first trial he testified that he did not remember committing the murder, but was "sorry [if I've done anything]." At his second trial, on the other hand, he testified specifically that he was not involved in the murder. Brown's case was not included in In Spite of Innocence, thus this appears to be one of the unidentified cases in which the Cooley study considered the evidence of innocence to be "relatively weak." Cooley, at p. 914, 928–929.

41. Robert Cox—*Cox* v. *State,* 555 So.2d 352 (Fla. 1990). This first degree murder conviction was reversed for insufficient evidence, not because of innocence. "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction * * * Although state witnesses cast doubt on Cox' alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." Again, this case is an example of a reversal due to Florida's more stingent legal sufficiency standard for proof beyond a reasonable doubt. The evidence obviously still indicated a "strong suspicion" of Cox's guilt.

43. James Richardson—*Richardson* v. *State,* 546 So.2d 1037 (Fla. 1989). Convicted and sentenced under invalid pre-*Furman* statute in Florida.

45. Patrick Croy—*People* v. *Croy,* 41 Cal.3d 1 (Cal. 1986). Croy was convicted of murdering a police officer in Yreka, California. The California Supreme Court reversed Croy's murder conviction for instructional error, but it affirmed his conviction for conspiracy to commit murder. His defense had been intoxication. Yet, on retrial, Croy claimed self-defense and was acquitted of murder. Thus, Croy was not "actually innocent" in the sense of being the wrong person.

There was no dispute Croy killed the police officer. However, he was acquitted on the basis of a controversial and legally questionable cultural defense based on his Native American heritage, i.e., that his background as a Native American led him to reasonably fear that the police officer intended to kill him. See, e.g., Comment, 99 Dick.L.Rev. 141 (1994); 13 Ariz.J.Int'l & Comp.L. 523 (1996); Note, 62 Ohio St. L.J. 1695 (2001); Note, 2001 Duke L.J. 1809 (2001).

By contrast (and inconsistently), at his first trial, Croy did not claim self-defense. Instead, he relied on an extensive intoxication defense and testified that he initially "became concerned when he saw the police because he was on probation and was afraid that he would be arrested for being drunk." He also claimed "he was startled when [the police officer/victim] appeared as he was trying to find safety in his grandmother's cabin, and that if he shot [the victim] he did not intend to." *People* v. *Croy* (1986) 41 Cal.3d 1, 16, 19, 21. The defenses Croy used at his first and second trials were inconsistent with each other.

Croy's testimony at his second trial was not all that impressive either. While he testified emotionally that he believed the police "were going to kill us all", other parts of his testimony sounded like a "prepared statement" and he was forced to admit that he had consumed an "impressive amount of liquor and marijuana" during the fateful weekend he confronted the police. Croy admitted lying at his first trial, but explained that he lied because did not believe he could win and he wanted to protect his friends. "All in all, Croy's performance was neither as commanding as [his attorney] hoped it would be, nor as damaging as the prosecution tried to make it. As the long trial drew to a close * * *, it seemed that victory * * * would depend less on [Croy's] courtroom 'vibrations',

than on the [defense] attorney's to indict Yreka as a racist community."

Croy's second trial was depicted as a political trial, not a trial about guilt or innocence. "What made * * * Croy worthy in his attorney's mind was not so much his innocence as his symbolic value as an aggrieved Indian [sic] * * *." More significantly, neither defense at Croy's two trials established that Croy was "actually innocent" or the "wrong person". Los Angeles Times (5/1l/00); San Francisco Examiner (7/8/90); Santa Rosa Press Democrat (7/27/97)

46. John C. Skelton—*Skelton* v. *State,* 795 S.W.2d 162 (Tex.Crim.App. 1989). In a 2–1 split decision, the Texas appeals court was reversed the capital murder conviction for insufficient evidence of guilt beyond a reasonable doubt. The majority opinion believed there was a possibility that another person committed the murder. Nevertheless, the majority explained: "Although the evidence against appellant *leads to a strong suspicion or probability* that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt * * * Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so." [emphasis added]. The dissent outlines the evidence of a "strong suspicion" of Skelton's guilt. Once again, this reversal is based on a stringent standard of evidentiary sufficiency not required by the United States Constitution and no longer even applied in Texas. This appears to be another of the "relatively weak" innocence cases not included in In Spite of Innocence. The reversal of Skelton's conviction was not a finding of "actual innocence".

47. Dale Johnston—*State* v. *Johnston,* 1986 WL 8798 (Oh.App. 1986) [2 unreported opinions]; *State* v. *Johnston,* 529 N.E.2d 898 (Ohio 1988); *State* v. *Johnston,* 580 N.E.2d 1162 (Ohio 1990). This defendant was convicted and sentenced to death for slaying his stepdaughter and her fiancé. The stepdaughter had publicly complained in the past about incestuous advances by Johnston. A witness who had been hypnotized to refresh his recollection testified as to his pre-hypnosis recollection that he identified Johnston angrily forcing a couple into his car on or about the day of the murders. Feedbags consistent with feedbags found on Johnston's farm were also found at the gravesite of the two victims. Some bloodstained items were seized from a strip mining pit on Johnston's property. Johnston's first conviction was ultimately reversed because of some problems with the hypnotized witness and the state's failure to disclose evidence which may have helped Johnston with his defense. Prior to retrial, the court excluded incriminating statements Johnston made during his initial interrogation as well as incriminating evidence seized due to the interrogation. The prosecution then dismissed the case due to the passage of time, poor recollection of the witnesses, and the suppression of evidence. Johnston's subsequent wrongful imprisonment lawsuit was rejected since "although the evidence did not prove Johnston committed the murders, it did not prove his innocence." Cleveland Plain Dealer (5/11/90, 5/12/90, 6/22/91, 9/13/93); Associated Press (5/11/90).

48. Jimmy Lee Mathers—*State* v. *Mathers,* 796 P.2d 866 (Ariz. 1990). Mathers was convicted, along with two codefendants, of the murder of Sterleen Hill in 1987. In a 3–2 decision, the Arizona Supreme Court reversed Mathers' conviction for insufficient evidence. Since the reversal was based on insufficiency of the evidence, retrial was barred by the Double Jeopardy Clause. The dissent points out that there was still ample evidence of Mathers' guilt even if the majority of the court did not believe there was substantial evidence to support a conviction beyond a reasonable doubt. The appellate court reversal of Mathers' conviction was not a finding of actual innocence and the record of his case would not possibly justify such a finding.

50. Bradley Scott—*Scott* v. *State,* 581 So.2d 887 (Fla.1991). This case was reversed due to delay in prosecution and insufficient circumstantial evidence. The delay in prosecution appears to have hampered both parties to the extent that no assessment may be made of Scott's actual innocence. According to the appeals court, the available circumstantial evidence "could only create a suspicion that Scott committed this murder." Once again, even if the available evidence of Scott's guilt was not sufficient to support a conviction beyond a reasonable doubt, he certainly was not exonerated.

52. Jay C. Smith—*Commonwealth* v. *Smith,* 615 A.2d 321 (Pa. 1992); *Commonwealth* v. *Smith,* 568 A.2d 600 (Pa.1989); *Smith* v. *Holtz* (3rd Cir. 2000), 210 F.3d 186; *Smith* v. *Holtz* (M.D.Pa. 1998) 30 F.Supp.2d 468. Smith was not freed because he was innocent, but because the Pennsylvania court believed that Pennsylvania's double jeopardy clause barred a retrial due to prosecutorial misconduct in withholding exculpatory evidence. The Pennsylvania court conceded that the United States Constitution and other states would not necessarily have compelled such a harsh sanction.

Without belaboring the evidence of Smith's guilt which was unaffected by the evidence withheld by the prosecution, it is enough to note that the DPIC List does not mention Smith's subsequent loss in civil court when he sued the Commonwealth of Pennsylvania for wrongful imprisonment. As the appeals court explained, "*Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished* * * * and Smith has therefore not established that he is entitled to compensation * * *" [emphasis added]. Indeed, a federal jury trial ultimately found that the withheld evidence was not "crucial" at all and that the prosecution's alleged misconduct did not undermine confidence in the outcome of Smith's trial. Thus, if anything, the courts have repeatedly reaffirmed their conclusion that Smith was "actually guilty". Smith's inclusion on the DPIC List is a "false exoneration" at its most extreme.

57. James Robison—Robison was accused of being one of three participants in the conspiracy to murder Arizona news reporter Don Bolles. The other conspirators were Adamson and Dunlap. Robison was acquitted on retrial because the jury did not believe the testimony of his accomplice, Adamson. However, the separate trial of third co-defendant Dunlap elicited evidence that Robison had received "hush money" to prevent him from revealing Dunlap's role in Bolles' murder. Dunlap admitted giving gifts and money to Robison, but only out of "friendship". At Dunlap's trial, evidence

was admitted of incriminating diary entries made by Robison. Dunlap filed a new trial motion offering Robison's testimony from Robison's second trial in which Robison testified that Dunlap's gifts to him were not offered to obtain his silence. The trial court denied Dunlap's motion because it did not find Robison's testimony credible. In particular, the trial court noted that Robison had admitted at his own trial that he had lied under oath and "would have no hesitation in testifying to whatever he felt was expedient." *People* v. *Dunlap,* 930 P.2d 518 (Ariz.App. 1996). Robison has been subsequently convicted of plotting to murder alleged accomplice Adamson. Arizona Republic (12/19/93,7/27/95). The Dunlap trial record does not support including the duplicitous Robison on a list of "actually innocent" defendants.

58. Muneer Deeb—*Deeb* v. *Texas,* 815 S.W.2d 692 (1991). The evidence indicates that Deeb was not "actually innocent," even if there was not enough evidence to convict him beyond a reasonable doubt. At his first trial, Deeb was convicted of conspiring with David Wayne Spence to murder Deeb's girlfriend, Kelley, in order to collect insurance money. However, Spence and some confederates bungled the job by accidentally murdering the wrong woman and two other people. A jailhouse informant testified that Spence told him about numerous incriminating statements by Deeb in which Deeb stated that he would benefit from Kelley's death and that Deeb asked Spence if he knew someone who would kill Kelley. One of Spence's confederates, Melendez, also testified that he was present when Spence and Deeb conspired to commit the murder. Deeb's conviction was reversed because the trial court erroneously admitted Spence's hearsay statements to the informant. Deeb was acquitted on retrial. The special prosecutor at Deeb's retrial explained that Melendez had refused to testify a second time against Deeb.

However, the jury at Deeb's second trial did not believe that Deeb was "actually innocent". After the second trial in which Deeb was found not guilty, the jury foreperson more accurately put it: "We did not say that this man was innocent of the crime. We did not say that. We just could not say that he was guilty."

Spence was tried separately for the triple murders and executed for them. Evidence was presented at Spence's trial that Spence argued with Deeb about the murder, indicating that the murder had gone awry. There was also evidence that Deeb and Spence frequently discussed whether Kelley should be killed. *Spence* v. *Johnson,* 80 F.3d 989, 1004 fn. 12 (5th Cir. 1996); Dallas Morning News (11/4/93). Thus, the record of Spence's trial also indicates that Deeb was not "actually innocent".

59. Andrew Golden—*Golden* v. *State,* 629 So.2d 109 (1994). The Florida Supreme Court felt compelled to reverse Golden's conviction for murdering his wife to collect insurance because the evidence was insufficient to prove guilt beyond a reasonable doubt, but the state court noted as follows: "The finger of suspicion points heavily at Golden. A reasonable juror could conclude that he more likely than not caused his wife's death." After his wife's death, Golden denied having insurance. However, it turned out he had $300,000 in insurance, was heavily in debt, and that he filed for bankruptcy after her death. There was evidence he forged his wife's

signature on insurance applications. The "heavy finger of suspicion" indicates that Golden is not "innocent".

62. Robert Charles Cruz—In light of the United States Supreme Court's recent decision in *Ring* v. *Arizona,* this Arizona case should now be deleted from the DPIC List. Pursuant to *Ring,* the Arizona statute unconstitutionally denied defendants their Sixth Amendment right to a jury trial on the findings necessary for death penalty eligibility by giving that power to state trial judges. As with the earlier cases in which the defendants were tried under now defunct death penalty statutes, Arizona convictions are no longer appropriately considered in light of current death penalty jurisprudence. It is simply speculative that Cruz would have been found eligible for the death penalty by a jury under a constitutional statute.

63. Rolando Cruz.

64. Alejandro Hernandez—*People* v. *Cruz,* 521 N.E.2d 18 (Ill. 1988); *People* v. *Cruz,* 643 N.E.2d 636 (Ill. 1994); *People* v. *Hernandez,* 521 N.E.2d 25 (Ill. 1988); *Buckley* v. *Fitzsimmons,* 919 F.2d 1230 (7th Cir. 1991). These defendants were charged with the notorious abduction, rape, and murder of ten-year-old Jeanine Nicarico. Cruz was convicted and sentenced to death twice, but both judgments were reversed. During the third trial, the trial court judge lambasted the police for "sloppy" police work and accused a sheriff's deputy of lying. He then directed a verdict for Cruz and freed him before the presentation of the defense case. The trial court did acknowledge that the prosecution had "circumstantial evidence" but did not consider it sufficient to support a conviction beyond a reasonable doubt. Hernandez's first conviction was reversed. After a hung jury ended his second trial, he was convicted in a third trial and sentenced to 80 years in prison. However, that conviction was reversed and after the court dismissed Cruz's case the prosecution dropped charges against Hernandez.

During this time, another convicted murderer named Brian Dugan announced he was willing to confess to being the lone perpetrator of the Nicarico murder in return for immunity from the death penalty. Dugan himself had been sentenced to two life sentences for other sex related murders. A 1995 DNA test implicated Dugan in Nicarico's murder, but excluded Cruz and Hernandez as actual perpetrators. However, this test result did not exclude Cruz's and Hernandez's potental culpability as accomplices to Nicarico's murder.

Ultimately, after Cruz's acquittal by the court, Illinois law enforcement officers and prosecutors were prosecuted for their roles in Cruz's case. The trial court excluded evidence that after the first trial for the Nicarico murder, Cruz looked at Nicarico's sister and mouthed the words, "You're next." However, during this trial, the defense for the accused law enforcement officers attempted to link Cruz with other suspects in the murder. There was evidence which raised a question as to whether Cruz and Dugan could have lived on the same block at the time of the murder, thus raising questions as to whether Dugan acted alone. Moreover, Dugan had a relevant modus operandi for burglaries which involved accomplices. Cruz himself took the stand and contradicted his previous testimony. He also testified that he was seeing a psychiatrist about his lying! The

jury was advised that scientific evidence excluded Cruz as the rapist, but did not exclude Dugan. However, the jury was also told that the scientific evidence could not exclude the possibility that Cruz was present at the Nicarico murder. The police officers were acquitted. The trial court also acquitted one of the officers of a charge that he had falsely testified about incriminating statements Cruz made in jail. Some jurors stated they believed Cruz was guilty of the Nicarico murder. Other jurors observed that they could not believe Cruz's testimony that he had not made a so-called incriminating "dream statement" to the police about the murder in which he described details of the Nicarico murder. Chicago Daily Law Bulletin (4/28/99; 5/25/99); Chicago Daily Herald (4/21/99, 5/5/99, 5/26/99); Chicago Tribune (12/8/95; 4/30/99, 5/26/99); Chicago Sun-Times (12/9/95; 12/10/95; 5/26/99; 6/6/99); Chicago Daily Herald (4/21/99; 6/6/99); Associated Press (6/5/99, 7/22/02); State Journal-Register (6/14/99).

The actual reliability of Dugan's confession that he was the lone murderer, including his actual motivation for that confession, is subject to question. Notwithstanding the DNA test, Dugan has nothing to lose by confessing to the Nicarico murder, but also has no incentive to implicate or "snitch off" anyone else. *People* v. *Cruz,* 643 N.E.2d 636–695, 676–687, 691–695 (Ill. 1994) (plur.opn. of Freeman, J.) (dis.opns. of Heiple, McMorrow, J.J.).

65. Sabrina Butler—*Butler* v. *State,* 608 So.2d 314 (Miss. 1992). Butler was convicted of murdering her infant son, Walter. She brought Walter to the hospital with severe internal injuries and gave numerous conflicting statements, including at least one version in which she admitted pushing on his protruding rectum and hitting the baby boy once in the stomach with her fist when he was crying. Other versions included statements by her that she had tried to apply CPR when the baby was not breathing.

Butler's first conviction was reversed because the prosecutor improperly commented on her failure to testify at trial. She was acquitted on retrial, but not necessarily because she was not the actual killer of her young baby. At both trials, the evidence indicated that the baby died from peritonitis, the presence of foreign substances in the abdomen. Although a witness substantiated one of Butler's versions of events about administering CPR to the baby and the coroner admitted his examination had not been thorough, the jury foreperson indicated only that the jury had a "reasonable doubt" that Butler administered the fatal blow.

There does not appear to be any witness as to what occurred prior to the CPR. The jury was not told that Butler had lost custody of another child because of abuse. Apparently, the defense provided sufficient alternative explanations for the baby's injuries to "speculate" (but not establish) that the cause of death was either SIDS or a cystic kidney disease. There does not appear to be any definitive verdict as to the cause of death. Even Butler's own attorney stated that he "doesn't know what the truth is." Butler's co-counsel indicated that at best the case should have been prosecuted as a manslaughter, hardly an endorsement of Butler's innocence. Butler's acquittal on retrial does not represent a finding that she did not administer a deadly trauma to baby Walter's abdomen.

Mississippi Clarion-Ledger (1/22/96); Baltimore Sun, (1/02/96); Washington Times (12/30/95).

69. Gary Gauger—Gauger was not actually sentenced to death. Although the trial court erroneously imposed a death sentence in January 1994, the court granted a motion for reconsideration and vacated the sentence less than ten months later in September 1994. The trial court found that it had not considered all the mitigating evidence and concluded that Gauger should not be sentenced to death. *People* v. *Bull,* 705 N.E.2d 824, 843 (Ill. 1999); Chicago Tribune (9/23/94). Although Gauger served a brief time on Death Row, he was not properly sentenced to death by the trial court. He should never have been sent to Death Row because the trial court did not finally sentence him to be executed. Gauger's case is an example of how consideration of mitigating evidence under current law results in a sentence less than death. Whatever the reasons for Gauger's later release from prison, he is not properly considered as an innocent person released from Death Row since his initial death sentence was not legitimately imposed under Illinois law. Accordingly, Gauger's case is not appropriate for the DPIC List.

70. Troy Lee Jones—*In re Jones,* 13 Cal.4th 552 (1996); *People* v. *Jones,* 13 Cal.4th 535 (1996). The conviction was vacated because of ineffective assistance of counsel. The California Supreme Court held that while the evidence of Jones' guilt was not overwhelming, it still suggested Jones' guilt. Jones was convicted of murdering Carolyn Grayson in order to prevent Grayson from implicating him in the murder of an elderly woman, Janet Benner.

Grayson had told Jones' brother Marlow that she had seen Jones strangle the old lady. Grayson had told her daughter Sauda that Jones killed Ms. Benner. Jones' sister overheard a conversation between Jones and his mother in which Jones arguably regretted not killing Grayson when he killed Benner. The same sister also testified to Jones' involvement in a family plot to murder Grayson. Although there was also evidence that Jones was ambivalent about killing Grayson, there was more testimony that Grayson's neighbor witnessed a violent altercation between Grayson and Jones in which she assured him that she would not say anything and he continued to threaten to kill her. Grayson's body was later found in a field the day after she had reportedly left with Jones for Oakland. At best, Jones only had evidence to contradict the inferences suggesting his guilt.

To sum up: "[T]he prosecution introduced * * * evidence that [Jones] was observed attacking Carolyn Grayson with a tire iron a few weeks before she was fatally shot, [Jones] and his family engaged in a plot to fatally poison Grayson, [Jones] confided to his brother that he had to kill Grayson or she would send him to the gas chamber, [Jones] informed his brother of the need to establish an alibi for the evening Grayson was murdered, and Grayson's daughter, Sauda, testified that, on the night of Grayson's death, Grayson told her daughter that she was going out with [Jones]." *In re Jones,* 13 Cal.4th at 584. While it was also true that this evidence had been subject to some varying accounts and biases, the evidence came from several different sources and it can hardly be said that Jones has been shown to be "actually innocent."

The prosecution did not choose to drop charges because Jones was innocent. Rather, due to the passage of time, it no longer had the evidence and witnesses available to retry the case. Modesto Bee, (11/16/96); Washington Times, (9/12/99).

71. Carl Lawson—*People* v. *Lawson,* 644 N.E.2d 1172 (Ill. 1994). Lawson was convicted of murdering eight year old Terrance Jones. The victim's body was found in an abandoned church. There was evidence that Lawson's romantic relationship with the young boy's mother had ended and that Lawson was upset about the breakup. Investigators discovered two bloody shoeprints of a commonly worn brand of gym shoe near the body. Lawson wore these type of shoes. The shoeprints were made near the time of the crime and were the only evidence capable of establishing Lawson's presence at the scene of the crime at the time it occurred. Various items were removed from around the victim's body. Two of the items near the body, a beer bottle and a matchbook, had Lawson's fingerprints. Lawson's first conviction was reversed because his attorney had a conflict of interest. He was acquitted at his second trial, apparently, because the shoeprint evidence could not be associated only with him the shoe was too popular. However, this does not change the fact that Lawson's fingerprints were on items found near the body and that other evidence, albeit some of it highly inconsistent, remain to incriminate Lawson, including evidence of motive.

72. Ricardo Aldape Guerra—*Guerra* v. *Johnson,* 90 F.3d 1075 (5th Cir. 1996); *Guerra* v. *Collins,* 916 F.Supp. 620 (S.D.Tex. 1995); *Guerra* v. *State,* 771 S.W.2d 543 (Tex.Crim.App. 1988). Guerra was convicted as the triggerman, but evidence indicates he may have only been the accomplice. It is noted in the federal court opinion that Guerra was not prosecuted as an accomplice although he was undoubtedly present at the scene and in the company of the triggerman. He fled with the shooter from the scene and was hiding at the site of a subsequent shootout with the police. Near him was a gun wrapped in a bandanna. Originally, this factual distinction was not considered proof of "actual innocence". Stanford, at 43.

73. Benjamin Harris—*Harris (Ramseyer)* v. *Wood,* 64 F.3d 1432 (9th Cir. 1995). Harris was convicted of hiring a hit man named Bonds to murder a man named Turner. Harris gave numerous inconsistent statements about his whereabouts and involvement in the murder. Ultimately, Harris admitted taking turns with Bonds in shooting Turner, but denied hiring Bonds to shoot Turner. Harris did admit having a motive to murder Turner. He admitted driving the murderer Bonds to the scene and providing a gun. Initially, Harris confessed, but then testified at trial that he and Bonds took turns pulling the trigger.

By denying a contract killing, Harris hoped to avoid eligibility for the death penalty under Washington state law. A federal court vacated his conviction because of ineffective assistance of counsel. Although Harris's counsel claimed that Harris fantasized his confession, the prosecution chose not to retry Harris because the alleged hitman (Bonds) was in prison and would not testify, other witnesses were unavailable, and the federal court had ruled Harris's confession inadmissible.

Since Harris could not be retried, the prosecution sought his civil commitment based on a petition from hospital psychiatrists. He

was confined in state a mental hospital, but a jury subsequently found he should be kept in a less restrictive environment. These circumstances do not support placing Harris on a list of the actually innocent. Seattle Times, (8/19/97,4/16/00); Portland Oregonian, (8/24/97); Seattle Post-Intelligencer, (7/17/97, 8/23/97); Tacoma News Tribune, (5/29/97).

74. Robert Hayes—*Hayes* v. *State,* 660 So.2d 257 (Fla. 1995). The initial conviction was based on a combination of DNA evidence, Hayes's inconsistent statements about when he was last with the victim, and hearsay statements by the victim expressing fear of Hayes. The Florida Supreme Court reversed the case because the trial court erroneously admitted DNA evidence matching Hayes with semen on the victim's shirt. The court held that a "band-shifting" technique used to identify the DNA had not reached the appropriate level of scientific acceptance—a Florida state opinion not universally shared. See, e.g. *State* v. *Copeland,* 922 P.2d 1304 (Wash. 1996). However, the court also held that the trial court on retrial could consider admitting evidence of Hayes's semen in the victim's vagina. The appeals court opinion noted that "evidence exists in this case to establish that Hayes committed this offense, physical evidence also exists to establish that someone other than Hayes committed the offense."

On retrial, the trial court admitted evidence that Hayes' semen was in the victim's vagina. However, there was also evidence that the victim was clutching hairs in her hand inconsistent with Hayes' hair. The state attorney explained to the Florida Commission on Capital Cases: "In the end, the jury disregarded the fact that Hayes' DNA was found in the victim's vagina and acquitted of murder." Nothing about Hayes' retrial changes the appeals court's original observation that evidence existed to establish Hayes' guilt. The acquittal on retrial was based on reasonable doubt, not actual innocence.

77. Curtis Kyles—*Kyles* v. *Whitley,* 514 U.S. 419 (1995). After one vacated conviction and four mistrials in which a jury was unable to reach a verdict over a 14-year period, the prosecutor chose not to retry Kyles although the final jury hung 8–4 for conviction (an earlier jury hung 10–2 for acquittal). The man whom Kyles alleged did the killing was himself killed by a member of Kyles' family in 1986. New Orleans Times-Picayune, (2/19/98,6/27/98); Baton Rouge Advocate, (2/19/98). A 5–4 United States Supreme Court split decision vacating Kyles' conviction disagreed on the strength of the evidence against Kyles. That disagreement itself certainly refutes any judgment that Kyles was actually innocent.

78. Shareef Cousin—*State* v. *Cousin,* 710 So.2d 1065 (La. 1998). Contrary to the DPIC List's summary, Cousin's case was not reversed because of "improperly withheld evidence * * *". In fact, the Louisiana Supreme Court explicitly did not rule on that issue. *State* v. *Cousin,* 710 So.2d at 1073 fn. 8. Rather, the Louisiana high court reversed Cousin's conviction because the prosecutor improperly impeached a witness with prior inconsistent statements recounting a confession made to him by Cousin. In other words, to prove the case against Cousin, the prosecutor brought out the fact that the witness had previously told the police that Cousin had confessed to the crime. Under Louisiana law, such prior statements

cannot be used as substantive evidence of the defendant's guilt. *State* v. *Brown,* 674 So.2d 428 (La.App. 1996) Other jurisdictions, of course, would not necessarily find this evidence inadmissible as substantive evidence. See *State* v. *Owunta,* 761 So.2d 528 (La. 2000) (acknowledging that Louisiana follows the minority rule in not allowing prior inconsistent statements to be used as substantive evidence). Thus, Cousin's conviction may have been upheld in other states. See *California* v. *Green,* 399 U.S. 49 (1970). Without these statements, the prosecution determined that the remaining evidence (weak or tentative identifications and Cousin's incriminating comment that the arrest warrant had the wrong date for the murder) was insufficient to carry the burden of proof. Baton Rouge Saturday State Times/Morning Advocate (1/9/99); New Orleans Times-Picayune (1/9/99). Cousin was not retried because the prosecution believed he was "actually innocent," but because Louisiana state law precluded evidence of guilt in this case that would actually have been admissible in other states.

80. Steven Smith—*People* v. *Smith,* 565 N.E.2d 900 (Ill. 1991); People v. Smith, 708 N.E.2d 365 (Ill. 1999). In this case, Smith was accused of assassinating an assistant prison warden while the victim was standing by his car in a local bar's parking lot. Various witnesses testified that they saw Smith and two other men in the bar and then departing just before the victim left.

The prosecution's theory was that Smith murdered the victim at the behest of a local neighborhood criminal gang leader. One eyewitness, who knew Smith, identified him as the shooter. When Smith was arrested, he was talking to the leader of the local gang. There was testimony that on certain occasions, Smith had been seen in the company of the gang leader. When the police searched Smith's residence they seized 77 pages of documents including regulations or bylaws of the criminal gang, other information relating to the gang, and two invitations to recent gang functions. However, at trial, the court excluded this evidence of Smith's association with the gang. The trial court admitted evidence of gang-related activity in the Illinois prison system, that the victim was a strict disciplinarian, and that the leader of Smith's gang had had an altercation with the victim. However, the trial court excluded the evidence seized in Smith's residence connecting him to the prison gang. On appeal, Smith's conviction was reversed because there was no evidence at trial connecting Smith to the prison gang! The irony was not lost on the dissenting judge: "If there was error at trial, it occurred not because the trial judge admitted too much evidence, but because he admitted too little."

Smith's conviction after retrial was then reversed for insufficient evidence. In any event, although various witnesses identified Smith in the bar before the victim was shot, only one eyewitness identified Smith as the actual shooter. The appellate court found that there were too many serious inconsistencies and impeachment of that witness at the trial to support Smith's conviction for shooting the victim. The court rejected the State's arguments reconciling some of the conflicting accounts of the shooting, although only because the State had not raised these arguments until it was too late for the defense to challenge the State's theory. It is not clear if the witness was confronted with previous statements that were

consistent with the accounts of other witnesses. Ordinarily, the testimony of a single witness is sufficient to convict. However, the Illinois court explained that the conviction may be rejected if the witnesses' testimony "is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." At best, the circumstantial evidence "tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim * * *" Given the evidence, Smith appears to have been an accomplice to the shooting even if he was not the actual triggerman. He was certainly not eliminated from the "class of individuals who may have killed the victim * * *".

Significantly, in reversing Smith's conviction and ending any chance for another retrial, the appellate court explained: "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. While there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances. When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim." In short, as the appeals court took pains to emphasize, the evidence against Smith was legally insufficient, but it was not shown that he was "actually innocent".

81. Ronald Keith Williamson—Even widely touted DNA exonerations are sometimes less than they seem. For instance, the recent decision by the Oklahoma authorities not to retry Williamson after DNA testing established that the victim's body did not contain his semen did not automatically make him "poster material for Actual Innocence".

Recent Congressional testimony by the Oklahoma Attorney General indicates there is more to this story:

> Williamson was not convicted "on the strength of a jailhouse snitch" as reported. Among the direct and circumstantial evidence of his guilt was a statement he gave to the Oklahoma State Bureau of Investigation describing a "dream" in which he had committed the murder. Williamson said, "I was on her, had a cord around her neck, stabbed her frequently, pulled the rope tight around her neck." He paused and then stated that he was worried about what this would do to his family.
>
> When asked if Fritz was there, Williamson said, "yes."
>
> When asked if he went there with the intention of killing her, Williamson said 'probably.'
>
> In response to the question of why he killed her, Williamson said, "she made me mad."
>
> The Pontotoc County prosecutor had a tough decision to make on a re-prosecution of Williamson and Fritz and con-

> cluded that conviction was highly unlikely in the wake of the DNA evidence, even though the note left at the scene said "Don't look fore us or ealse," [sic] indicating multiple perpetrators.

Testimony of the Honorable W.A. Drew Edmondson, Attorney General of the State of Oklahoma, Senate Judiciary Committee, 6/13/00.

Although Williamson suffered from mental problems that included delusional thinking, there was nothing presented to indicate that he would coincidentally "imagine" the actual facts of the murder. The victim had small puncture wounds and cuts. There was a semicircular ligature mark on her neck. The cause of death was suffocation due to a washcloth in her mouth and the ligature tightened around her neck. Thus, Williamson's "dream" was consistent with the murder. Given the evidence of Williamson's alleged mental problems, there is no more reason to believe his denials of guilt than his incriminating statements.

Furthermore, the DNA testing showed only that the semen in the victim's body belonged to another man named Gore. However, as the Attorney General's statement indicates, the evidence at trial indicated that more than one person could have been involved in the assault on the victim. The evidence of a group involvement in the murderous assault means that the failure to find Williamson's semen in the victim does not eliminate him as a participant in her assault. He may be exonerated as a perpetrator of the sexual assault, but he is not necessarily exonerated as an accomplice. Compare *People* v. *Gholston* (Ill.App. 1998) 697 N.E.2d 415; *Mebane* v. *State* (Kan.App. 1995) 902 P.2d 494; Note, 62 Ohio L.J. 1195, 1241 fn.46; Nat'l Comm'n on the Future of DNA Evidence, Post Conviction Testing: Recommendations for Handling Requests, September 1999; NIJ Research Report, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, June 1996 (all discussing potentially inconclusive DNA results in cases involving multiple defendants).

84. Warren Douglas Manning—*State* v. *Manning,* 409 S.E.2d 372 (S.C. 1991). There were five trials in this case, including two convictions that were reversed and two mistrials, before Manning was acquitted. Manning was convicted of murdering a state trooper who had taken him into custody for driving with a suspended license. Manning first stated that the victim had released him with a warning ticket, but then explained that he escaped from the trooper's car when the trooper stopped another car. However, the trooper was shot with his own revolver and that revolver was seized in a barn behind Manning's residence. Other circumstantial evidence was also consistent with Manning's guilt. Manning was acquitted in his fifth trial based on a defense of reasonable doubt. Hence, his defense lawyer conceded in argument to the jury that "[i]f there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty." Associated Press, 9/30/99. Manning's acquittal on retrial does not mean that Manning was "actually innocent."

86. Steve Manning—*People* v. *Manning,* 695 N.E.2d 423 (Ill. 1998). The prosecution exercised its discretion not to retry Man-

ning after his conviction was reversed. The Illinois Supreme Court forbade the use of certain evidence including questionable informant testimony. However, the Illinois Supreme Court also excluded the victim's wife's hearsay testimony that the victim had warned her that if he was ever killed to tell the FBI that Manning killed him. Apparently, the victim had told his wife that Manning had "ripped him off for a lot of money" and he was going to get the money back. Thus, while legally inadmissible under state law, there was evidence that Manning had a motive to murder the victim. It was also "consolation" to the district attorney in not retrying the case that Manning, a former cop gone bad, was already serving two life sentences plus 100 years for kidnaping in Missouri. Chicago Tribune, 1/19/00.

88. Joseph N. Green, Jr.—*Green* v. *State,* 688 So.2d 301 (Fla. 1997). The prosecution's case in this robbery-murder was based on the victim's dying declaration, an eyewitness, and "circumstantial evidence that Green had the opportunity to kill" the victim. Green's conviction and death sentence were reversed because the prosecution improperly cross-examined a defense witness and because the trial court erroneously denied a suppression motion. On retrial, the critical eyewitness was found incompetent to testify. This eyewitness had given inconsistent and contradictory testimony. The trial court then dismissed the case because there was no physical evidence connecting Green to the murder. The trial court found that there was a reasonable doubt about Green's guilt and it was "possible" someone else had committed the crime. However, the victim's dying declaration describing her assailant was generally consistent with Green's description, i.e., a slim black man in his mid-20's. The victim also said the murderer fled toward the motel where Green resided. Green needed money. Furthermore, when Green was arrested, he gave inconsistent statements about his activities on the night of the murder although one of his alibis did receive some corroboration. St. Petersburg Times (12/29/99, 3/17/00.) Thus, while there may not be sufficient evidence of Green's guilt, the evidence hardly establishes his innocence.

The recent report of the Florida Commission on Capital Cases sheds additional information on this case. Prior to the first trial, the court suppressed evidence of gun power residue in the pockets of Green's clothing. Although the trial court had originally found the eyewitness competent to testify at the first trial, it reversed itself on retrial and found the witness incompetent. The prosecution reiterated that Green had "been given the benefit of the doubt", but that his innocence was not established since he had motive, opportunity, and problems with his alibi. Green's defense attorney actually attributed his client's acquittal at least partially to the "bad search warrant" served in the case. Since the search warrant was "bad", evidence of Green's guilt such as the gun residue in his pocket was never presented to the jury.

90. William Nieves—*Commonwealth* v. *Nieves,* 746 A.2d 1102 (Pa. 2000). This Hispanic defendant was convicted of murdering Eric McAiley due to a drug debt. As the police sped to the scene of the murder, a bearded Hispanic in a Cadillac pointed out where the murder occurred and drove away. A witness ultimately identified Nieves as the man who got out of a Cadillac and shot McAiley.

The witness also admitted that she initially failed to identify Nieves. McAiley's nephew testified that McAiley sold drugs for Nieves. Another witness testified that before the murder he overheard Nieves warn McAiley, "Better get me my fucking money, I'm not playing with you." Nieves did not testify at the guilt phase of his first trial because his lawyer erroneously advised him that he would be impeached with his prior record of firearms and drug trafficking offenses. Ultimately, Nieves did testify at his penalty phase. He admitted he was a "small-time drug dealer" who had only a few drug transactions with McAiley. Nieves' case was reversed because of his attorney's faulty advice about whether he would be impeached if he testified.

Nieves was acquitted on retrial. His retrial defense again impeached the eyewitness who identified Nieves with prior conflicting statements she had made, including that she had initially identified two thin black men and then a husky Hispanic. The witness denied identifying the assailant(s) as black men. Nieves is Hispanic, but not "husky." Another witness testified that he saw a black man shoot McAiley, but this witness' testimony was also rife with inconsistencies. The Philadelphia district attorney continues to maintain that Nieves is guilty. The Nieves case is not an example of a defendant who was found actually innocent, but of a defendant for which the prosecution could not prove guilt beyond a reasonable doubt. Associated Press (10/20/00, 5/14/01, 5/25/01).

92. Michael Graham.

93. Ronnie Burrell—The Louisiana Attorney General dismissed charges rather than retrying these two defendants after their convictions were vacated due to a witness recantation and the discovery of significant impeaching evidence of a jailhouse informant. The Louisiana Attorney General's decision was not based on "innocence," but on the lack of sufficient credible evidence to establish guilt. However, Graham's and Burrell's own counsel acknowledge that new evidence could result in reinstatement of the charges and they have instructed their clients not to discuss the case. Contrary to the DPIC summary, DNA played no role in this case. The case was not dismissed because Graham and Burrell have been established as "innocent," only because there was insufficient evidence of guilt. The local prosecutor, now retired, indicated that he would have tried the case again. Baton Rouge Advocate (3/20/01, 3/21/01, 3/30/02); Minneapolis-St. Paul Star Tribune (1/1/01).

94. Peter Limone—*Limone* v. *Massachusetts,* 408 U.S. 936 (1972). As with Lawyer Johnson, Limone was convicted and sentenced under Massachusetts' defunct, pre-1976 death penalty statute.

96. Joaquin Martinez—*Martinez* v. *State,* 261 So.2d 1074 (Fla. 2000). Spanish native Martinez was accused of murdering a couple at their home sometime between October 27, 1995 and October 30, 1995. One victim was shot and the other victim died of multiple stab wounds. There was no physical evidence of a forced entry, indicating that the victims knew their assailant. A phone list in the kitchen included a pager number for "Joe." After the police left several messages for "Joe," Martinez's ex-wife, Sloane, called and explained she had the pager. She advised the police of her suspicions that Martinez was involved in the murders. The detective listened to a phone conversation Martinez had with his ex-wife in which he

stated, "[T]his is something that I explained to you before, and that I am going to get the death penalty for what I did." When she asked him if he was referring to the murder, he cryptically replied, "No, I can't talk to you about it on the phone right now." Martinez's ex-wife Sloane then had a surreptitiously recorded conversation at her home during which Martinez made "several remarks that could be interpreted as incriminating." Martinez's girlfriend testified that Martinez went out on October 27 and returned with ill-fitting clothes, a swollen lip, and scraped knuckles. Another witness testified he saw Martinez on October 27 and that he looked like he had been in a fight. Three inmates testified to incriminating statements by Martinez. The prosecution relied primarily on Sloane's testimony and the surreptitious tape. Sloane testified about the contents of the taped conversations, Martinez's behavior, and other statements he had made to her as well.

Martinez's case was reversed because a police witness erroneously testified as to his opinion that Martinez was guilty. The case was returned for retrial and the prosecution suffered many of the problems that occur on retrial in terms of changes in the evidence. Due to the passage of time, a witness had died, another witness had refused to cooperate (apparently Martinez's girlfriend), and the third witness (Martinez's ex-wife Sloane) had recanted.

Furthermore, a major piece of prosecution evidence was excluded on retrial. At Martinez's first trial, the trial court overruled Martinez's objection that the incriminating tape of his conversation with ex-wife Sloane was unintelligible and incomplete. The trial court allowed the tape to be played while the jury read a transcript. On appeal, Martinez did not challenge the admission of the tape. However, several of the judges on the appeals court noted that the tape was of "poor quality and portions of the conversation are difficult to hear * * *" However, one concurring justice specifically stated that the tape recording was "sufficiently audible to be admitted * * *" In any event, even if portions of the tape were inaudible, Sloane Martinez could herself testify as to what was said during her incriminating conversation with Martinez. There seems to be no question that Martinez made potentially incriminating statements on the tape.

Nevertheless, on retrial and despite the appeals court indications that portions of the tape were audible, the trial court excluded the tape completely as inaudible.[11] Sloane Martinez now stated that she had lied about what her former husband had said. The tape was not available to contradict her. The prosecution chose not to call Sloane to testify and instead relied on a police officer to testify from memory about what he had heard when Martinez's incriminating conversation with Sloane. However, the officer had no independent recollection any more of the conversation and had to rely on a transcript of the recording. The jury's request to hear the actual tape was denied. Associated Press (6/6/01); St. Petersburg Times (6/7/01). Martinez's acquittal on retrial appears attributable

[11] The appeals court holding about the tape was not binding on the trial court. Thus, the trial court judge had the discretion on retrial to exclude the entire tape. The prosecution would not have been able to appeal the trial court's ruling. The Martinez acquittal could have boiled down to no more than a disagreement between the prosecution and the trial court about the audibility of a tape.

to a deterioration and gutting of the prosecution's evidence, not proof of innocence. Both the prosecution and the defense advised the Florida Commission on Capital Cases that the prosecution was unable to present the same evidence at Martinez's retrial.

97. Jeremy Sheets—*State* v. *Sheets,* 618 N.W.2d 117 (Neb. 2000). The appellate court decision explains that Sheets was convicted of a racially motivated murder of a young African American girl. The evidence of Sheets' guilt included the tape-recorded statements of an accomplice named Barnett, who had died prior to Sheets' trial. The Nebraska Supreme Court reversed the conviction because Sheets could not cross-examine the dead accomplice.

According to newspaper accounts, the prosecutor did not retry the case since he believed there was insufficient evidence to convict Sheets beyond a reasonable doubt, not because the prosecutor believed that Sheets was innocent. In fact, Sheets' arrest originally resulted from a tip based on Barnett's statements that he and Sheets had murdered the victim. The tipster then tape recorded statements by Barnett implicating Sheets as the murderer. Once again, there is no reason to doubt the reliability of this particular taped statement by Barnett since it occurred before Barnett's arrest. Sheets' own testimony that he did not buy a car involved in the murder until after the murder occurred was contradicted by other police testimony. Testimony was also presented that Sheets had threatened an African American neighbor and had a fascination with Nazism, including shaving his head and drawing swastikas.

Most significantly, Sheets later requested a refund of the monies deposited in the Victim's Compensation Fund on his behalf. The Nebraska Attorney General pointed out in denying Sheets' request that the reversal of Sheets' conviction is not even considered a "disposition of charges favorable" to the defendant unless the case is subsequently dismissed because the prosecution is convinced that the accused is innocent. Neb. Op. Atty. Gen. No. 01036; Omaha World Herald, 5/6/97, 6/13/01. Since the dismissal was not on the basis of innocence, Sheets' request for compensation was denied.

98. Charles Fain—As with Arizona, Idaho's statute is now invalidated under the recent decision in *Ring* v. *Arizona.* It is speculative as to whether a jury, as opposed to a judge, would have found Fain death eligible.

99. Juan Roberto Melendez—*Melendez* v. *State,* 498 So.2d 1258 (Fla. 1986); *Melendez* v. *State,* 612 So.2d 1366 (Fla. 1992); *Melendez* v. *Singletary,* 644 So.2d 983 (Fla. 1994); *Melendez* v. *State,* 718 So.2d 746 (Fla. 1998). Melendez was convicted of murdering a beauty salon owner in 1984. Melendez's conviction was based on the testimony of a friend John Berrien and of a David Falcon, who claimed Melendez confessed to him in jail. The defense relied on alibi and presented evidence that a third party named James had confessed to murdering the victim. The defense also impeached Falcon as a paid informant.

After his conviction, Melendez continued to attack the credibility of the prosecution's witnesses and to further support his defense that James actually committed the murder. Various witnesses testified as to incriminating statements by James. However, James never explicitly confessed to these witnesses or he otherwise gave

conflicting explanations for murdering the victim. His accounts of the murder also conflicted. Berrien partially recanted and it was revealed he had negotiated a deal for his testimony. However, none of these witnesses who provided this new information for Melendez were found to be credible.

Then, Melendez's original trial attorney suddenly discovered a long-forgotten transcript of a jailhouse confession by James. It was not explained why this transcript had not been used at trial. Apparently, according to this transcript, James had also confessed to a state investigator. The suddenly discovered transcript and the Berrien recantation coupled with the belated revelation of a deal for his testimony were sufficient for a court to order a new trial. However, by this time, James and Falcon were both dead. Thus, there was no longer any opportunity for the prosecution to explore and impeach their conflicting accounts. On that basis, although the prosecution continued to believe that Melendez was the murderer, the prosecution decided there was insufficient evidence for a new trial and dismissed the case. Sun Herald, 1/6/02; The Guardian, 1/5/02; St. Petersburg Times, 1/4/02, 1/5/02; Tampa Tribune, 1/3/02; 1/4/02.

101. Thomas H. Kimbell—*Commonwealth* v. *Kimbell,* 759 A.2d 256 (Pa. 2000). Kimbell's acquittal on retrial is another example of a case in which the prosecution could not prove guilt beyond a reasonable doubt, but the acquittal did not establish Kimbell's innocence.

Kimbell's defense at his first trial was that another member of the victim's family, probably the husband, committed the murder. The victim's mother had testified that she had been talking on the telephone with her daughter shortly before the murders (between two and three in the afternoon) when her daughter said she had to go because "someone" had pulled into the driveway (possibly the murderer). Previously, the mother had told the police that her daughter had said that her husband had driven into the driveway. The Pennsylvania Supreme Court reversed Kimbell's conviction because Kimbell's lawyer was not allowed to impeach the mother with her prior inconsistent statement that her daughter had specifically said that her husband (not just "someone") was arriving at the house. The court agreed that this testimony could have created a reasonable doubt about Kimbell's guilt.

Despite the acquittal on retrial, the prosecution maintained that Kimbell was the murderer and noted that "the more time that elapses between a crime and a trial, the harder it can be to obtain a conviction." Lost in the shuffle was evidence casting doubt on the credibility of the mother's testimony and recollection in general, given her understandable grief about her daughter's murder. At the first trial, a psychiatrist had testified that the mother's testimony "could be affected by the impact that the slayings have had on her." Indeed, when the mother testified at the first trial, she repeatedly broke down sobbing and said she had talked to her daughter a "whole bunch" and that the conversations were "mixed up together". She had also told investigators before that her daughter had hung up to make dinner, but she could not remember that previous statement. Furthermore, another witness had testified that he did stop briefly at the victims' home at around 2:00 p.m. to

make a phone call and then left (although this person could have been the person whom the daughter referred to in the phone call with her mother, he is apparently not considered a suspect in the case). When Kimbell was interviewed by the police he provided them information about the murder that he claimed he overheard on police scanners, but this information had not been broadcast on the police radios.

At the first trial, a friend of Kimbell's testified that Kimbell had pointed at the victims' home after the murders and admitted killing the people. However, this witness died after the first trial. Other witnesses had identified Kimbell as being near the victims' home on the day of the murder and other witnesses had testified to incriminating admissions by Kimbell. Pittsburgh Post-Gazette, 5/4/02; 5/6/98, 5/2/98; 2/4/97; Associated Press, 5/6/98. While there might have been "reasonable doubt" about Kimbell's guilt, the available information does not exonerate him.

102. Larry Osborne—*Osborne* v. *Commonwealth,* 43 S.W.3d 234 (Ky.2001). Osborne was convicted of breaking into the home of an elderly couple, bludgeoning them, and burning their house down. Osborne was acquitted on retrial due to reasonable doubt, but not because the evidence established that he was not the actual culprit. A friend and potential accomplice of Osborne's implicated Osborne in a grand jury proceeding. However, this witness then died by drowning before the first trial. Instead, his grand jury testimony was read at Osborne's first trial. The conviction was reversed because of the admission of the dead witnesses' grand jury testimony—since there was no opportunity for Osborne to cross-examine the witness. On retrial, without the grand jury testimony of the dead witness, the prosecution had insufficient evidence to convince the jury of Osborne's guilt beyond a reasonable doubt. Nevertheless, there was evidence that Osborne and his mother staged a phony "911" call to the police in order to divert police attention to another potential perpetrator. There was also a dispute whether Osborne possessed a set of wire cutters removed from the victims' home. Louisville Courier-Journal (8/2/02; 8/3/02); Associated Press (8/2/02).

D. *UNITED STATES* V. *QUINONES*

On July 1, 2002, in the case of *United States* v. *Quinones,* 205 F.Supp.2d 256 (S.D.N.Y. 2002) the United States District Court for the Southern District of New York declared that the Federal Death Penalty Act unconstitutional. The federal court based its decision in part on the DPIC List. The federal court itself analyzed the List and applied undefined "conservative criteria" to conclude that 40 defendants on the List were released on grounds indicating "factual innocence." However, 23 of the names on the *Quinones*' List are names which this study submits that should be eliminated from the DPIC List. If the *Quinones* court's analysis of the DPIC List is combined with this critique's analysis, only 17 defendants should be on the List, not the 102 defendants currently listed.

IMPLICATIONS AND CONCLUSION

The DPIC engaged in a "rush to judgment" to compile a list of allegedly innocent defendants released from Death Row. It is tragic whenever an innocent person is convicted and sentenced to death. Obviously, it is a very serious charge to claim that 102 innocent defendants have suffered such an unjust fate. While recent developments such as DNA have revealed "wrongful convictions," the evidence does not support other claims of such miscarriages under our current capital punishment system.

In compiling its List, the DPIC has too often relied on inexact standards such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence to exonerate released death row inmates. However, there is a big difference between "reasonable doubt" and the kind of "wrong person mistake" that was the genesis of the original Stanford study. Moreover, the DPIC has used old cases in which the defendants did not receive the modern protections that "probably reduce the likelihood of executing the innocent."

No reasonable person would be so dishonest as to say that no actually innocent person has ever been convicted and sentenced to death. The system has always anticipated potential factual error and has provided remedies for wrongly convicted defendants—that is why there is a more elaborate post-*Furman* trial process, an appellate process, state and federal habeas corpus processes, and clemency. The development in DNA technology is now giving birth to new post-conviction procedures in many of the states designed to give inmates the opportunity to have DNA testing that was not available at the time of their trials. Moreover, our open society promotes ongoing inquiry and investigation into legitimate claims of injustice.

However, it is irresponsible to misrepresent the extent and dimensions of this phenomenon. "It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons." Schwartz, at 154–155. The DPIC's gimmicky and superficial List falsely inflates the problem of wrongful convictions in order to skew the public's opinion about capital punishment.

The Cooley article includes the dramatic, but meaningless, statistical conclusion that "one death row inmate is released because of innocence for every five inmates executed." Cooley, at 916. Of course, comparing an execution rate with a "sentenced to death" rate is mixing apples and oranges since there is no claim that any innocent defendants have actually been executed—being sentenced to death is not the same as then being executed. Yet, the recent book by Barry Scheck and Peter Neufeld, Actual Innocence (2000), updated this hysterical ratio to assert that one innocent inmate is being released for every seven inmates executed. This contrived "statistic" has even made its way to the Senate floor. 148 Congressional Record S889–92 (2/15/02). The "wide use" of this dubious "new measure for evaluating the accuracy of the death penalty * * *" is cited as one of the events most responsible for

"igniting the current capital punishment debate." 33 Columbia Human Rights Law Review 527 (2002); 63 Ohio St. Law Journal 343 (2002).

Of course, the valid comparison is between the total number of death sentences and the number of innocent Death Row inmates actually released from Death Row. The most recent available statistics reveal that 6,930 death sentences were imposed between 1973 and 2000.[12] Thus, even under the DPIC's own questionable estimate that 102 innocent defendants have been sentenced to death—only 1.4% of the inmates sentenced to death were released because of innocence. Of course, given the analysis in this paper, the DPIC's estimate of 102 innocent inmates is artificially inflated. If the 68 cases analyzed in this paper are removed from the DPIC List, then the most that can be said is that between 1973 and 2000, there were 34 wrongly convicted defendants, i.e. less than ½ of 1% or 0.4% of the inmates sentenced to death were actually innocent.

The analysis of the federal court opinion in *Quinones* yields similar results. As noted, that decision held that 40 names on the DPIC List were released for reasons indicating "actual innocence." This would mean that approximately ½ of 1% of the 6,930 inmates sentenced to death between 1973 and 2000 were "actually innocent." When the *Quinones* analysis and this critique are combined to remove all but 17 names from the List, the result is that 2/10 of 1% or 0.2% of the 6,930 prisoners were released on actual innocence grounds.

The significance of these figures may be appreciated when contrasted with the aforementioned hyperbolic ratio used by the authors of the Cooley study and echoed in Actual Innocence and in the halls of Congress which fallaciously compares executions and exonerations. That 7:1 ratio is a nonsensical public relations statistic that creates the misimpression of an epidemic of wrongful convictions. The facts actually show that for every 6,930 death sentences imposed, 102 innocent defendants were sentenced to death or more likely it is that for every 6,930 death sentences imposed only 40 or 34 or 17 innocent defendants have been sentenced to death. In other words, the relative number of innocent defendants sentenced to death appears to be infinitesimal.

The public may or may not take comfort from these estimates. The microscopic percentage of defendants who may have been wrongly convicted and sentenced to death can be considered a testament to the accuracy and reliability of our modern capital punishment system in filtering out and punishing the actual perpetrators of our most heinous crimes. The United States Supreme Court continues to monitor and modify this system.

However, if a person believes that the death penalty should be abolished if there is any risk at all that an innocent person could be sentenced to death, then that person is justified in advocating the abolition of capital punishment. No criminal justice system can promise that kind of foolproof perfection—although the minute number of cases in which an innocent person may have been sentenced to death in this country approaches that absolute standard.

[12] The total number of death sentences since 2000 is not yet available.

However, the inherent risk of sentencing an innocent person to death and the still unrealized possibility that an innocent person may actually be executed cannot be considered in isolation. Counterbalancing the concern that even one innocent person may be executed is the question of whether the death penalty saves innocent lives by deterring potential murderers.[13] Now, for the first time, various academic and statistical reports have been published that examine the effect of capital punishment during this modern post-*Furman* period of death penalty jurisprudence. A recent study by the Emory University Department of Economics concludes that capital punishment as it is currently administered has a strong deterrent effect, saving 8–28 lives per execution. Another study conducted by School of Business & Public Adminstration at the University of Houston-Clear Lake and published in Applied Economics shows that homicides increase during periods when there are no executions and decrease during periods when executions are occurring. Economists with the University of Colorado at Denver studied the impact of capital punishment during the years 1977 through 1997. The preliminary results of the Colorado study indicate a deterrence effect of 5–6 fewer homicides per execution. Finally, statistical evidence has been cited to argue that the homicide rates have fallen more steadily and steeply in states that have conducted executions as opposed to states that do not conduct executions or do not have capital punishment. The Weekly Standard, 8/13/01. Inevitably (and properly), the debate over deterrence and the validity of these new studies will continue.[14]

Deterrence, of course, involves more than numbers. As Senator Dianne Feinstein (D.–Cal.) explained to the Senate Judiciary Committee in 1993:

> In the 1960's, I was appointed to one of the term-setting and paroling authorities and sat on some 5,000 cases of women who were convicted of felonies in the State of California. I remember one woman who came before me because she was convicted of robbery in the first degree, and I noticed on what is called the granny sheet that she had a weapon, but it was unloaded. I asked her the question why was the gun unloaded and she said, so I wouldn't panic, kill somebody and get the death penalty.
>
> That case went by and I didn't think too much of it at the time. I read a lot of books that said the death penalty was not a deterrent. Then in the 1970's, I walked into a mom-and-pop grocery store just after the proprietor, his

[13] By focusing on the deterrence aspects of capital punishment, this writer is not ignoring that for many people there are reasons for supporting and opposing the death penalty that are totally irrelevant to the deterrence issue.

[14] Indeed the Emory study notes potential problems with some of these other studies. However, the objectivity of some of these studies is underscored by the ambivalence expressed about the death penalty by several of the academicians who compiled the information. For instance, the Emory study warns: "[D]eterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as the possible unfairness of the justice system and discrimination need to be considered when making a social decision regarding capital punishment." The Colorado working paper concludes with a similar caveat about other "significant issues" including racial discrimination in the imposition of the death penalty and the pardon process. "Given these concerns, a stand for or against capital punishment should be taken with caution." Thus, the reserachers who have prepared these most recent deterrence studies do not appear predisposed to supporting the death penalty.

> wife and dog had been shot. People in real life don't die the way they do on television. There was brain matter on the ceiling, on the canned goods. It was a terrible, terrible scene of carnage.
>
> I came to remember that woman because by then California had done away with the death penalty. I came to remember the woman who said to me in the 1960's, the gun was unloaded so I wouldn't panic and kill someone, and suddenly the death penalty came to have new meaning to me as a deterrent.

Statement of the Honorable Dianne Feinstein, Senator from California, Hearing Before the Senate Judiciary Committee on S. 221 (April 1, 1993).[15]

Under any analysis, innocent lives are at stake. On the one hand, there is the remote prospect that an innocent person may be executed despite the most elaborate, protracted, and sympathetic legal review procedures in the world. On the other, there is the possibility of innocent people horribly and brutally murdered in the streets and in their homes with no legal review process at all. When weighing these choices, the public deserves information that places the innocence question in proper perspective. The DPIC List of allegedly innocent defendants released from Death Row fails to provide that legitimate perspective.

POSTSCRIPT: ACTUALLY GUILTY

Recent international interest has focused on the case of James Hanratty, one of the last murderers to be executed in England. Hanratty was hung in 1962 for the notorious "A–6 Murder". He was convicted of murdering Michael Gregsten and also raping/shooting Gregsten's girlfriend, Valerie Storie. Despite some alleged confusion about Storie's identification of him as the perpetrator, Hanratty was convicted after the longest murder trial in English history. After Hanratty was hung, another man confessed to the murder, but then recanted the confession. Hanratty's case became a cause celebre and was part of the final impetus leading to the abolition of the death penalty in England in 1969. Bailey, Hangmen of England (1992 Barnes & Noble ed.) at 190–191. The late Beatle John Lennon mourned Hanratty as a victim of "class war". However, the continuing efforts of Hanratty's supporters to "clear" his name have now come to naught. DNA evidence from Ms. Storie's underpants established Hanratty's guilt and eliminated the other alleged perpetrator who had "confessed" after Hanratty's execution. In dismissing the Hanratty family's case, the English court graciously "commend[ed] the Hanratty family for the manner in which they have logically but mistakenly pursued their long campaign to establish James Hanratty's innocence." *Regina* v. *James Hanratty Deceased by his Brother Michael Hanratty,* 2002 WL

[15] Moreover, case law reveals examples of the ineffectiveness of imprisonment as a deterrent to murder. See, e.g. *Campbell* v. *Kincheloe,* 829 F.2d 1453 (9th Cir. 1987) (prison escapee commits triple murder of witnesses who testified against him); *Hernandez* v. *Johnson,* 108 F.3d 554 (5th Cir. 1997) (twice-convicted murderer murders jail guard during abortive jail escape); *People* v. *Allen,* 42 Cal. 3d 1222 (Cal. 1986) (murderer serving life sentence convicted of murdering witness on the outside, murder of two bystanders, and conspiracy to murder seven other prior witnesses).

499035 (May 10, 2002). Since the abolition of the death penalty, the rate of unlawful killings in Britain has soared. McKinstry, All my Life I have Been Passionately Opposed to the Death Penalty * * *. This is Why I have Changed My Mind, Daily Mail, 3/13/02. "All of us who regret the transformation of our country from a 'relative oasis in violent world' to a society where crimes like the A6 murder are almost daily occurrences, are surely entitled to an apology." Hanratty Deserved to Die, The Spectator (May 11, 2002) at 24–25.

ATTACHMENT—B

I. 2002 Votes by Circuit (Through September 30, 2002)

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	6	4	1	1		67
Fourth	9	8		1		89
Fifth	18	18				100
Sixth	10	8	2			80
Seventh	12	8	4			67
Eight	7	5	1	1		71
Tenth	17	14	2	1		82
Eleventh	11	9	2			82
D.C.	0					N/A
Overall totals	90	74	12	4		82

II. 2001 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	1	1				100
Second	0					N/A
Third	5		5			0
Fourth	6	5	1			83
Fifth	24	20	4			83
Sixth	14	10	3	1		71
Seventh	7	5	1	1		71
Eight	10	8	2			80
Tenth	20	15	5			75
Eleventh	14	12	2			86
D.C.	0					N/A
Overall totals	101	76	23	2		75

III. 2000 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	1	1				100
Second	0					N/A
Third	3	3				100

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
Fourth	19	17	1	1		89
Fifth	25	19	1	5		76
Sixth	10	5	2	3		50
Seventh	6	5		1		83
Eight	10	7	1	2		70
Tenth	19	13	1	5		68
Eleventh	12	10		2		83
D.C.	0					N/A
Overall totals	105	80	6	19		76

IV. 1999 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	1	1				100
Fourth	20	18		2		90
Fifth	21	20	1			95
Sixth	3	2		1		67
Seventh	7	7				100
Eight	9	7	2			78
Tenth	20	16	1	3		80
Eleventh	11	9	2			82
D.C.	0					N/A
Overall totals	92	80	6	6		87

V. 1998 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	1	1				100
Third	0					N/A
Fourth	33	32			1	97
Fifth	27	26	1			96
Sixth	4	3		1		75
Seventh	7	6	1			86
Eight	15	14	1			93
Tenth	8	8				100
Eleventh	12	9	3			75
D.C.	0					N/A
Overall totals	107	99	6	1	1	92.5

VI. 1997 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	3		3			0
Fourth	13	12		1		92
Fifth	22	18	1	3		82
Sixth	7	3	3	1		43
Seventh	9	8	1			89
Eight	16	12	3	1		75
Tenth	4	3	1			75
Eleventh	9	8	1			89
D.C.	0					N/A
Overall totals	83	64	13	6		77

VII. 1996 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	0					N/A
Fourth	15	14	1			93
Fifth	16	14	1	1		87.5
Sixth	2	2				100
Seventh	11	8	1	2		73
Eight	18	16	1	1		89
Tenth	8	5	1	2		62.5
Eleventh	9	7	1	1		78
D.C.	0					N/A
Overall totals	79	66	6	7		83.5

VIII. 1995 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	2	1		1		50
Fourth	10	9		1		90
Fifth	14	14				100
Sixth	2	1	1			50
Seventh	6	5			1	83
Eight	14	13	1			93
Tenth	7	5	2			71
Eleventh	15	10	2	3		67
D.C.	0					N/A
Overall totals	70	58	6	5	1	83

IX. 1994 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	2	1		1		50
Fourth	9	9				100
Fifth	17	16		1		94
Sixth	1	1				100
Seventh	8	8				100
Eight	14	11	1	2		79
Tenth	1	1				100
Eleventh	14	11	3			79
D.C.	0					N/A
Overall totals	66	58	4	4		88

X. 1993 Votes by Circuit

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	0					N/A
Second	0					N/A
Third	0					N/A
Fourth	5	5				100
Fifth	12	9	1	2		75
Sixth	0					N/A
Seventh	2	1		1		50
Eight	10	8	1	1		80
Tenth	0					N/A
Eleventh	8	7	1			87.5
D.C.	0					N/A
Overall totals	37	30	3	4		81

XI. Total Votes by Circuit (2002–1993)

Circuit courts	Total number of cases	Affirm death penalty	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing	Percentage of rulings resulting in death penalty
First	2	2				100
Second	1	1				100
Third	22	10	9	3		45
Fourth	139	129	3	6	1	93
Fifth	196	176	10	12		90
Sixth	53	35	11	7		66
Seventh	75	61	8	5	1	81
Eight	123	101	14	8		82
Tenth	104	80	13	11		77
Eleventh	115	92	17	6		80
D.C.	0					N/A
Overall totals	830	685	85	58	2	83

XII. Ninth Circuit Statistics

NINTH CIRCUIT REVERSAL RATE BY YEAR

Year	Total cases	Rev'd/rem'd	Percentage
2002 [1]	14	12	86
2001	15	12	80
2000	8	7	88
1999	12	5	42
1998	12	6	50
1997	22	11	80
1996	11	3	27
1995	10	5	50
1994	8	3	38
1993	7	4	57
Overall	115	65	57

[1] As of September 2002.

POST–1992 VOTES OF JUDGES APPOINTED BY REPUBLICAN PRESIDENTS

Republican President appointees	Affirm death penalty sentence	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing
Beezer	7	1		
Brunetti	13	3		
Fernandez	11	2		1
Goodwin	2	2		
Hall	6	3		
Kleinfeld	12	3	1	2
Kovinski	16	5	3	1
Leavy	4	3		
T.G. Nelson	16	4	2	
Noonan	1	1		
O'Scannlain	12	2	1	
Rymer	11	5	2	
Thompson	13	9	2	
Trott	14	4	1	
Wallace	8	1		
Wiggins	6		1	
Totals	146	48	13	4

POST–1992 VOTES OF JUDGES APPOINTED BY DEMOCRATIC PRESIDENTS

Democratic President appointees	Affirm death penalty sentence	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing
Alarcon	2			
Berzon		4	2	
Boochever	1	1		
Browning	7	11		
Canby	1	7		
Farris	9	2		
Ferguson	1	10	3	
Fisher		1	1	
B. Fletcher	2	13	1	
W. Fletcher		6	2	
Graber	2	5		
Gould	4	2		
Hawkins	7	6	1	
P. Hug-Jr.	10	9	1	
McKeown		1		
D. Nelson	3	4		
Norris		5		

POST–1992 VOTES OF JUDGES APPOINTED BY DEMOCRATIC PRESIDENTS—Continued

Democratic President appointees	Affirm death penalty sentence	Reverse death penalty sentence	Remand/evidentiary hearing	Deny evidentiary hearing
Paez		2	2	
Poole	3	1		
Pregerson	2	17	3	
Rawlinson		2		
Reinhardt		21	4	
Schroeder	5	11	3	
Silverman		2	1	
Tallman	1	1	1	
Tang		2		
Tashima		9		
Thomas	2	8	3	
K. Wardlaw	2	2	1	
Totals	64	165	29	0

Judge Ferguson

All but one of his votes has been to reverse/remand the death penalty sentence. Total of seventeen cases: *Caro* v. *Woodford,* 280 F.3d 1247 (2002); *Morris* v. *Woodford,* 273 F.3d 826 (2001); *Murtishaw* v. *Woodford,* 255 F.3d 926 (2001); *Lambright* v. *Stewart,* 241 F.3d 1201 (2001); *Smith* v. *Stewart,* 241 F.3d 1191 (2001); *Morris* v. *Woodford,* 229 F.3d 775 (2000); *Lambright* v. *Stewart,* 220 F.3d 1022 (2000); *Comer* v. *Stewart,* 215 F.3d 910 (2000); *Lambright* v. *Stewart,* 191 F.3d 1181 (1999); *Smith* v. *Stewart,* 189 F.3d 1004 (1999); *Lambright* v. *Stewart,* 167 F.3d 477 (1999); *Caro* v. *Calderon,* 165 F.3d 1223 (1999); *McLain* v. *Calderon,* 134 F.3d 1383 (1998); *Moore* v. *Calderon,* 108 F.3d 261 (1997); *Adamson* v. *Lewis,* 955 F.2d 614 (1992); *Smith* v. *McCormick,* 914 F.2d 1153 (1990); *Adamson* v. *Ricketts,* 865 F.2d 1011 (1988).

Judge B. Fletcher

All but two of her votes have been to reverse/remand the death penalty sentence. Total of twenty-two cases: *Pizzuto* v. *Arave,* 280 F.3d 949 (2002); *Silva* v. *Woodford,* 279 F.3d 825 (2002); *Phillips* v. *Woodford,* 267 F.3d 966 (2001); *Dyer* v. *Calderon,* 151 F.3d 970 (1998); *Thompson* v. *Calderon,* 151 F.3d 918 (1998) (en banc); *Smith* v. *Stewart,* 140 F.3d 1263 (1998); *McDowell* v. *Calderon,* 130 F.3d 833 (1997) (en banc); *Thompson* v. *Calderon,* 120 F.3d 1045 (1997); *Jeffries* v. *Wood,* 114 F.3d 1484 (1997) (en banc); *Villafuerte* v. *Stewart,* 111 F.3d 616 (1997); *Ceja* v. *Stewart,* 97 F.3d 1246 (1996); *Rice* v. *Wood,* 77 F.3d 1138 (1996) (en banc); *Villafuerte* v. *Lewis,* 75 F.3d 1330 (1996); *Phillips* v. *Vasquez,* 56 F.3d 1030 (1995); *Jeffers* v. *Lewis,* 38 F.3d 411 (1994) (en banc); *Hamilton* v. *Vasquez,* 17 F.3d 1149 (1994); *Hoffman* v. *Arave,* 952 F.2d 1164 (1991); *Smith* v. *McCormick,* 914 F.2d 1153 (1990); *Coleman* v. *McCormick,* 874 F.2d 1280 (1989); *McKenzie* v. *Risley,* 842 F.2d 1525 (1988); *Campbell* v. *Kincheloe,* 829 F.2d 1453 (1987); *U.S.* v. *Harper,* 729 F.2d 1216 (1984).

Judge Pregerson

All but two of his votes have been to reverse/remand death sentence. Twenty-eight cases total: *Payton* v. *Woodford,* 299 F.3d 815

(2002); *Visciotti* v. *Woodford,* 288 F.3d 1097 (2002); *Caro* v. *Woodford,* 280 F.3d 1247 (2002); *Petrocelli* v. *Angelone,* 248 F.3d 877 (2001); *Hoffman* v. *Arave,* 236 F.3d 523 (2001); *Comer* v. *Stewart,* 215 F.3d 910 (2000); *McDowell* v. *Calderon,* 197 F.3d 1253 (1999); *Rich* v. *Calderon,* 187 F.3d 1064 (1999) (voting to uphold); *Siripongs* v. *Calderon,* 167 F.3d 1225 (1999); *Caro* v. *Calderon,* 165 F.3d 1223 (1999); *Dyer* v. *Calderon,* 151 F.3d 970 (1998); *Crandell* v. *Bunnell,* 144 F.3d 1213 (1998); *LaGrand* v. *Stewart,* 133 F.3d 1253 (1998); *Siripongs* v. *Calderon,* 133 F.3d 732 (1998); *Carriger* v. *Stewart,* 132 F.3d 463 (1997); *McDowell* v. *Calderon,* 130 F.3d 833 (1997) (en banc); *Fields* v. *Calderon,* 125 F.3d 757 (1997); *Thompson* v. *Calderon,* 120 F.3d 1045 (1997); *Gretzler* v. *Stewart,* 112 F.3d 992 (1997); *Rupe* v. *Wood,* 93 F.3d 1434 (1996); *Moran* v. *Godinez,* 57 F.3d 690 (1995); *Jeffers* v. *Lewis,* 38 F.3d 411 (1994) (en banc); *Siripongs* v. *Calderon,* 35 F.3d 1308 (1994); *Jeffers* v. *Lewis,* 5 F.3d 1199 (1992); *Jeffers* v. *Lewis,* 974 F.2d 1075 (1992); *Moran* v. *Godinez,* 972 F.2d 263 (1992); *Adamson* v. *Ricketts,* 865 F.2d 1011 (1988); *McKenzie* v. *Risley,* 842 F.2d 1525 (1988); *Jeffers* v. *Ricketts,* 832 F.2d 476 (1987).

Judge Reinhardt

All his votes have been to reverse/remand the death penalty sentence. Total of thirty one cases: *Valerio* v. *Crawford,* 2002 WL 31056609 (2002); *Benn* v. *Lambert,* 282 F.3d 1040 (2002); *Ghent* v. *Woodford,* 279 F.3d 1121 (2002); *Phillips* v. *Woodford,* 267 F.3d 966 (2001); *Lambright* v. *Stewart,* 241 F.3d 1201 (2001); *Smith* v. *Stewart,* 241 F.3d 1191 (2001); *Lambright* v. *Stewart,* 220 F.3d 1022 (2000); *Lambright* v. *Stewart,* 191 F.3d 1181 (1999); *Smith* v. *Stewart,* 189 F.3d 1004 (1999); *Lambright* v. *Stewart,* 167 F.3d 477 (1999); *Vargas* v. *Lambert,* 159 F.3d 1161 (1998); *Chaney* v. *Stewart,* 156 F.3d 921 (1998); *Dyer* v. *Calderon,* 151 F.3d 970 (1998); *Thompson* v. *Calderon,* 151 F.3d 918 (1998); *Bloom* v. *Calderon,* 132 F.3d 1267 (1997); *Carriger* v. *Stewart,* 132 F.3d 463 (1997); *McDowell* v. *Calderon,* 130 F.3d 833 (1997) (en banc); *Gerlaugh* v. *Stewart,* 129 F.3d 1027 (1997); *Thompson* v. *Calderon,* 120 F.3d 1045 (1997); *Jeffries* v. *Wood,* 114 F.3d 1484 (1997); *Jeffries* v. *Wood,* 103 F.3d 827 (1996); *Clabourne* v. *Lewis,* 64 F.3d 1373 (1995); *Phillips* v. *Vasquez,* 56 F.3d 1030 (1995); *Bartholomew* v. *Wood,* 34 F.3d 870 (1994); *Wade* v. *Calderon,* 29 F.3d 1312 (1994); *Campbell* v. *Wood,* 18 F.3d 662 (1994) (en banc); *Beam* v. *Paskett,* 3 F.3d 1301 (1993); *Beam* v. *Paskett,* 966 F.2d 1563 (1992); *Richmond* v. *Lewis,* 948 F.2d 1473 (1990); *Coleman* v. *McCormick,* 874 F.2d 1280 (1989); *Coleman* v. *Risley,* 839 F.2d 434 (1988); *Vickers* v. *Ricketts,* 798 F.2d 369 (1986); *U.S.* v. *Harper,* 729 F.2d 1216 (1984).

Judge Schroeder

All but five of her votes have been to reverse/remand the death penalty sentence. Total of twenty-three cases: *Valerio* v. *Crawford,* 2002 WL 31056609 (2002); *Payton* v. *Woodford,* 299 F.3d 815 (2002); *Mayfield* v. *Woodford,* 270 F.3d 915 (2001); *Sandoval* v. *Calderon,* 241 F.3d 765 (2001); *Coleman* v. *Calderon,* 210 F.3d 1047 (2000); *Lambright* v. *Stewart,* 191 F.3d 1181 (1999); *Siripongs* v. *Calderon,* 167 F.3d 1225 (1999); *Thompson* v. *Calderon,* 151 F.3d

918 (1998); *Coleman* v. *Calderon,* 150 F.3d 1105 (1998); *Vickers* v. *Stewart,* 144 F.3d 613 (1998); *Correll* v. *Stewart,* 137 F.3d 1404 (1997); *Siripongs* v. *Calderon,* 133 F.3d 732 (1998); *Carriger* v. *Stewart,* 132 F.3d 463 (1997); *Jeffries* v. *Wood,* 114 F.3d 1484 (1997); *Rupe* v. *Wood,* 93 F.3d 1434 (1996); *Rice* v. *Wood,* 77 F.3d 1138 (1996); *Siripongs* v. *Calderon,* 35 F.3d 1308 (1994); *Hamilton* v. *Vasquez,* 17 F.3d 1149 (1994); *Fetterly* v. *Paskett,* 997 F.2d 1295 (1993); *Carriger* v. *Lewis,* 971 F.2d 329 (1992); *Adamson* v. *Lewis,* 955 F.2d 614 (1992); *Hamilton* v. *Vasquez,* 882 F.2d 1469 (1989); *Adamson* v. *Ricketts,* 865 F.2d 1011 (1988).

Judge Tashima

All of his votes have been to reverse/remand the death penalty sentence. Total of nine cases: *Payton* v. *Woodford,* 299 F.3d 815 (2002); *Visciotti* v. *Woodford,* 288 F.3d 1097 (9th Cir. 2002); *Garceau* v. *Woodford,* 275 F.3d 769 (2001); *Petrocelli* v. *Angelone,* 248 F.3d 877 (9th Cir. 2001); *McDowell* v. *Calderon,* 197 F.3d 1253 (1999); *Thompson* v. *Calderon,* 151 F.3d 918 (1998) (en banc); *Paradis* v. *Arave,* 130 F.3d 385 (1997); *Thompson* v. *Calderon,* 120 F.3d 1045 (9th Cir. 1997); *Jeffries* v. *Wood,* 114 F.3d 1484 (1997).

POST–1992 NINTH CIRCUIT DEATH PENALTY APPEALS—SUMMARIES OF CASES

1. *Valerio* v. *Crawford,* 2002 WL 31056609 (2002).

Judges: Schroeder, Reinhardt, O'Scannlain, Rymer, G. Nelson, Thomas, Graber, W. Fletcher, Fisher, Paez, Berzon (Rymer, O'Scannlain, Nelson, Graber dissenting).

Summary: Valerio was convicted of first degree murder after he stabbed Karen Blackwell 45 times and was sentenced to death. The district court dismissed his petition for a writ of habeas corpus. The court of appeals reversed the district courts' ruling stating that the jury instructions during the penalty phase were unconstitutional under *Godfrey.*

2. *Williams* v. *Woodford,* 2002 WL 31012121 (2002).

Judges: Hug, Nelson, Gould.

Summary: Williams was convicted of multiple counts of first degree murder and armed robbery and sentenced to death. He was denied federal habeas relief by the district court who also denied Williams' Federal Rules of Civil Procedure Rule 60(b) motion for relief from the court's judgment denying the habeas petition. The circuit court affirmed but vacated the order denying Williams' Rule 60(b) motion because the district court lacked jurisdiction to consider the motion.

3. *Hayes* v. *Woodford,* 301 F.3d 1054 (2002).

Judges: O'Scannlain, Rymer, Thomas (Thomas dissenting in part).

Summary: Petitioner was convicted for robbery, burglary, and first degree murder and was sentenced to death. The district court denied habeas relief and the petitioner appealed. The circuit court affirmed the district courts' ruling saying that the petitioner's attorney did not provide insufficient assistance of counsel and the evidentiary findings of the lower court were sufficiently supported by the record.

4. *Payton* v. *Woodford,* 299 F.3d 815 (2002).

Judges: Schroeder, Pregerson, Kozinski, Trott, Fernandez, Nelson, Tashima, W. Fletcher, Paez, Berzon, Tallman (Tallman dissenting in part, joined by Kozinski, Trott, Fernandez, Nelson).

Summary: Payton was convicted of first degree murder, rape, and two counts of attempted murder and sentenced to death. He sought a writ of habeas corpus that was granted by the district court requiring either a new penalty trial or a reduction of sentence to a life terms without parole. The circuit court, sitting en banc, affirmed the ruling of the district court.

5. *Visciotti* v. *Woodford,* 288 F.3d 1097 (2002).

Judges: Pregerson, Tashima, Berzon.

Summary: After being fired from their jobs, Visciotti and his co-worker Hefner devised a plan to rob two of their former co-workers. After robbing the two co-workers, Visciotti shot both of them. He was later convicted of murder, attempted murder, and armed robbery and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition as to the penalty phase of the trial, but not as to the guilt phase. The court held that part of the California Supreme Court's decision was contrary to Supreme Court law outlined in Strickland.

6. *Karis* v. *Calderon,* 283 F.3d 1117 (2002).

Judges: Hug, Browning, Kleinfeld (Kleinfeld dissenting).

Summary: Karis abducted two women who were taking a morning walk, raped them, shot them, and then buried them in a hole. He was convicted of two counts of kidnapping, two counts of rape, one count of attempted murder, and murder and was sentenced to death. The court of appeals affirmed the district court's grant of petition for habeas corpus as to the penalty phase, but not as to the conviction phase of the trial. The court held that counsel was deficient during the penalty phase of the trial because he failed to introduce mitigating evidence regarding the defendant's troubled childhood.

7. *Benn* v. *Lambert,* 283 F.3d 1040 (2002).

Judges: Reinhardt, Trott, W. Fletcher.

Summary: Benn shot and killed his half-brother and his half-brother's friend. A jury convicted Benn of two counts of premeditated murder and sentenced him to death. The court of appeals affirmed the district court's decision granting the petition for a writ of habeas corpus because the trial court violated Brady and the state court's determinations were unreasonable applications of established Supreme Court law.

8. *Gray* v. *Klauser,* 282 F.3d 633 (2002).

Judges: Berzon, Lay, Trott (Trott dissenting).

Summary: Gray was convicted of killing his wife and her friend and was sentenced to death. The court of appeals reversed the district court's ruling denying the habeas petition. The court held that the Idaho trial court's rulings regarding the admission of hearsay evidence violated Gray's constitutional rights and that the presentation of the hearsay evidence was not harmless error.

9. *Fields* v. *Woodford,* 281 F.3d 963 (2002).

Judges: Rymer, Kozinski, and Silverman.

Summary: After already serving a sentence for voluntary manslaughter, a jury convicted Fields of a variety of criminal acts including murder and sentenced him to death. The court affirmed the

district court's decision on all of the claims having to do with the petitioner's conviction except for his claim of juror bias. As to it, the court concluded that an evidentiary hearing was needed and remanded the case. Given this disposition, the court did not reach any of the penalty phase issues.

10. *Turner* v. *Calderon,* 281 F.3d 851 (2002).

Judges: Wardlaw, Paez, Tallman.

Summary: Turner stabbed (over forty times), killed, and robbed a man who had hired him to do yard work at his home. A jury convicted Turner of first-degree murder and robbery and sentenced him to death. The appellate court reversed the district court's ruling denying Turner's request for an evidentiary hearing on his claim that his counsel was constitutionally ineffective during the penalty phase of his trial. The court held that his counsel may have been ineffective in presenting mitigating evidence during the sentencing phase of the trial.

11. *Pizzuto* v. *Arave,* 280 F.3d 949 (2002).

Judges: B. Fletcher, Rymer, Gould (Fletcher dissenting).

Summary: Pizzuto robbed and murdered two people at a campsite in Idaho. A jury convicted Pizzuto of two counts of murder and sentenced him to death. The district court dismissed Pizzuto's habeas petition, and the court of appeals affirmed.

12. *Caro* v. *Woodford,* 280 F.3d 1247 (2002).

Judges: Pregerson, Ferguson, Kleinfeld (Kleinfeld dissenting).

Summary: Caro was convicted for the murders of two teenage cousins who were killed by a close range gunshot wound to the head and was sentenced to death. The court of appeals affirmed the district court's grant of the habeas petition holding that the district court was not clearly erroneous in finding that the defendant's counsel was ineffective during the penalty phase of the trial because he failed to present evidence of the defendant's brain damage.

13. *Ghent* v. *Woodford,* 279 F.3d 1121 (2002).

Judges: Reinhardt, Hawkins, and Rawlison.

Summary: Ghent was found guilty of first degree murder and attempted rape of an acquaintance and was sentenced to death. The district court's denial of petitioner's habeas request with respect to the claims regarding his first trial was affirmed. However, the determination of the district court with respect to petitioner's special circumstances retrial was reversed and remanded with instructions to vacate petitioner's death sentence. The court held that the admission of the psychiatrist's testimony during the special circumstances retrial warranted habeas relief.

14. *Silva* v. *Woodford,* 279 F.3d 825 (2002).

Judges: B. Fletcher, Thomas, and Wardlaw.

Summary: Silva was convicted of the abduction, robbery and murder of a college student and was sentenced to death. The court of appeals reversed the district court's denial of the habeas petition as to the penalty phase of petitioner's trial, vacated petitioner's death penalty, and remanded for a new sentencing hearing. In addition, the appellate court remanded for an evidentiary hearing as to the petitioner's Brady claim.

15. *Garceau* v. *Woodford,* 275 F.3d 769 (2001).

Judges: O'Scannlain, Tashima, Thomas (O'Scannlain dissenting).

Summary: Garceau stabbed and killed his girlfriend and her 14-year-old son. A jury convicted him of double homicide and sentenced him to death. The court of appeals reversed the district court's ruling denying the habeas petition holding that a jury instruction inferring Garceau's propensity for criminal actions violated due process.

16. *Morris* v. *Woodford,* 273 F.3d 826 (2001).

Judges: Ferguson, Graber, W. Fletcher.

Summary: Morris killed a man as part of a plot to steal his van. A jury convicted him of murder and sentenced him to death. The court of appeals reversed the district court's ruling denying the habeas petition holding that a typographical error contained in a written penalty phase instruction created a harmful constitutional error.

17. *Landrigan* v. *Stewart,* 272 F.3d 1221 (2001).

Judges: Fernandez, Rymer, and Wardlaw.

Summary: Landrigan escaped from incarceration in Oklahoma and then killed a man in Arizona. A jury convicted him of murder and a trial judge sentenced him to death. The appellate court affirmed the district court's denial of the habeas petition.

18. *Mayfield* v. *Woodford,* 270 F.3d 915 (2001) (en banc).

Judges: Schroeder, O'Scannlain, Rymer, Kleinfeld, Hawkins, Silverman, Graber, Gould, Berzon, Tallman, and Rawlison.

Summary: Mayfield killed a person who had sworn out a complaint against him for auto theft, and then killed again to eliminate the only eyewitness to the case. The jury convicted and recommended he be put to death. The court of appeals, en banc, reversed the district court's denial of the habeas petition and granted COAs as to two of petitioner's claims and denied as to five of his claims. The denial of petitioner's claim for ineffective assistance at the guilt phase was affirmed. (Judges Schroeder, Hawkins, and Rawlison dissented on this point.) The denial of petitioner's claim for ineffective assistance at the penalty phase was reversed.

19. *Ainsworth* v. *Woodford,* 268 F.3d 868 (2001).

Judges: Hug, Graber, W. Fletcher (Graber dissenting).

Summary: Ainsworth and an accomplice shot a woman in the hip, raped her, put her in the trunk of her car, dumped her body in the woods (after she had died), and stole her car. Ainsworth was convicted of first degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting the habeas writ. The court held that defendant's counsel was ineffective during the penalty phase of his trial because he failed to present mitigating evidence.

20. *Phillips* v. *Woodford,* 267 F.3d 966 (2001).

Judges: B. Fletcher, Reinhardt, Kleinfeld (Kleinfeld dissenting).

Summary: Phillips shot two people who were involved in a cocaine deal with him, killing one of them. A jury found the special circumstance of murder during the commission of a robbery to be true and sentenced Phillips to death. The court of appeals reversed the district court's denial of an evidentiary hearing holding that petitioner showed cause for his ineffective assistance of counsel claim.

21. *Summerlin* v. *Stewart,* 267 F.3d 926 (2000).

Judges: Trott, Thomas, Kozinski (Kozinski dissenting).

Summary: Summerlin killed a woman who was sent to his home to collect a delinquent debt by hitting her head with a hatchet. He was convicted of murder and sentenced to death. The district court denied habeas relief, but the court of appeals held that petitioner was entitled to an evidentiary hearing regarding whether the trial judge's alleged use of marijuana deprived his due process rights.

22. *Payton* v. *Woodford,* 258 F.3d 905 (2001).

Judges: Rymer, Gould, Hawkins (Hawkins dissenting).

Summary: Payton was convicted of rape and murder and two counts of attempted murder and was sentenced to death. The court of appeals reversed the district court's ruling granting Payton's habeas petition.

23. *Cooper* v. *Calderon,* 255 F.3d 1104 (2001).

Judges: Rymer, Gould, Browning (Browning dissenting).

Summary: Cooper escaped from a California state prison and later hacked four people to death using a hatchet or ax and a knife. He was convicted of the four murders and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

24. *Murtishaw* v. *Woodford,* 255 F. 3d 926 (2001).

Judges: Hug, Ferguson, and Wardlaw.

Summary: Murtishaw shot and killed three students who were in the desert filming a movie. He was convicted of three counts of first degree murder and sentenced to death. The court of appeals affirmed the district court's denial of the Murtishaw's petition pertaining to his guilt conviction, but reversed the denial as to his sentence. The court ordered that the death penalty sentence be vacated.

25. *Petrocelli* v. *Angelone,* 248 F.3d 877 (2001).

Judges: Rymer, Pregerson, and Tashima.

Summary: Petrocelli killed his fiancee in Washington and then killed a car salesman in Reno to obtain a vehicle for his flight. A jury convicted Petrocelli of first-degree murder and robbery with use of a deadly weapon and imposed the death penalty. The court of appeals reversed the district court's ruling that some of petitioner's claims were procedurally defaulted and remanded for the evaluation of those claims.

26. *Lambright* v. *Stewart,* 241 F.3d 1201 (2001).

Judges: Ferguson, Reinhardt, and D.R. Thompson.

Summary: Lambright was convicted of first degree murder, sexual assault, and kidnapping and was sentenced to death. The conviction was affirmed as was the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applied. However, the court of appeals reversed the district court's ruling denying habeas relief as to the penalty phase of the trial. The court held that the state-court procedural default of petitioner's ineffective counsel claim did not bar federal habeas review and that he was entitled to an evidentiary hearing on this claim.

27. *Smith* v. *Stewart,* 241 F.3d 1191 (2001).

Judges: Ferguson, Reinhardt, and D.R. Thompson.

Summary: Smith and his accomplice, Lambright, were convicted of sexual assault, kidnapping, and first-degree murder and the trial judge sentenced him to death. The court of appeals reversed the district court's denial of the habeas petition. Federal habeas review

was not barred because it was unclear from the state court order denying rehearing whether the court invoked a procedural bar as the basis of its ruling. The court ordered an evidentiary hearing because petitioner had made a colorable claim of ineffective assistance.

28. *Sandoval* v. *Calderon,* 241 F.3d 765 (2001).

Judges: Schroeder, Hawkins, and Fisher.

Summary: Sandoval was convicted of four murders and one attempted murder and was sentenced to death for one of the murders. The court of appeals reversed the district court's ruling, which granted Sandoval relief from his conviction, but affirmed the writ as to the death sentence.

29. *Odle* v. *Woodford,* 238 F.3d 1084 (2001).

Judges: Kozinski, Hawkins, Berzon.

Summary: Odle was convicted of two first degree murders and sentenced to death. The court of appeals held that failure to conduct a competency hearing resulted in denial of due process and remanded the case to the district court.

30. *Hoffman* v. *Arave,* 236 F.3d 523 (2001).

Judges: Pregerson, W. Fletcher, and Gould.

Summary: An Idaho jury found Hoffman guilty of first-degree murder for killing a police informant. The court of appeals reversed the ruling that the U.S. Constitution amendments V, VI did not apply to petitioner's pre-sentence interview, and deferred judgment whether the denial of counsel during petitioner's pre-sentence interview constituted harmless error until after the hearing. They affirmed the district court's denial of all other claims.

31. *Anderson* v. *Calderon,* 232 F.3d 1053 (2000).

Judges: Trott, Fernandez, McKeown (McKeown dissenting).

Summary: Anderson killed an 81-year-old woman who was lying in bed before robbing her house. A jury convicted him and sentenced him to death. The court of appeals affirmed the district court's denial of the habeas petition.

32. *Mayfield* v. *Calderon,* 229 F.3d 895 (2000).

Judges: Brunetti, Fernandez, Kleinfeld.

Summary: Mayfield shot and killed two people who had filed charges against him for auto theft. He was convicted of both of the murders and was sentenced to death. The appellate court affirmed the district court's ruling denying petitioner's habeas relief request.

33. *Morris* v. *Woodford,* 229 F.3d 775 (2000).

Judges: Ferguson, Graber, W. Fletcher.

Summary: Morris was convicted of murder in 1985 and was sentenced to death. The district court dismissed Morris's habeas petition, but the court of appeals held that petitioner stated colorable constitutional claims that warranted an evidentiary hearing.

34. *Lambright* v. *Stewart,* 220 F.3d 1022 (2000).

Judges: Ferguson, Reinhardt, Thompson.

Summary: Lambright was convicted of first degree murder, sexual assault, kidnapping and was sentenced to death. The court of appeals granted certificates of appealability on five of his nine claims, reversing the district court's denial of the certificates.

35. *Comer* v. *Stewart,* 215 F.3d 910 (2000).

Judges: Pregerson, Ferguson, Rymer.

Summary: Comer was convicted of murder and sentenced to death. The district court denied his habeas petition, but the court of appeals remanded for an evidentiary hearing to determine petitioner's competence to withdraw appeal.

36. *Jackson* v. *Calderon,* 211 F.3d 1148 (2000).

Judges: Canby, Thomas, O'Scannlain (O'Scannlain dissenting).

Summary: Jackson, while intoxicated with PCP, shot and killed a police officer. He was convicted of first-degree murder and sentenced to death. The court of appeals affirmed petitioner's conviction, but reversed the district court's denial of the habeas petition as to the penalty phase holding that the claims of ineffective assistance of counsel were not procedurally defaulted.

37. *Coleman* v. *Calderon,* 210 F.3d 1047 (2000).

Judges: Schroeder, Thompson, Brunetti (Brunetti dissenting).

Summary: A jury convicted Coleman of rape and murder and sentenced him to death. The court of appeals affirmed the district court's grant of the habeas petition as to Coleman's death sentence holding that an erroneous jury instruction had a substantial and injurious effect on the jury's verdict.

38. *McDowell* v. *Calderon,* 197 F.3d 1253 (1999) (en banc).

Judges: Hug, Browning, Pregerson, Brunetti, Kozinski, Rymer, T.G. Nelson, Kleinfeld, Tashima, Silverman, Graber.

Summary: McDowell was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling granting McDowell's habeas petition.

39. *Lambright* v. *Stewart,* 191 F.3d 1181 (1999) (en banc).

Judges: Hug, Ferguson, Reinhardt, Browning, Schroeder, Kozinski, O'Scannlain, Trott, T.G. Nelson, Graber, and Wardlaw (Reinhardt dissenting).

Summary: Lambright and an accomplice (Smith) killed a woman who they had kidnaped and Smith had raped. Lambright was convicted of murder and sentenced to death. The district court denied Lambright's habeas petition. The court of appeals, en banc, took up the issue of whether the use of dual juries violated due process and affirmed the district court's ruling that the use of dual juries did not violate due process.

40. *Smith* v. *Stewart,* 189 F.3d 1004 (1999).

Judges: Reinhardt, Ferguson, Fernandez (Fernandez dissenting).

Summary: Smith picked up two teenage hitchhikers (on two different occasions), stabbed them multiple times, suffocated them by putting dirt in their mouths then taping them shut, and left them in the desert to die. Smith was convicted and sentenced to death for the two murders. The court of appeals affirmed on all but the ineffective assistance of counsel claim, which it reversed holding counsel's failure at sentencing to present any mitigating evidence of defendant's mental condition or background was sufficient to undermine confidence in the sentence, and remanded for re-sentencing.

41. *Rich* v. *Calderon,* 187 F.3d 1064 (1999).

Judges: Pregerson, Kleinfeld, Hawkins.

Summary: A jury convicted Rich of a series of sexual attacks and murders of several defenseless young women and sentenced him to death. The judgment of the district court denying defendant prisoner's petition for habeas corpus was affirmed because there were

no constitutional errors in the selection and composition of the grand jury, jury instructions, defense counsel, defendant's shackling during the trial, and because there was no prosecutorial misconduct, and defendant was mentally competent to stand trial.

42. *Wallace* v. *Stewart,* 184 F.3d 1112 (1999).

Judges: Kozinski, Hug, T.G. Nelson.

Summary: Wallace brutally killed his girlfriend and her two children in their mobile home. He was convicted of the murders and was sentenced to death. The district court denied his habeas petition. The appellate court remanded for an evidentiary hearing because petitioner made a prima facie case of ineffective assistance in the penalty phase of the trial.

43. *Lord* v. *Wood,* 184 F.3d 1083 (1999).

Judges: Kozinski, Browning, T.G. Nelson.

Summary: A jury convicted Lord of first degree murder of a sixteen year old girl and sentenced him to death. The district court granted habeas relief as to the penalty phase of the petitioner's trial, but not as to the guilt phase. The appellate court held that habeas relief should be granted as to the guilt phase because petitioner's counsel failed to call three witnesses who claimed to have seen the victim after petitioner was supposed to have killed her.

44. *Houston* v. *Roe,* 177 F.3d 901 (1999).

Judges: D.W. Nelson, Kozinski, Trott.

Summary: After seeing his wife hug and kiss another man, Houston hid outside his wife's office and shot her with a shotgun as she exited. He was convicted of the murder and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

45. *Poland* v. *Stewart,* 169 F.3d 573 (1999).

Judges: Hug, Browning, T.G. Nelson.

Summary: Poland was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition holding that he did not establish that any prejudice resulted from the denial of his right to exercise his challenges for cause. Therefore, the court ruled that no violation of his constitutional right to an impartial jury occurred.

46. *Siripongs* v. *Calderon,* 167 F.3d 1225 (1999).

Judges: Schroeder, Fernandez, Pregerson (Pregerson dissenting).

Summary: Siripongs brutally killed the owner and an employee of a Thai market. He was convicted of the murders and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's successive habeas petition. (This was the fourth time the case was brought before the panel).

47. *Lambright* v. *Stewart,* 167 F.3d 477 (1999).

Judges: Ferguson, Reinhardt, Thompson (Thompson dissenting).

Summary: Lambright was convicted of first degree murder and was sentenced to death. The district court denied habeas relief, but the court of appeals reversed holding that the trial court violated the Fourteenth Amendment by conducting dual trials.

48. *Malone* v. *Calderon,* 165 F.3d 1234 (1999).

Judges: Beezer, Kleinfeld, Hawkins.

Summary: Malone was under sentence of death in California and Missouri and filed a habeas petition a few days prior to his execu-

tion date. The district court denied the petition and the court of appeals affirmed.

49. *Caro* v. *Calderon,* 165 F.3d 1223 (1999).

Judges: Pregerson, Ferguson, Kleinfeld (Kleinfeld dissenting).

Summary: Caro was convicted of two counts of first degree murder, the kidnapping of one of the victims, and two counts of assault with intent to commit murder. The jury sentenced him to death. The district court dismissed petitioner's habeas petition, but the court of appeals held that he was entitled to an evidentiary hearing on his claim that counsel was ineffective during the sentencing phase of the trial.

50. *Bean* v. *Calderon,* 163 F.3d 1073 (1998).

Judges: Canby, Thomas, O'Scannlain (O'Scannlain dissenting).

Summary: Bean and an accomplice, on two different occasions, killed two older women while burglarizing and robbing their homes. He was convicted of two counts of first degree murder, two counts of burglary, and two counts of robbery and was sentenced to death. The court of appeals affirmed the district courts ruling granting habeas relief holding that petitioner received ineffective assistance during the penalty phase of his trial. The court held that the joinder of two indictments deprived the petitioner of a fundamentally fair trial.

51. *Vargas* v. *Lambert,* 159 F.3d 1161 (1998).

Judges: Reinhardt, Thompson, Kleinfeld (Kleinfeld dissenting).

Summary: Sagastegui admitted sodomizing and killing a three-year-old boy whom he was babysitting and then killing the boy's mother and her friend. He was convicted of three counts of first-degree murder and was sentenced to death. The court of appeals reversed the district court's judgment denying appellant's application for a stay of execution in order to conduct a hearing to determine Sagastegui's present competency.

52. *Chaney* v. *Stewart,* 156 F.3d 921 (1998).

Judges: Hawkins, Rymer, Reinhardt (Reinhardt dissenting).

Summary: Chaney stole a truck in New Mexico and some guns in Texas, hid out in a wooded area in Flagstaff, AZ, and shot a Deputy in pursuit. He was convicted of the murder of the reserve deputy and was sentenced to death. The appellate court affirmed the district court's ruling denying habeas relief.

53. *Babbitt* v. *Calderon,* 151 F.3d 1170 (1998).

Judges: Hall, Brunetti, Thompson.

Summary: Babbitt was found guilty of first-degree murder after his victim died of heart failure during Babbitt's burglary, robbery, and attempted rape. The court of appeals affirmed the district court's grant of summary dismissal in favor of the state regarding petitioner's habeas petition.

54. *Dyer* v. *Calderon,* 151 F.3d 970 (1998) (en banc).

Judges: Hug, Browning, Fletcher, Pregerson, Reinhardt, Brunetti, Kozinski, Thompson, O'Scannlain, T.G. Nelson, and Kleinfeld. (Judges Brunetti, D.R. Thompson, Kleinfeld, and O'Scannlain dissented).

Summary: Dyer and two friends took four people hostage, drove them into some remote hills, and shot them (two survived). He was convicted of the murders and sentenced to death. The court of appeals vacated the panel decision that affirmed the denial of defend-

ant's petition for federal habeas relief. The court determined that the state court's finding of juror impartiality was not entitled to a presumption of correctness. The court concluded that juror bias was implied from the lies that the juror told during voir dire and during the state court investigation of the matter.

55. *Thompson* v. *Calderon,* 151 F.3d 918 (1998) (en banc).

Judges: Hug, Browning, Schroeder, B. Fletcher, Kozinski, O'Scannlain, T.G. Nelson, Kleinfeld, Thomas, Reinhardt, Tashima (Reinhardt and Tashima dissenting).

Summary: Thompson was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of a second habeas petition.

56. *Coleman* v. *Calderon,* 150 F.3d 1105 (1998).

Judges: Thompson, Brunetti, Schroeder.

Summary: Coleman was convicted of rape and murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

57. *Ortiz* v. *Stewart,* 149 F.3d 923 (9th Cir. 1998).

Judges: D.W. Nelson, Brunetti, Hawkins.

Summary: A jury found Ortiz guilty of one count of first-degree murder, three counts of attempted first-degree murder, two counts of aggravated assault, one count of arson of an occupied structure, one count of first-degree burglary, and one count of conspiracy to commit first-degree murder. The court of appeals affirmed the decision granting summary judgment in favor of the state on petitioner's petition for a writ of habeas corpus because his arguments lacked merit or were partially barred.

58. *Crandell* v. *Bunnell,* 144 F.3d 1213 (1998).

Judges: Hall, Beezer, Pregerson.

Summary: During an argument, Crandell killed his roommate and his roommate's son. Crandell was convicted of two counts of first degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting habeas relief holding that defense counsel's representation was incompetent and appointment of substitute counsel was warranted.

59. *Vickers* v. *Stewart,* 144 F.3d 613 (1998).

Judges: Schroeder, Rymer, T.G. Nelson.

Summary: Vickers killed a fellow inmate while on death row, was convicted of first-degree murder, and was sentenced to death. The court of appeals affirmed the district court's denial of habeas relief.

60. *Smith* v. *Stewart,* 140 F.3d 1263 (1998).

Judges: B. Fletcher, Brunetti, Fernandez.

Summary: Smith killed a store clerk during a robbery, was found guilty, and was sentenced to death. The court of appeals affirmed the district court's order granting summary judgment for the state and denying summary judgment for defendant, but reversed the district court's denial of habeas relief with respect to the death sentence and remanded the case with directions that defendant be resentenced. The court reasoned that counsel's ineffectiveness during the sentencing phase, by failing to present mitigating factors, prejudiced the defendant.

61. *Ainsworth* v. *Calderon,* 138 F.3d 787 (1998).

Judges: Leavy, Browning, Trott.

Summary: Ainsworth and an accomplice shot a woman in the hip, raped her, put her in the trunk of her car, dumped her body in the woods (after she had died), and stole her car. Ainsworth was convicted of first degree murder and was sentenced to death. The appellate court reversed the district court's ruling granting petitioner's habeas relief holding that petitioner did not have ineffective counsel at trial.

62. *Correll* v. *Stewart,* 137 F.3d 1404 (1997).

Judges: Schroeder, O'Scannlain, Thomas.

Summary: Correll brought three victims, who he rounded up during a robbery, to the Phoenix desert and shot all of them. He was convicted of first-degree murder, attempted first-degree murder, kidnapping, armed robbery, and first-degree burglary and was sentenced to death. The appellate court reversed the lower court's denial of an evidentiary hearing because Correll made a colorable ineffective assistance of counsel claim.

63. *Bonillas* v. *Hill,* 134 F.3d 1414 (1998).

Judges: Hall, Brunetti, Rymer.

Summary: Bonillas was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas petition.

64. *McLain* v. *Calderon,* 134 F.3d 1383 (1998).

Judges: Ferguson, Hall, Kozinski.

Summary: A jury convicted McLain of killing a young girl (he has a history of raping and sometimes killing young women) and was convicted to death. The court of appeals affirmed the district court's judgment, which set aside his death sentence because the jury instructions violated that which was set forth in another decision.

65. *LaGrand* v. *Stewart,* 133 F.3d 1253 (1998).

Judges: Hug, Pregerson, T.G. Nelson (Pregerson dissenting).

Summary: LaGrand killed a bank employee during a bank robbery. He was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

66. *Siripongs* v. *Calderon,* 133 F.3d 732 (1998).

Judges: Schroeder, Pregerson, Fernandez.

Summary: Siripongs was convicted and sentenced to death in 1983 for the murders of the owner and an employee of a Thai market. The court of appeals affirmed the district court's ruling denying petitioner's successive habeas petition.

67. *Bloom* v. *Calderon,* 132 F.3d 1267 (1997).

Judges: Reinhardt, Thompson, Hawkins.

Summary: During a fight with his father, Bloom, an eighteen-year-old, shot and killed his father, his step-mother, and his sister. A jury convicted Bloom of three counts of murder and sentenced him to death. The court of appeals reversed the district court's ruling denying habeas relief holding that counsel's representation was constitutionally deficient.

68. *Carriger* v. *Stewart,* 132 F.3d 463 (1997).

Judges: Hug, Browning, Schroeder, Pregerson, Reinhardt, Thomas, Kozinski, Farris, Fernandez, T.G. Nelson, Kleinfeld (Kozinski, Farris, Fernandez, T.G. Nelson, and Kleinfeld dissenting).

Summary: During the robbery of a jewelry store, Carriger strangled the owner, killing him. Carriger was convicted of murder and

was sentenced to death. The court of appeals reversed the district court's denial of petitioner's second habeas petition holding that the Brady violation warranted habeas relief.

69. *McDowell* v. *Calderon,* 130 F.3d 833 (9th Cir. 1997) (en banc).

Judges: Browning, Hug, B. Fletcher, Pregerson, Reinhardt, Brunetti, Kozinski, Thompson, Trott, Kleinfeld, Thomas (Thompson, Brunetti, Kozinski, Kleinfeld dissenting).

Summary: McDowell was convicted of murder with the special circumstance of burglary and rape, and was sentenced to death. The court of appeals reversed the district court's denial of the habeas petition holding that the jury misunderstood its task, which had a substantial and injurious effect and influence on its verdict of death.

70. *Paradis* v. *Arave,* 130 F.3d 385 (1997).

Judges: Tashima, Canby, Silver.

Summary: Paradis was convicted of murder and was sentenced to death. The court of appeals reversed the district court's dismissal of petitioner's habeas petition. The court held that petitioner demonstrated cause and prejudice sufficient to permit his presentation of successive claim that prosecution violated Brady.

71. *Gerlaugh* v. *Stewart,* 129 F.3d 1027 (1997).

Judges: Reinhardt, Trott, Thompson (Reinhardt dissenting).

Summary: Gerlaugh and two others hitched a ride from a man who they robbed and killed. Gerlaugh was convicted of the murder and sentenced to death. The appellate court affirmed the district court's denial of the habeas petition.

72. *Fields* v. *Calderon,* 125 F.3d 757 (1997).

Judges: Pregerson, Wiggins, T.G. Nelson.

Summary: Fields was convicted of murder and sentenced to death. The district court dismissed his claims ruling that they were procedurally defaulted. The court of appeals vacated the district court's ruling that petitioner's claims were procedurally defaulted and remanded to the district court.

73. *Gallego* v. *McDaniel,* 124 F.3d 1065 (1997).

Judges: Camby, Norris, Leavy.

Summary: A jury convicted Gallego of the kidnap and murder of several teenage girls. The district denied the habeas petition. The court of appeals held that the jury instructions during the penalty phase of the trial were incorrect and remanded the penalty portion of the action. The court ordered the district court to issue the writ unless Nevada re-sentences the defendant within a specified time.

74. *Amaya-Ruiz* v. *Stewart,* 121 F.3d 486 (1997).

Judges: Thompson, Kozinski, Fernandez.

Summary: Amaya-Ruiz killed his employer while working on her ranch. He was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition.

75. *Thompson* v. *Calderon,* 120 F.3d 1045 (1997).

Judges: Browning, Fletcher, Pregerson, Reinhardt, Hall, Kozinski, T.G. Nelson, Kleinfeld, Tashima, and Thomas. (Judges Hall, T.G. Nelson, Kozinski, and Kleinfeld dissented).

Summary: Thompson raped and murdered a 20-year-old and was sentenced to death. The court affirmed the grant of defendant's petition for writ of habeas corpus on his ineffective assistance claim,

because counsel's deficient performance at trial affected the verdict and vacated the death penalty. The court reversed the denial of defendant's petition on his prosecutorial misconduct claim because the prosecutor advanced inconsistent theories, which constituted fundamental error that violated due process.

76. *Woratzeck* v. *Stewart,* 118 F.3d 648 (9th Cir. 1997).

Judges: Wallace, Farris, Boochever.

Summary: Woratzeck was on death row and sentenced to die the next day when this appeal was taken. The appellate court denied petitioner's application to file a successive application for a writ of habeas corpus because petitioner had failed to make a prima facie showing that his claims complied with federal requirements to file such a successive writ.

77. *Poland* v. *Stewart,* 117 F.3d 1094 (1997).

Judges: Hug, Browning, T.G. Nelson.

Summary: Poland hijacked, robbed, and killed two drivers of an armored truck. He was convicted of the two murders and sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

78. *Jeffries* v. *Wood,* 114 F.3d 1484 (1997) (en banc).

Judges: Hug, Schroeder, B. Fletcher, Reinhardt, Tashima, Thomas, Kozinski, Goodwin, Brunetti, T.G. Nelson, Hawkins (Kozinski, Goodwin, Brunetti, T.G. Nelson, Hawkins dissenting).

Summary: After being released from jail, the Skiffs invited Jeffries to live in their home. A few months later the Skiffs' bodies were found in a shallow grave with bullet wounds. A jury found Jeffries guilty of two counts of aggravated first degree murder and sentenced him to death. The court of appeals reversed the district court's ruling denying habeas relief.

79. *Gretzler* v. *Stewart,* 112 F.3d 992 (1997).

Judges: Farris, Leavy, Pregerson (Pregerson dissenting).

Summary: In California, Gretzler pleaded guilty and was convicted for nine counts of first-degree murder. In Arizona, he was convicted of two murders and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition.

80. *Villafuerte* v. *Stewart,* 111 F.3d 616 (1997).

Judges: B. Fletcher, Thompson, T.G. Nelson.

Summary: Villafuerte physically assaulted his girlfriend, tied her to a bed, gagged her, and left. A few days later the police found his girlfriend dead. Villafuerte was sentenced to death after a jury convicted him of kidnapping, theft, and felony murder. The court of appeals affirmed the district court's denial of petitioner's habeas petition.

81. *Langford* v. *Day,* 110 F.3d 1380 (9th Cir. 1997).

Judges: Canby, Trott, Hawkins.

Summary: Langford was convicted of robbing and killing two people and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

82. *Moore* v. *Calderon,* 108 F.3d 261 (1997).

Judges: O'Scannlain, Ferguson, Fernandez.

Summary: A jury found Moore guilty of two murders and sentenced him to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas request. The court held

that his request for self-representation made two weeks before trial began was timely, so that denial of the request violated his Sixth Amendment right to self-representation.

83. *Greenawalt* v. *Stewart,* 105 F.3d 1268 (1997).

Judges: Wallace, Alarcon, Wiggins.

Summary: Greenawalt was convicted of four murders and sentenced to death. The court of appeals affirmed the district court's denial of petitioner's habeas petition.

84. *Poland* v. *Stewart,* 104 F.3d 1099 (1996).

Judges: Hug, Browning, T.G. Nelson.

Summary: Poland and his brother were convicted of the murders of two armored car drivers and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas request.

85. *Ceja* v. *Stewart,* 97 F.3d 1246 (1996).

Judges: Farris, Beezer, B. Fletcher (B. Fletcher dissenting).

Summary: Ceja was tried, convicted and sentenced to death for the drug related murders of two people. The court of appeals affirmed the district court's denial of the habeas petition.

86. *Carriger* v. *Stewart,* 95 F.3d 755 (1996).

Judges: Farris, Kozinski, O'Scannlain.

Summary: Carriger was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's second habeas petition.

87. *Rupe* v. *Wood,* 93 F.3d 1434 (1996).

Judges: Wallace, Schroeder, Pregerson.

Summary: Rupe was convicted and sentenced to death for killing two bank tellers during a robbery. The court of appeals affirmed the district court's grant of the habeas petition that vacated petitioner's sentence and granted him a new penalty phase hearing so that the jury could consider a previously excluded polygraph test as mitigating evidence.

88. *Morales* v. *Calderon,* 85 F.3d 1387 (1996).

Judges: Farris, Canby, Thompson.

Summary: Morales was convicted of murder and sentenced to death. The court of appeals reversed the district court's ruling dismissing petitioner's habeas petition holding that California's habeas corpus timeliness requirements were not clear, consistently applied, and well-established and thus could not procedurally bar his claims.

89. *Williams* v. *Calderon,* 83 F.3d 281 (1996).

Judges: Poole, Thompson, Trott.

Summary: Williams was convicted of murder and sentenced to death. He brought this appeal days before his scheduled execution. The court of appeals affirmed the district court's ruling denying petitioner's second habeas petition.

90. *Martinez-Villareal* v. *Lewis,* 80 F.3d 1301 (1996).

Judges: T.G. Nelson, D.W. Nelson, Leavy.

Summary: Martinez-Villareal was sentenced to death for two homicides committed after stealing guns and ammo from another family's residence. The court of appeals reversed the district court's grant of habeas relief as to the petitioner's penalty phase holding that his claims had been procedurally defaulted.

91. *Bonin* v. *Calderon,* 77 F.3d 1155 (1996).

Judges: Wallace, Brunetti, Kozinski.

Summary: Bonin was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of his habeas petition.

92. *Rice* v. *Wood,* 77 F.3d 1138 (1996) (en banc).

Judges: Kozinski, Wallace, Hall, T.G. Nelson, Hawkins, Trott, D.W. Nelson, Browning, Schroeder, B. Fletcher, Thompson (D.W. Nelson, Browning, Schroeder, B. Fletcher, Thompson dissenting).

Summary: Rice entered his victims' home and proceeded to kill all four family members. He was convicted of the murders and sentenced to death. The court of appeals reversed the district court's ruling granting petitioner's habeas request. The court held that imposing the death penalty in defendant's absence was not structural error and therefore was subject to harmless error analysis. In this case, the error was harmless.

93. *Villafuerte* v. *Lewis,* 75 F.3d 1330 (1996).

Judges: T.G. Nelson, B. Fletcher, Thompson.

Summary: A jury convicted Villafuerte of felony murder for kidnapping and sentenced him to death. The court of appeals reversed the district court's ruling denying petitioner's habeas request holding that the state trial court erred in failing to instruct on lesser included offense to kidnapping and that error had a substantial and injurious effect on the verdict.

94. *Jeffries* v. *Wood,* 75 F.3d 491 (1996).

Judges: Goodwin, Farris, Fernandez.

Summary: Jeffries was convicted on two counts of aggravated murder and was sentenced to death. The court of appeals reversed the district court's ruling granting petitioner's habeas petition.

95. *Hendricks* v. *Calderon,* 70 F.3d 1032 (1995).

Judges: Goodwin, Canby, Rymer.

Summary: The jury found Hendricks guilty of multiple murders and felony-murder and imposed the death penalty. The court of appeals affirmed the district court's grant of the habeas petition as to the penalty phase of petitioner's trial.

96. *McKenna* v. *McDaniel,* 65 F.3d 1483 (1995).

Judges: Hug, Hall, Trott.

Summary: While in jail, McKenna killed another inmate in his cell. A jury convicted him and sentenced him to death. The court of appeals affirmed the district court's grant of the habeas petition finding an exception to a procedural bar.

97. *Clabourne* v. *Lewis,* 64 F.3d 1373 (1995).

Judges: Kozinski, Reinhardt, Rymer.

Summary: Clabourne admitted to raping and killing a college student. He was convicted of kidnapping, sexual assault, and first degree murder. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition holding that the defense counsel's failure to adequately prepare and present a case for mitigation at the sentencing hearing amounted to ineffective assistance of counsel.

98. *Bonin* v. *Calderon,* 59 F.3d 815 (1995).

Judges: Wallace, Brunetti, Kozinski.

Summary: A jury found Bonin guilty of a series of murders of boys ranging from ages 12 to19. The court of appeals affirmed denial of appellant prisoner's two petitions for writ of habeas corpus

relief because the performance of appellant's counsel did not fall below the standard of objective reasonableness, appellant was not deprived of a fair trial, and there were no due process violations. Furthermore, the death penalty was properly handed out and there were no other procedural or substantive errors which entitled appellant to the relief requested.

99. *McKenzie* v. *Day,* 57 F.3d 1493 (1995) (en banc).

Judges: Wallace, Wiggins, Brunetti, Kozinski, O'Scannlain, Trott, Rymer, Kleinfeld, Browning, D. Thompson, Hawkins (Browning, D. Thompson, Hawkins dissenting).

Summary: McKenzie was convicted of murder and sentenced to death. The court of appeals affirmed the district court's decision denying McKenzie's petition for habeas relief.

100. *McKenzie* v. *Day,* 57 F.3d 1461 (1995).

Judges: Kozinski, Beezer, Norris (Norris dissenting).

Summary: McKenzie was convicted of murder and sentenced to death. (He had been on death row for two decades when this appeal came up—this was his third habeas petition) The court of appeals affirmed the district court's decision denying McKenzie's petition for habeas relief.

101. *Moran* v. *Godinez,* 57 F.3d 690 (1995).

Judges: Thompson, Farris, Pregerson (Pregerson dissenting).

Summary: Moran was convicted of two murders and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas petition.

102. *Phillips* v. *Vasquez,* 56 F.3d 1030 (1995).

Judges: B. Fletcher, Reinhardt, Kleinfeld.

Summary: Phillips was convicted of first-degree murder and was sentenced to death. The court of appeals reversed the district court's ruling denying petitioner's habeas petition.

103. *Williams* v. *Calderon,* 52 F.3d 1465 (1995).

Judges: Poole, Thompson, Trott.

Summary: To recover a $1500 check, Williams shot and killed three people who had sold a car to him. A jury found Williams guilty of three counts of first-degree murder. The court of appeals affirmed the district court's denial of the habeas writ.

104. *Rice* v. *Wood,* 44 F.3d 1396 (1995).

Judges: D.W. Nelson, Leavy, Wallace (Wallace dissenting).

Summary: Rice was convicted of four murders and sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

105. *Jeffers* v. *Lewis,* 38 F.3d 411 (1994) (en banc).

Judges: Thompson, Farris, Wallace, Beezer, Wiggins, Leavy, Rymer, Pregerson, B. Fletcher, Norris, Noonan (Pregerson, Fletcher, Norris, Noonan dissenting).

Summary: A jury convicted Jeffers of murder and the court sentenced him to death. The court of appeals affirmed the district court's denial of the habeas petition because the sentencing court adequately reviewed the record and reweighed and explained the mitigation and aggravation factors offered by defendant.

106. *Siripongs* v. *Calderon,* 35 F.3d 1308 (1994).

Judges: Schroeder, Pregerson, Fernandez (Fernandez dissenting).

Summary: Siripongs was convicted of first-degree murder and sentenced to death for a violent robbery/double homicide. The ap-

pellate court reversed the district court's ruling that petitioner is not entitled to an evidentiary hearing holding that petitioner may have an ineffective assistance claim.

107. *Wade* v. *Calderon,* 29 F.3d 1312 (1994).

Judges: Canby, Reinhardt, Trott (Trott dissenting).

Summary: Wade beat his wife's ten-year-old child to death. He was then convicted of murder and sentenced to death. The court of appeals reversed the district court's denial of the habeas petition holding that the torture-murder circumstance instruction failed to meet requirements of Eighth Amendment and petitioner received ineffective assistance of counsel at the penalty phase of the trial.

108. *McKenzie* v. *McCormick,* 27 F.3d 1415 (1994).

Judges: Kozinski, Beezer, Norris (Norris dissenting).

Summary: McKenzie was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas petition.

109. *James* v. *Borg,* 24 F.3d 20 (1994).

Judges: Hug, Wiggins, Noonan.

Summary: James shot two women while attempting to rob them. A jury convicted James of first-degree murder committed during a robbery. The court affirmed the court's denial of the habeas petition.

110. *Paradis* v. *Arave,* 20 F.3d 950 (1994).

Judges: Alarcon, Beezer, Nielsen (sitting by designation).

Summary: A jury convicted Paradis of murder and the trial judge sentenced him to death. The appellate court affirmed the district court's ruling denying the habeas petition.

111. *Campbell* v. *Wood,* 18 F.3d 662 (1994) (en banc).

Judges: Wallace, Browning, Tang, Poole, D.W. Nelson, Reinhardt, Beezer, Wiggins, Thompson, O'Scannlain, Kleinfeld (Browning, Tang, Poole, D.W. Nelson, Reinhardt dissenting).

Summary: Campbell was convicted of three counts of aggravated murder and sentenced to death (Two of the three had testified against Campbell on a previous charge of sexual assault). The appellate court affirmed the district court's ruling denying the habeas petition.

112. *Hamilton* v. *Vasquez,* 17 F.3d 1149 (1994).

Judges: Schroeder, B. Fletcher, Trott (Trott dissenting).

Summary: A jury convicted Hamilton of first degree murder, burglary, robbery and kidnapping and sentenced him to death. The court of appeals reversed the district court's denial of the habeas petition as to the penalty phase of petitioner's trial. The court held that the trial court's penalty phase jury instruction distracted jurors from considering relevant mitigating evidence and thus violated Hamilton's due process rights.

113. *Jeffries* v. *Blodgett,* 5 F.3d 1180 (1993).

Judges: Goodwin, Farris, Fernandez (Fernandez dissenting).

Summary: Jeffries was convicted of two counts of aggravated first-degree murder and sentenced to death. The appellate court vacated the district court's ruling, which denied petitioner's request for habeas corpus relief.

114. *Beam* v. *Paskett,* 3 F.3d 1301 (1993).

Judges: Reinhardt, Boochever, D.W. Nelson.

Summary: Beam was convicted of the rape and murder of a thirteen-year-old girl. The appellate court remanded to the district court directing it to grant the habeas petition. Additionally, the court vacated the death sentence and directed the state court to conduct new sentencing proceedings.

115. *Blazak* v. *Ricketts,* 1 F.3d 891 (1993).

Judges: Tang, Beezer, Brunetti (Beezer (no opinion on the merits) Brunetti dissenting).

Summary: During an attempted robbery of a bar, a man wearing a ski mask shot and killed two people. Blazak was convicted of two counts of first-degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

116. *Clark* v. *Lewis,* 1 F.3d 814 (1993).

Judges: Farris, Brunetti, Thompson.

Summary: Clark was convicted of four counts of first-degree murder (two guests and two wranglers at a dude ranch he worked at). The court of appeals affirmed the district court's denial of his application for certificate of probable cause and stay of execution.

117. *Fetterly* v. *Paskett,* 997 F.2d 1295 (1993).

Judges: Trott, Schroeder, Leavy.

Summary: A jury convicted Fetterly of murder and sentenced him to death. The appellate court reversed the district court's denial of the habeas petition.

118. *Campbell* v. *Blodgett,* 997 F.2d 512 (1993).

Judges: Hug, Poole, Hall.

Summary: Campbell was convicted of murder and sentenced to death. The court of appeals affirmed the district court's dismissal of the habeas writ.

119. *Brewer* v. *Lewis,* 989 F.2d 1021 (1993).

Judges: Hall, Browning, Norris (Norris dissenting).

Summary: Brewer was convicted of murder and sentenced to death. The court of appeals dismissed the writ appealing the district court's denial of the habeas petition.

XIII. CITATIONS

2002 TO 1993 CIRCUIT COURT CASES, EXCLUDING THE NINTH CIRCUIT

2002 circuit cases (From January 1 to October 1). See *Marshall* v. *Hendricks,* 2002 WL 31018600 (3rd Cir. 2002); *Scarbrough* v. *Johnson,* 300 F.3d 302 (3rd Cir. 2002); *Carpenter* v. *Vaughn,* 296 F.3d 138 (3rd Cir. 2002); *Cristin* v. *Brennan,* 281 F.3d 404 (3rd Cir. 2002); *Whitney* v. *Horn,* 280 F.3d 240 (3rd Cir. 2002); *Gattis* v. *Snyder,* 278 F.3d 222 (3rd Cir. 2002); *Brosius* v. *Pennsylvania,* 278 F.3d 239 (3rd Cir. 2002); *Hunt* v. *Lee,* 291 F.3d 284 (4th Cir. 2002); *Fullwood* v. *Lee,* 290 F.3d 663 (4th Cir. 2002); *Basden* v. *Lee,* 290 F.3d 602 (4th Cir. 2002); *Wiggins* v. *Corcoran,* 288 F.3d 629 (4th Cir. 2002); *Ivey* v. *Catoe,* 36 Fed.Appx 718 (4th Cir. 2002); *Booth-El* v. *Nuth,* 288 F.3d 571 (4th Cir. 2002); *Carter* v. *Lee,* 283 F.3d 240 (4th Cir. 2002); *Hartman* v. *Lee,* 283 F.3d 190 (4th Cir. 2002); *McWee* v. *Weldon,* 283 F.3d 179 (4th Cir. 2002); *Woods* v. *Cockrell,* 2002 WL 31114329 (5th Cir. 2002); *Johnson* v. *Cockrell,* 2002 WL 31059311 (5th Cir. 2002); *Dunn* v. *Cockrell,* 302 F.3d 491 (5th Cir. 2002); *Kutzner* v. *Cockrell,* 303 F.3d 333 (5th Cir. 2002); *Janecka*

v. *Cockrell,* 301 F.3d 316 (5th Cir. 2002); *Johnson* v. *Cockrell,* 301 F.3d 234 (5th Cir. 2002); *Collier* v. *Cockrell,* 300 F.3d 577 (5th Cir. 2002); *U.S.* v. *Bernard,* 299 F.3d 467 (5th Cir. 2002); *Ogan* v. *Cockrell,* 297 F.3d 349 (5th Cir. 2002); *Fierro* v. *Cockrell,* 294 F.3d 674 (5th Cir. 2002); *Foster* v. *Johnson,* 293 F.3d 766 (5th Cir. 2002); *Lookingbill* v. *Cockrell,* 293 F.3d 256 (5th Cir. 2002); *Martinez* v. *Keller,* 292 F.3d 417 (5th Cir. 2002); *Riddle* v. *Cockrell,* 288 F.3d 713 (5th Cir. 2002); *U.S.* v. *Jones,* 287 F.3d 325 (5th Cir. 2002); *Neal* v. *Puckett,* 286 F.3d 230 (5th Cir. 2002); *Tennard* v. *Cockrell,* 284 F.3d 591 (5th Cir. 2002); *Williams* v. *Puckett,* 283 F.3d 272 (5th Cir. 2002); *Buell* v. *Anderson,* 2002 WL 31119679 (6th Cir. 2002); *Brewer* v. *Anderson,* 2002 WL 31027950 (6th Cir. 2002); *Hutchison* v. *Bell,* 2002 WL 1988196 (6th Cir. 2002); *Jamison* v. *Collins,* 291 F.3d 380 (6th Cir. 2002); *Lorraine* v. *Coyle,* 291 F.3d 416 (6th Cir. 2002); *Caldwell* v. *Bell,* 288 F.3d 838 (6th Cir. 2002); *Coleman* v. *Coyle,* 37 Fed. Appx. 134 (6th Cir. 2002); *Cooey* v. *Coyle,* 289 F.3d 882 (6th Cir. 2002); *House* v. *Warden,* 283 F.3d 737 (6th Cir. 2002); *Martin* v. *Mitchell,* 280 F.3d 594 (6th Cir. 2002); *Williams* v. *Davis,* 301 F.3d 625 (7th Cir. 2002); *Trueblood* v. *Davis,* 301 F.3d 784 (7th Cir. 2002); *Holleman* v. *Cotton,* 301 F.3d 737 (7th Cir. 2002); *Pierre* v. *Walls,* 297 F.3d 617 (7th Cir. 2002); *Henderson* v. *Walls,* 296 F.3d 541 (7th Cir. 2002); *Mahaffey* v. *Schomig,* 294 F.3d 907 (7th Cir. 2002); *Roche* v. *Davis,* 291 F.3d 473 (7th Cir. 2002); *Wright* v. *Walls,* 288 F.3d 937 (7th Cir. 2002); *Pecoraro* v. *Walls,* 286 F.3d 439 (7th Cir. 2002); *Bracy* v. *Schomig,* 286 F.3d 406 (7th Cir. 2002); *Todd* v. *Schomig,* 283 F.3d 842 (7th Cir. 2002); *Rastafari* v. *Anderson,* 278 F.3d 673 (7th Cir. 2002); *Simmons* v. *Luebbers,* 299 F.3d 929 (8th Cir. 2002); *Hall* v. *Luebbers,* 296 F.3d 685 (8th Cir. 2002); *Johnston* v. *Luebbers,* 288 F.3d 1048 (8th Cir. 2002); *Gray* v. *Bowersox,* 281 F.3d 749 (8th Cir. 2002); *Owesley* v. *Luebbers,* 281 F.3d 687 (8th Cir. 2002); *Moore* v. *Kinney,* 278 F.3d 774 (8th Cir. 2002); *Kenley* v. *Bowersox,* 275 F.3d 709 (8th Cir. 2002); *Jackson* v. *Mullin,* 2002 WL 31053984 (10th Cir. 2002); *Duckett* v. *Mullin,* 2002 WL 31075013 (10th Cir. 2002); *Gilbert* v. *Mullin,* 2002 WL 2005911 (10th Cir. 2002); *Scott* v. *Mullin,* 2002 WL 1965329 (10th Cir. 2002); *Cannon* v. *Mullin,* 297 F.3d 989 (10th Cir. 2002); *Hooker* v. *Mullin,* 293 F.3d 1232 (10th Cir. 2002); *Willingham* v. *Mullin,* 296 F.3d 917 (10th Cir. 2002); *Knighton* v. *Mullin,* 293 F.3d 1165 (10th Cir. 2002); *Charm* v. *Mullin,* 37 Fed.Appx. 475 (10th Cir. 2002); *Hawkins* v. *Mullin,* 291 F.3d 658 (10th Cir. 2002); *Revilla* v. *Gibsoni,* 283 F.3d 1203 (10th Cir. 2002); *Fisher* v. *Gibson,* 282 F.3d 1283 (10th Cir. 2002); *Hain* v. *Gibson,* 287 F.3d 1224 (10th Cir. 2002); *Romano* v. *Gibson,* 278 F.3d 1145 (10th Cir. 2002); *Fields* v. *Gibson,* 277 F.3d 1203 (10th Cir. 2002); *Sallahdin* v. *Gibson,* 275 F.3d 1211 (10th Cir. 2002); *Robinson* v. *Gibson,* 35 Fed.Appx. 715 (10th Cir. 2002); *Brownlee* v. *Haley,* 2002 WL 31050882 (11th Cir. 2002); *Robinson* v. *Moore,* 300 F.3d 1320 (11th Cir. 2002); *Isaacs* v. *Head,* 300 F.3d 1232 (11th Cir. 2002); *Fortenberry* v. *Haley,* 297 F.3d 1213 (11th Cir. 2002); *Van Poyck* v. *Florida,* 290 F.3d 1318 (11th Cir. 2002); *Nelson* v. *Alabama,* 292 F.3d 1291 (11th Cir. 2002); *Brown* v. *Head,* 285 F.3d 1325 (11th Cir. 2002); *Moon* v. *Head,* 285 F.3d 1301 (11th Cir. 2002); *Bui* v. *Haley,* 279 F.3d 1327 (11th Cir. 2002); *Breedlove* v. *Moore,* 279 F.3d 952 (11th Cir. 2002).

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1997 circuit cases: See *Frey* v. *Fulcomer,* 132 F.3d 916 (3rd Cir. 1997); *Banks* v. *Horn,* 126 F.3d 206 (3rd Cir. 1997); *Smith* v. *Horn,* 120 F.3d 400 (3rd Cir. 1997); *Hill* v. *French,* 133 F.3d 915 (4th Cir. 1997); *MacKall* v. *Angelone,* 131 F.3d 442 (4th Cir. 1997); *Howard* v. *Moore,* 131 F.3d 399 (4th Cir. 1997); *Plath* v. *Moore,* 130 F.3d 595 (4th Cir. 1997); *Beavers* v. *Pruett,* 125 F.3d 847 (4th Cir. 1997); *Satcher* v. *Pruett,* 126 F.3d 561 (4th Cir. 1997); *Mu'Min* v. *Pruett,* 125 F.3d 192 (4th Cir. 1997); *Murphy* v. *Netherland,* 116 F.3d 97 (4th Cir. 1997); *Pope* v. *Netherland,* 113 F.3d 1364 (4th Cir. 1997); *Arnold* v. *Evatt,* 113 F.3d 1352 (4th Cir. 1997); *Smith* v. *Angelone,* 111 F.3d 1126 (4th Cir. 1997); *Mackall* v. *Murray,* 109 F.3d 957 (4th Cir. 1997); *Matthews* v. *Evatt,* 105 F.3d 907 (4th Cir. 1997); *Goodwin* v. *Johnson,* 132 F.3d 162 (5th Cir. 1997); *Carter* v. *Johnson,* 131 F.3d 452 (5th Cir. 1997); *Hogue* v. *Johnson,* 131 F.3d 466 (5th Cir. 1997); *Nobles* v. *Johnson,* 127 F.3d 409 (5th Cir. 1997); *Ramson* v. *Johnson,* 126 F.3d 716 (5th Cir. 1997); *Williams* v. *Cain,* 125 F.3d 269 (5th Cir. 1997); *East* v. *Johnson,* 123 F.3d 235 (5th

Cir. 1997); *Emery* v. *Johnson,* 139 F.3d 191 (5th Cir. 1997); *In re Davis,* 121 F.3d 952 (5th Cir. 1997); *Rector* v. *Johnson,* 120 F.3d 551 (5th Cir. 1997); *Cockrum* v. *Johnson,* 119 F.3d 297 (5th Cir. 1997); *Green* v. *Johnson,* 116 F.3d 1115 (5th Cir. 1997); *Tucker* v. *Johnson,* 115 F.3d 276 (5th Cir. 1997); *Fuller* v. *Johnson,* 114 F.3d 491 (5th Cir. 1997); *Muniz* v. *Johnson,* 114 F.3d 43 (5th Cir. 1997); *Carter* v. *Johnson,* 110 F.3d 1098 (5th Cir. 1997); *Hernandez* v. *Johnson,* 108 F.3d 554 (5th Cir. 1997); *Sharp* v. *Johnson,* 107 F.3d 282 (5th Cir. 1997); *Turner* v. *Johnson,* 106 F.3d 1178 (5th Cir. 1997); *Mata* v. *Johnson,* 105 F.3d 209 (5th Cir. 1997); *Brown* v. *Cain,* 104 F.3d 744 (5th Cir. 1997); *Lockhart* v. *Johnson,* 104 F.3d 54 (5th Cir. 1997); *Lyons* v. *Ohio Adult Parole Auth.,* 105 F.3d 1063 (6th Cir. 1997); *Preston* v. *Morgan,* 107 F.3d 871 (6th Cir. 1997); *Morris* v. *Bell,* 124 F.3d 198 (6th Cir. 1997); *Williams* v. *Carlton,* 124 F.3d 201 (6th Cir. 1997); *Austin* v. *Bell,* 126 F.3d 843 (6th Cir. 1997); *Rickman* v. *Bell,* 131 F.3d 1150 (6th Cir. 1997); *Groseclose* v. *Bell,* 130 F.3d 1161 (6th Cir. 1997); *Hampton* v. *Page,* 103 F.3d 1338 (7th Cir. 1997); *Hall* v. *Washington,* 106 F.3d 742 (7th Cir. 1997); *Porter* v. *Gramley,* 112 F.3d 1308 (7th Cir. 1997); *Spreitzer* v. *Peters,* 114 F.3d 1435 (7th Cir. 1997), *Burris* v. *Parke,* 116 F.3d 256 (7th Cir. 1997); *Holman* v. *Gilmore,* 126 F.3d 876 (7th Cir. 1997); *Stewart* v. *Gilmore,* 129 F.3d 1268 (7th Cir. 1997); *English* v. *Page,* 132 F.3d 36 (7th Cir. 1997); *Kokorales* v. *Gilmore,* 131 F.3d 692 (7th Cir. 1997); *Ruiz* v. *Norris,* 104 F.3d 163 (8th Cir. 1997); *Denton* v. *Norris,* 104 F.3d 166 (8th Cir. 1997); *Schneider* v. *Bowersox,* 105 F.3d 397 (8th Cir. 1997); *Perry* v. *Norris,* 107 F.3d 665 (8th Cir. 1997); *Singleton* v. *Norris,* 108 F.3d 872 (8th Cir. 1997); *Powell* v. *Bowersox,* 112 F.3d 966 (8th Cir. 1997); *Hochstein* v. *Hopkins,* 113 F.3d 143 (8th Cir. 1997); *Anderson* v. *Hopkins,* 113 F.3d 825 (8th Cir. 1997); *Henderson* v. *Norris,* 118 F.3d 1283 (8th Cir. 1997); *Clemmons* v. *Delo,* 124 F.3d 944 (8th Cir. 1997); *Kilgore* v. *Bowersox,* 124 F.3d 985 (8th Cir. 1997); *Sweet* v. *Delo,* 125 F.3d 1144 (8th Cir. 1997); *McDonald* v. *Bowersox,* 125 F.3d 1183 (8th Cir. 1997); *Bannister* v. *Bowersox,* 128 F.3d 621 (8th Cir. 1997); *Amrine* v. *Bowersox,* 128 F.3d 1222 (8th Cir. 1997); *Cox* v. *Norris,* 133 F.3d 565 (8th Cir. 1997); *Williamson* v. *Ward,* 110 F. 3d 1508 (10th Cir. 1997); *Darks* v. *Ward,* 116 F.3d 489 (10th Cir. 1997); *Nguyen* v. *Reynolds,* 131 F.3d 1340 (10th Cir. 1997); *Duvall* v. *Reynolds,* 131 F.3d 907 (10th Cir. 1997); *In re Waldrop,* 105 F.3d 1337 (11th Cir. 1997); *In re Medina,* 109 F.3d 1556 (11th Cir. 1997); *In re Hill,* 113 F.3d 181 (11th Cir. 1997); *Lusk* v. *Singletary,* 112 F.3d 1103 (11th Cir. 1997); *In re Magwood,* 113 F.3d 1544 (11th Cir. 1997); *Freund* v. *Butterworth,* 117 F.3d 1543 (11th Cir. 1997); *Thompson* v. *Nagle,* 118 F.3d 1442 (11th Cir. 1997); *Davis* v. *Singletary,* 130 F.3d 446 (11th Cir. 1997); *Cargill* v. *Turpin,* 131 F.3d 157 (11th Cir. 1997).

1996 circuit cases: See *Cooper* v. *Taylor,* 103 F.3d 366 (4th Cir. 1996); *Buchanan* v. *Angelone,* 103 F.3d 344 (4th Cir. 1996); *George* v. *Angelone,* 100 F.3d 353 (4th Cir. 1996); *Gray* v. *Netherland,* 99 F.3d 158 (4th Cir. 1996); *O'Dell* v. *Netherland,* 95 F.3d 1214 (4th Cir. 1996); *Beaver* v. *Thompson,* 93 F.3d 1186 (4th Cir. 1996); *Hoke* v. *Netherland,* 92 F.3d 1350 (4th Cir. 1996); *Bennett* v. *Angelone,* 92 F.3d 1336 (4th Cir. 1996); *Payne* v. *Netherland,* 94 F.3d 642 (4th Cir. 1996); *U.S.* v. *Roane,* 90 F.3d 861 (4th Cir. 1996); *Savino* v.

Murray, 82 F.3d 593 (4th Cir. 1996); *Tuggle* v. *Netherland,* 79 F.3d 1386 (4th Cir. 1996); *Middleton* v. *Evatt,* 77 F.3d 469 (4th Cir. 1996); *Townes* v. *Angelone,* 73 F.3d 545 (4th Cir. 1996); *Darden* v. *Barnett,* 74 F.3d 1231 (4th Cir. 1996); *Lauti* v. *Johnson,* 102 F.3d 166 (5th Cir. 1996); *Moore* v. *Johnson,* 101 F.3d 1069 (5th Cir. 1996); *Mata* v. *Johnson,* 99 F.3d 166 (5th Cir. 1996); *Herman* v. *Johnson,* 98 F.3d 171 (5th Cir. 1996); *Drinkard* v. *Johnson,* 97 F.3d 751 (5th Cir. 1996); *Graham* v. *Johnson,* 94 F.3d 958 (5th Cir. 1996); *West* v. *Johnson,* 92 F.3d 1385 (5th Cir. 1996); *Boyle* v. *Johnson,* 93 F.3d 180 (5th Cir. 1996); *Guerra* v. *Johnson,* 90 F.3d 1075 (5th Cir. 1996); *Washington* v. *Johnson,* 90 F.3d 945 (5th Cir. 1996); *Westley* v. *Johnson,* 83 F.3d 714 (5th Cir. 1996); *Lackey* v. *Johnson,* 83 F.3d 116 (5th Cir. 1996); *Faulder* v. *Johnson,* 81 F.3d 515 (5th Cir. 1996); *Spence* v. *Johnson,* 80 F.3d 989 (5th Cir. 1996); *Perillo* v. *Johnson,* 79 F.3d 441 (5th Cir. 1996); *Woods* v. *Johnson,* 75 F.3d 1017 (5th Cir. 1996); *McQueen* v. *Scroggy,* 99 F.3d 1302 (6th Cir. 1996); *O'Guinn* v. *Dutton,* 88 F.3d 1409 (6th Cir. 1996); *Pitsonbarger* v. *Gramley,* 103 F.3d 1293 (7th Cir. 1996); *Neal* v. *Gramley,* 99 F.3d 841 (7th Cir. 1996); *Burris* v. *Parke,* 95 F.3d 465 (7th Cir. 1996); *Eddmonds* v. *Peters,* 93 F.3d 1307 (7th Cir. 1996); *Emerson* v. *Gramley,* 91 F.3d 898 (7th Cir. 1996); *Gaston* v. *Washington,* 85 F.3d 631 (7th Cir. 1996); *Collins* v. *Welborn,* 81 F.3d 684 (7th Cir. 1996); *Steward* v. *Gilmore,* 80 F.3d 1205 (7th Cir. 1996); *Jones* v. *Page,* 76 F.3d 831 (7th Cir. 1996); *Gosier* v. *Welborn,* 76 F.3d 381 (7th Cir. 1996); *Stewart* v. *Gramley,* 74 F.3d 132 (7th Cir. 1996); *Reeves* v. *Hopkins,* 102 F.3d 977 (8th Cir. 1996); *Zeitvogal* v. *Bowersox,* 103 F.3d 54 (8th Cir. 1996); *Clemmons* v. *Delo,* 100 F.3d 1394 (8th Cir. 1996); *Preston* v. *Delo,* 100 F.3d 596 (8th Cir. 1996); *Bannister* v. *Delo,* 100 F.3d 610 (8th Cir. 1996); *Mathenia* v. *Delo,* 99 F.3d 1476 (8th Cir. 1996); *Boliek* v. *Bowersox,* 96 F.3d 1070 (8th Cir. 1996); *Reese* v. *Delo; 94 F.3d 1177 (8th Cir. 1996); Six* v. *Delo,* 94 F.3d 469 (8th Cir. 1996); *Feltrop* v. *Bowersox,* 91 F.3d 1178 (8th Cir. 1996); *Oxford* v. *Bowersox,* 86 F.3d 127 (8th Cir. 1996); *Schneider* v. *Delo,* 85 F.3d 335 (8th Cir. 1996); *Wainwright* v. *Lockhart,* 80 F.3d 1226 (8th Cir. 1996); *Zeitvogal* v. *Delo,* 78 F.3d 335 (8th Cir. 1996); *Sloan* v. *Bowersox,* 77 F.3d 234 (8th Cir. 1996); *Joubert* v. *Hopkins,* 75 F.3d 1232 (8th Cir. 1996); *Davis* v. *Exec. Dir. Dept. of Corrections,* 100 F.3d 750 (10th Cir. 1996); *Silver* v. *Hargett,* 96 F.3d 1453 (10th Cir. 1996); *U.S.* v. *McCullah,* 87 F.3d 1136 (10th Cir. 1996); *U.S.* v. *Montoya,* 85 F.3d 641 (10th Cir. 1996); *Stouffer* v. *Fields,* 85 F.3d 641 (10th Cir. 1996); *Selsor* v. *Kaiser,* 81 F.3d 1492 (10th Cir. 1996); *Hatch* v. *Reynolds,* 76 F.3d 392 (10th Cir. 1996); *Chateloin* v. *Singletary,* 89 F.3d 749 (11th Cir. 1996); *Booker* v. *Singletary,* 90 F.3d 440 (11th Cir. 1996); *Williams* v. *Turpin,* 87 F.3d 1204 (11th Cir. 1996); *Hays* v. *Alabama,* 85 F.3d 1492 (11th Cir. 1996), *Hill* v. *Jones,* 81 F.3d 1015 (11th Cir. 1996); *Waldrop* v. *Jones,* 77 F.3d 1308 (11th Cir. 1996); *Buenoano* v. *Singletary,* 74 F.3d 1078 (11th Cir. 1996); *Strickland* v. *Linahan,* 72 F.3d 1531 (11th Cir. 1996); *Lambrix* v. *Singletary,* 72 F.3d 1500 (11th Cir. 1996).

1995 circuit cases. See *Flamer* v. *Snyder,* 68 F.3d 736 (3rd Cir. 1995); *Riley* v. *Taylor,* 62 F.3d 86 (3rd Cir. 1995); *Bell* v. *Evatt,* 72 F.3d 421 (4th Cir. 1995); *Townes* v. *Murray,* 68 F.3d 840 (4th Cir. 1995); *Kornahrens, III* v. *Evatt,* 66 F.3d 1350 (4th Cir. 1995);

Correll v. *Thompson,* 63 F.3d 1279 (4th Cir. 1995); *Tuggle* v. *Thompson,* 57 F.3d 1356 (4th Cir. 1995); *Barnes* v. *Thompson,* 58 F.3d 971 (4th Cir. 1995); *Gray* v. *Thompson,* 58 F.3d 59 (4th Cir. 1995); *Hunt* v. *Nuth,* 57 F.3d 1327 (4th Cir. 1995); *Turner* v. *Jabe,* 58 F.3d 924 (4th Cir. 1995); *Noland* v. *Dixon,* 53 F.3d 328 (4th Cir. 1995); *Rogers* v. *Scott,* 70 F.3d 340 (5th Cir. 1995); *Nichols* v. *Scott,* 69 F.3d 1255 (5th Cir. 1995); *Johnson* v. *Scott,* 68 F.3d 106 (5th Cir. 1995); *Belyeu* v. *Scott,* 67 F.3d 535 (5th Cir. 1995); *Beets* v. *Scott,* 65 F.3d 1258 (5th Cir. 1995); *Montoya* v. *Scott,* 65 F.3d 405 (5th Cir. 1995); *U.S.* v. *Flores,* 63 F.3d 1342 (5th Cir. 1995); *Briddle* v. *Scott,* 63 F.3d 364 (5th Cir. 1995); *Vuong* v. *Scott,* 62 F.3d 673 (5th Cir. 1995); *Amos* v. *Scott,* 61 F.3d 333 (5th Cir. 1995); *Irving, III* v. *Hargett,* 59 F.3d 23 (5th Cir. 1995); *Fearance* v. *Scott,* 56 F.3d 633 (5th Cir. 1995); *Davis* v. *Scott,* 51 F.3d 457 (5th Cir. 1995); *James* v. *Cain,* 50 F.3d 1327 (5th Cir. 1995); *Glenn* v. *Tate,* 71 F.3d 1204 (6th Cir. 1995); *In re Parker,* 49 F.3d 204 (6th Cir. 1995); *Stewart* v. *Lane,* 70 F.3d 955 (7th Cir. 1995); *Enoch* v. *Gramley,* 70 F.3d 1490 (7th Cir. 1995); *Stewart* v. *Lane,* 60 F.3d 296 (7th Cir. 1995); *Smith* v. *Farley,* 59 F.3d 659 (7th Cir. 1995); *Burris* v. *Farley,* 51 F.3d 655 (7th Cir. 1995); *Williams* v. *Chrans,* 50 F.3d 1356 (7th Cir. 1995); *Ruiz* v. *Norris,* 71 F.3d 1404 (8th Cir. 1995); *LaRette* v. *Bowersox,* 70 F.3d 986 (8th Cir. 1995); *Parker* v. *Norris,* 64 F.3d 1178 (8th Cir. 1995); *Battle* v. *Delo,* 64 F.3d 347 (8th Cir. 1995); *Nave* v. *Delo,* 62 F.3d 1024 (8th Cir. 1995); *Oxford* v. *Delo,* 59 F.3d 741 (8th Cir. 1995); *Jones* v. *Delo,* 56 F.3d 878 (8th Cir. 1995); *Sloan* v. *Delo,* 54 F.3d 1371 (8th Cir. 1995); *Antwine* v. *Delo,* 54 F.3d 1357 (8th Cir. 1995); *Fairchild* v. *Norris,* 51 F.3d 129 (8th Cir. 1995); *Feltrop* v. *Delo,* 46 F.3d 766 (8th Cir. 1995); *Sidebottom* v. *Delo,* 46 F.3d 744 (8th Cir. 1995); *LaRette* v. *Delo,* 44 F.3d 681 (8th Cir. 1995); *O'Neal, II* v. *Delo,* 44 F.3d 655 (8th Cir. 1995); *Castro* v. *Oklahoma,* 71 F.3d 1502 (10th Cir. 1995); *Stafford* v. *Ward,* 59 F.3d 1025 (10th Cir. 1995); *Hatch* v. *Oklahoma,* 58 F.3d 1447 (10th Cir. 1995); *Smith* v. *Reynolds,* 56 F.3d 78 (10th Cir. 1995); *Brewer* v. *Reynolds,* 51 F.3d 1519 (10th Cir. 1995); *Smith* v. *Kerby,* 50 F.3d 801 (10th Cir. 1995); *White* v. *Singletary,* 70 F.3d 1198 (11th Cir. 1995); *Glock* v. *Singletary,* 65 F.3d 878 (11th Cir. 1995); *Mills* v. *Singletary,* 63 F.3d 999 (11th Cir. 1995); *Marek* v. *Singletary,* 62 F.3d 1295 (11th Cir. 1995); *Medina* v. *Singletary,* 59 F.3d 1095 (11th Cir. 1995); *Lonchar* v. *Thomas,* 58 F.3d 590 (11th Cir. 1995); *Upshaw* v. *Singletary,* 54 F.3d 718 (11th Cir. 1995); *Kennedy* v. *Herring,* 54 F.3d 678 (11th Cir. 1995); *Weeks* v. *Jones,* 52 F. 3d 1559 (11th Cir. 1995); *Felker* v. *Thomas,* 52 F.3d 907 (11th Cir. 1995); *Stano* v. *Butterworth,* 51 F.3d 942 (11th Cir. 1995); *Porter* v. *Singletary,* 49 F.3d 1483 (11th Cir. 1995); *Kight* v. *Singletary,* 50 F.3d 1539 (11th Cir. 1995); *Baxter* v. *Thomas,* 45 F.3d 1501 (11th Cir. 1995); *Horslet* v. *Alabama,* 45 F.3d 1486 (11th Cir. 1995).

1994 circuit cases: See *Story* v. *Kindt,* 26 F.3d 402 (3rd Cir. 1994); *Deputy* v. *Taylor,* 19 F.3d 1485 (3rd Cir. 1994); *Stockton* v. *Murray,* 41 F.3d 920 (4th Cir. 1994); *Adams* v. *Aiken,* 41 F.3d 175 (4th Cir. 1994); *Turner* v. *Williams,* 35 F.3d 872 (4th Cir. 1994); *Huffstetler* v. *Dixon,* 28 F.3d 1209 (4th Cir. 1994); *Lawson* v. *Dixon,* 25 F.3d 1040 (4th Cir. 1994); *Spencer* v. *Murray,* 18 F.3d 237 (4th Cir. 1994); *Edmonds* v. *Thompson,* 17 F.3d 1433 (4th Cir. 1994); *Spencer* v. *Murray,* 18 F.3d 229 (4th Cir. 1994); *Smith* v. *Dixon,* 14

F.3d 956 (4th Cir. 1994); *Mann* v. *Scott,* 41 F.3d 968 (5th Cir. 1994); *Allridge* v. *Scott,* 41 F.3d 213 (5th Cir. 1994); *Kinnamon* v. *Scott,* 40 F.3d 731 (5th Cir. 1994); *Williams* v. *Scott,* 35 F.3d 159 (5th Cir. 1994); *Wilkerson* v. *Whitley,* 28 F.3d 498 (5th Cir. 1994); *Lackey* v. *Scott,* 28 F.3d 486 (5th Cir. 1994); *Drew* v. *Scott,* 28 F.3d 460 (5th Cir. 1994); *Blackmon* v. *Scott,* 22 F.3d 560 (5th Cir. 1994); *Ward* v. *Whitley,* 21 F.3d 1355 (5th Cir. 1994); *Andrews* v. *Collins,* 21 F.3d 612 (5th Cir. 1994); *Clark* v. *Collins,* 19 F.3d 959 (5th Cir. 1994); *Crank* v. *Collins,* 19 F.3d 172 (5th Cir. 1994); *Anderson* v. *Collins,* 18 F.3d 1208 (5th Cir. 1994); *Motley* v. *Collins,* 18 F.3d 1223 (5th Cir. 1994); *Madden* v. *Collins,* 18 F.3d 304 (5th Cir. 1994); *Williams* v. *Collins,* 16 F.3d 626 (5th Cir. 1994); *Marquez* v. *Collins,* 11 F.3d 1241 (5th Cir. 1994); *King* v. *Dutton,* 17 F.3d 151 (6th Cir. 1994); *Williams* v. *Chrans,* 42 F.3d 1137 (7th Cir. 1994); *Barnhill* v. *Flannigan,* 42 F.3d 1074 (7th Cir. 1994); *Del Vicchio* v. *Illinois Dept. of Corrections,* 31 F.3d 1363 (7th Cir. 1994); *Jackson* v. *Roth,* 24 F.3d 1002 (7th Cir. 1994); *Milone* v. *Camp,* 22 F.3d 693 (7th Cir. 1994); *U.S.* v. *Cooper,* 19 F.3d 1154 (7th Cir. 1994); *Albanese* v. *Peters III,* 19 F.3d 21 (7th Cir. 1994); *Davis* v. *Greer,* 13 F.3d 1134 (7th Cir. 1994); *Williams* v. *Clark,* 40 F.3d 1529 (8th Cir. 1994); *Foster* v. *Delo,* 39 F.3d 873 (8th Cir. 1994); *Murray* v. *Delo,* 34 F.3d 1367 (8th Cir. 1994); *Parkus* v. *Delo,* 33 F.3d 933 (8th Cir. 1994); *Griffin* v. *Delo,* 33 F.3d 895 (8th Cir. 1994); *Pollard* v. *Delo,* 28 F.3d 887 (8th Cir. 1994); *Hill* v. *Lockhart,* 28 F.3d 832 (8th Cir. 1994); *Bivens* v. *Groose,* 28 F.3d 62 (8th Cir. 1994); *Starr* v. *Lockhart,* 23 F.3d 1280 (8th Cir. 1994); *Nave* v. *Delo,* 22 F.3d 802 (8th Cir. 1994); *Fairchild* v. *Norris,* 21 F.3d 799 (8th Cir. 1994); *Battle* v. *Delo,* 19 F.3d 1547 (8th Cir. 1994); *Chambers* v. *Armontrout,* 16 F.3d 257 (8th Cir. 1994); *Snell* v. *Lockhart,* 14 F.3d 1289 (8th Cir. 1994); *Brecheen* v. *Reynolds,* 41 F.3d 1343 (10th Cir. 1994); *Scott* v. *Singletary,* 38 F.3d 1547 (11th Cir. 1994); *Davis* v. *Zant,* 36 F.3d 1538 (11th Cir. 1994); *Glock* v. *Singletary,* 36 F.3d 1014 (11th Cir. 1994); *Spaziano* v. *Singletary,* 36 F.3d 1028 (11th Cir. 1994); *Routly* v. *Singletary* 33 F.3d 1279 (11th Cir. 1994); *Roberts* v. *Singletary,* 29 F.3d 1474 (11th Cir. 1994); *Ingram* v. *Zant,* 26 F.3d 1047 (11th Cir. 1994); *Clisby* v. *Alabama,* 26 F.3d 1054 (11th Cir. 1994); *Weeks* v. *Jones,* 26 F.3d 1030 (11th Cir. 1994); *Burden* v. *Zant,* 24 F.3d 1298 (11th Cir. 1994); *Alderman* v. *Zant,* 22 F.3d 1541 (11th Cir. 1994); *Bolender* v. *Singletary,* 16 F.3d 1547 (11th Cir. 1994); *Porter* v. *Singletary,* 14 F.3d 554 (11th Cir. 1994); *Rogers* v. *Zant,* 13 F.3d 384 (11th Cir. 1994); *Walker* v. *Jones,* 10 F.3d 1569 (11th Cir. 1994).

1993 circuit cases: See *Spencer* v. *Murray,* 5 F.3d 758 (4th Cir. 1993); *Lawson* v. *Dixon,* 3 F.3d 743 (4th Cir. 1993); *Watkins* v. *Murray,* 998 F.2d 1011 (4th Cir. 1993); *Pruett* v. *Thompson,* 996 F.2d 1560 (4th Cir. 1993); *Delong* v. *Thompson,* 985 F.2d 553 (4th Cir. 1993); *Kyles* v. *Whitley,* 5 F.3d 806 (5th Cir. 1993); *Motley* v. *Collins,* 3 F.3d 781 (5th Cir. 1993); *Webb* v. *Collins,* 2 F.3d 93 (5th Cir. 1993); *King* v. *Puckett,* 1 F.3d 280 (5th Cir. 1993); *Knox* v. *Collins,* 999 F.2d 824 (5th Cir. 1993); *Russell* v. *Collins,* 998 F.2d 1287 (5th Cir. 1993); *Callins* v. *Collins,* 998 F.2d 269 (5th Cir. 1993); *Nethery* v. *Collins,* 993 F.2d 1154 (5th Cir. 1993); *Kirkpatrick* v. *Whitley,* 992 F.2d 491 (5th Cir. 1993); *Harris* v. *Collins,* 990 F.2d 185 (5th Cir. 1993); *James* v. *Collins,* 987 F.2d 1116 (5th Cir.

1993); *Sawyers* v. *Collins,* 986 F.2d 1493 (5th Cir. 1993); *Beets* v. *Collins,* 986 F.2d 1478 (5th Cir. 1993); *Free* v. *Peters,* III, 12 F.3d 700 (7th Cir. 1993); *Gacy* v. *Welborn,* 994 F.2d 305 (7th Cir. 1993); *Foster* v. *Delo,* 11 F.3d 1451 (8th Cir. 1993); *Whitmore* v. *Lockhart,* 8 F.3d 614 (8th Cir. 1993); *Guinan* v. *Delo,* 7 F.3d 111 (8th Cir. 1993); *Otey* v. *Hopkins,* 5 F.3d 1125 (8th Cir. 1993); *Bannister* v. *Armontrout,* 4 F.3d 1434 (8th Cir. 1993); *Pickens* v. *Lockhart,* 4 F.3d 1446 (8th Cir. 1993); *Guinan* v. *Delo,* 5 F.3d 313 (8th Cir. 1993); *Orndorff* v. *Lockhart,* 998 F.2d 1426 (8th Cir. 1993); *Otey* v. *Hopkins,* 992 F.2d 871 (8th Cir. 1993); *Bolder* v. *Delo,* 985 F.2d 941 (8th Cir. 1993); *Devier* v. *Zant,* 3 F.3d 1445 (11th Cir. 1993); *Duest* v. *Singletary,* 997 F.2d 1336 (11th Cir. 1993); *U.S.* v. *Chandler,* 996 F.2d 1073 (11th Cir. 1993); *James* v. *Singletary,* 995 F.2d 187 (11th Cir. 1993); *Johnson* v. *Singletary,* 991 F.2d 663 (11th Cir. 1993); *Bush* v. *Singletary,* 988 F.2d 1082 (11th Cir. 1993); *Burger* v. *Zant,* 984 F.2d 1129 (11th Cir. 1993); *Hance* v. *Zant,* 981 F.2d 1180 (11th Cir. 1993).

ATTACHMENT – C
STATE-BY-STATE CHART OF STATUTES, PENDING LEGISLATION, CASE LAW AND POLICY APPLICABLE TO DNA TESTING

State	Time Limit	Specific DNA Post Conviction Statute	General Post Conviction Statute or Rule	Specific DNA Post Conviction Pending Legislation	Post Conviction DNA Case Law or Policy
Alabama ☆				2002 Ala. Acts House Bill 245; Senate Bill 420	Administrative Policy
Alaska			Alaska Statutes 12.72.010 -.020		
Arizona ☆		Arizona Revised Statutes § 13-4240 13-4240			
Arkansas ☆		Arkansas Code Annotated § 16-112-201 to 205, 207			
California ☆		California Penal Code § 1405			
Colorado ☆			Colorado Revised Statutes 16-12-203; 18-1-410		
Connecticut ☆	3 yrs		Connecticut General Statutes § 52-582		Case by Case
Delaware ☆	3 yrs	11 Delaware Code Annotated § 4504			
Florida ☆	2 yrs	2001 Florida Laws ch. 925.11			
Georgia ☆			Official Code of Georgia Annotated § 9-14-40 (2002)		
Hawaii			Hawaii Rules of Penal Procedure, Rule 40	House Bill 42	
Idaho ☆	1 yrs	Idaho Code § 19-4902 & 19-2719			

Illinois ☆		725 Illinois Compiled Statutes Annotated 5/116-3			
Indiana ☆		Indiana Code 35-38-7-5 1 (§ 1-19)			
Iowa			Iowa Code Annotated § 822.2	Senate File 229	
Kansas ☆		Kansas Statutes Annotated § 21-2512			
Kentucky ☆	2 yrs	Kentucky Revised Statutes Chapter 422 House Bill 4			
Louisiana ☆	Aug. 31, 2005	Louisiana Statutes Annotated Code of Criminal Procedure Art. 926.1			
Maine		15 Maine Revised Statutes §§ 2136 - 2138			
Maryland ☆		Maryland Code Annotated Criminal Procedure § 8-201			
Massachusetts			Mass. Rules Criminal Procedure, Rule 30		
Michigan	Jan. 1, 2006	Michigan Compiled Laws § 770.16			
Minnesota		Minnesota Statutes § 590.01 - 590.06			
Mississippi ☆			Mississippi Code Annotated § 99-39-1	Mississippi House Bill 217	*Ellis v. State*, No. 97--M--01326
Missouri ☆		Vernon's Annotated Missouri Statutes 547.035			
Montana ☆	1 yr		Montana Code Annotated § 46-21-102(2)		
Nebraska ☆		Nebraska Revised Statutes §§ 29-3001, 4118, 4120-4125			
Nevada ☆			Nevada Revised Statutes Annotated § 34.726		Case by Case; Clark County Review

New Hampshire ☆				New Hampshire House Bill 1258 Senate Bill 30	
New Jersey ☆		New Jersey Statutes Annotated 2A:84A-32a			
New Mexico ☆		New Mexico Annotated 1978, § 31-1A-1			
New York ☆	* 1996	New York Criminal Procedure § 440.30		Assembly Bill Number A09250	
North Carolina ☆		North Carolina Statutes Annotated § 15A-269			
North Dakota			North Dakota Century Code, § 29-32.1		
Ohio ☆					Capital Justice Initiative, a voluntary AG Program
Oklahoma ☆	July 1, 2005	22 Oklahoma Statutes §§ 1371, 1371.1			
Oregon ☆	Jan. 1, 2006	Oregon Statutes Title 14, Ch. 138,			
Pennsylvania ☆		42 Pennsylvania Consolidated Statutes § 9543.1			
Rhode Island		Chapter 10-9.1-10 (RI General laws)			
South Carolina ☆			South Carolina Code Annotated § 17-27-160		Case by Case
South Dakota ☆					*Jenner v. Dooley*, 590 NW 2d 463, (1999)
Tennessee ☆		Tennessee Code Annotated § 40-30-401-413			
Texas ☆		Texas Code Criminal Procedure art. 64.01-03 thru 05			

Utah ☆		Utah Code Annotated § 78-35a-301-304			
Vermont			13 Vermont Statute Annotated § 7131 - 7137		
Virginia ☆		Virginia Code Annotated § 19.2-327.1			
Washington ☆	Dec. 31, 2004	Revised Code of Washington § 10.73.170			
West Virginia			West Virginia Code § 53-4A-7		
Wisconsin		Wisconsin Statutes § 974.07 (2001)			
Wyoming ☆			Wyoming Statutes § 1-27-101		

☆ Death Penalty State

* Applies only to crimes committed before 1996

STATE-BY-STATE SUMMARY OF STATUTES APPLICABLE TO DNA TESTING

Alabama

Pending Legislation in Alabama—(2002 Ala. Acts HB245; SB420)

An individual serving a term of imprisonment or waiting execution for a capital offense to file a motion to obtain forensic Deoxyribonucleic acid (DNA) testing must meet the following criteria:

1. The individual must make an assertion of actual innocence.
2. A prima facie evidence demonstrating that the identity of the defendant was at issue in the trial that resulted in the conviction of the applicant and that DNA testing of the specified evidence would, assuming exculpatory results, exonerate the applicant of the offense for which the applicant was convicted.
3. The chain of custody is sufficient to establish that the evidence has not been altered in any material aspect.
4. The motion must be made in a timely manner and for the purpose of demonstrating actual innocence of the applicant and not to delay the execution of sentence or administration of justice.

Alaska (AS 12.72.010–.020)

A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief based on newly discovered evidence if (among other requirements):

1. The applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible.
2. The evidence was not known within two years after entry of the judgment of conviction if the claim relates to a conviction; two years after entry of a court order revoking probation if the claim relates to a court's revocation of probation; or one year after an administrative decision of the Board of Parole or the Department of Corrections is final if the claim relates to the administrative decision.
3. The evidence is not cumulative to the evidence presented at trial; is not impeachment evidence; and establishes by clear and convincing evidence that the applicant is innocent.

Arizona (§ 13–4240)

Convicted felon may at any time request DNA testing of evidence in control of the state that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence. The statute allows for both mandatory testing and discretionary testing.

The court is required to allow for testing if the court finds that all of the following apply:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.

3. The evidence was not previously subjected to DNA testing or was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing.

The court may order DNA testing if the court finds that all of the following apply:

1. A reasonable probability exists that either: the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction; or DNA testing will produce exculpatory evidence.

2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.

3. The evidence was not previously subject to DNA testing or was not subjected to the testing that the petitioner is requesting and that may resolve an issue not previously resolved by the previous testing.

If the results are unfavorable, the court may make further appropriate orders, including requesting that the petitioner's sample be added to CODIS (i.e., matching to unsolved crimes).

Arkansas (§§ 16–112–202–205)

Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of DNA testing, or other tests which may become available through advances in technology, to demonstrate the person's actual innocence if:

1. Identity must have been an issue at trial.

2. The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction.

3. The evidence was not subject to the testing because the testing was not available as evidence at the time of trial.

4. Must meet the standard that testing has scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence.

5. The motion is filed with the court in which the conviction was entered.

6. The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

California (Penal Code § 1405)

In order to obtain DNA testing a petitioner must make a motion, under penalty of perjury, that establishes the following:

1. The motion must explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

2. The evidence has not been previously subjected to the requested DNA testing for reasons beyond the petitioner's control, or a different type of DNA test must be requested having a reasonable likelihood of providing a more probative result.

3. The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material aspect.

4. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted per-

son's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

5. The motion is not solely for the purpose of delay.

Colorado (Colo. Rev. Stat. 16–11–401.5; C.R.S. 18–1–410)

Colorado allows post-conviction review, however, the burden of establishing a basis for post-conviction relief rests upon the petitioning defendant. Crim. P. 35(b) enables trial courts to review a sentence to ensure that it is proper before making it final. *Ghrist* v. *People,* 897 P.2d 809, 812 (Colo. 1995). A court's review of a Crim. P. 35(b) motion focuses on the fairness of the sentence in light of the purposes of the sentencing laws. Id. Any decision to reduce a sentence based on a Crim. P. 35(b) motion remains within the sound discretion of the trial court. Id. In its analysis, the trial court may consider all relevant and material factors, including new evidence as well as facts known at the time the court pronounced the original sentence. *Spann* v. *People,* 193 Colo. 53, 55, 561 P.2d 1268, 1269 (1977).

Connecticut (Conn. Gen. Stat. § 52–582 (2001))

Provides an exception to three-year time limit for petition for a new trial, where the petition is based on DNA evidence that was not discoverable or available at the time of the original trial. Therefore, the petition may be brought at any time after the discovery or availability of such new evidence.

Delaware (11 Del. C. § 4504)

A motion for DNA testing must be filed within three years of final judgment, and must be requested to demonstrate the person's actual innocence. The motion may be granted if:

1. The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction.

2. The evidence must not have been previously subject to testing because "the technology for testing was not available at the time of the trial."

3. Identity was an issue in the trial.

4. The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect.

5. The requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person's assertion of actual innocence

6. The relief available is limited to a new trial, and that relief may be granted only if the person establishes by clear and convincing evidence that no reasonable trier of fact would have convicted the person on consideration of the DNA test results in conjunction with all other possible evidence in the case.

Florida (2001 Fla. Laws. Ch. 97)

Any defendant who has been tried, convicted and sentenced by a Florida court may petition the trial court for DNA testing according to the following requirements:

1. Petition is filled within two years after a conviction become final, or petition by October 1, 2003, whichever comes later.

2. Evidence is available and was not subjected to tampering. Also the evidence must not have been tested previously or if it was, a proper explanation of why previous tests were inconclusive must be provided.

3. There is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

4. The defendant must claim innocence and explains how the DNA evidence would exonerate, or mitigate the sentence, received by him or her.

5. Identification must have been genuinely disputed at trial.

Georgia (O.C.G.A. § 9–14–40 (2002))

While there is no specific statute authorizing DNA testing, Georgia allows post-conviction statute permits DNA testing under certain circumstances. DNA testing is ordered by the court on a case by case basis, by filing a writ of Habeas Corpus petition.

Hawaii

Pending Legislation in Hawaii—HB 42

This legislation will allow a convicted person in custody acces to DNA testing if certain criteria are met.

1. The petitioner must show that evidence to be tested is "related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state; and was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results."

2. DNA test should produce noncumulative, exculpatory evidence relevant to a claim of wrongful conviction.

3. Petitioners may apply at any time after conviction.

Idaho (Idaho Code § 19–4902)

A petitioner may, at any time, file a petition before the trial court for DNA testing of evidence collected by the state according to the following requirements:

1. Petition for DNA testing must be filed by July 1, 2002, or within a year of conviction.

2. Petition must request testing of evidence secured in relation to the trial resulting in conviction, which was not subject to the requested testing because the technology for the testing was not available at the time of trial.

3. Petitioner must present prima facie case that identity was an issue in the trial resulting in conviction, and the result of testing must have the scientific potential to produce new evidence showing that petitioner's innocence is more probable than not.

4. Petitioner must present prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.

5. Relief is to be ordered if DNA test results, in conjunction with all other admissible evidence, demonstrate that petitioner is not the person who committed the offense.

Illinois (ch. 725, § 5/116–3)

A petitioner may file a petition before the trial court that entered the judgment of conviction in his or her case requesting the performance of DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction. The defendant must present a prima facie case that:

1. Identity was the issue in the trial which resulted in his or her conviction.
2. The evidence must not have been subject to the testing which is now requested "because the technology for the testing was not available at the time of trial."
3. The results of the testing must potentially produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."

Indiana (§ 35–38–7, As added by P.L.49–2001, SEC.2.)

A person who was convicted of and sentenced for an offense may file a written petition with the court that sentenced the petitioner for the offense to require DNA testing and analysis of any evidence that establishes the following:

1. The evidence is in the possession or control of a court or the state; or otherwise contained in the Indiana DNA data base.
2. The evidence sought to be tested was not previously subjected to DNA testing, or was tested, but the requested DNA testing and analysis will provide additional information as to the identity of the perpetrator or accomplice; or would have a reasonable probability of contradicting prior test results.
3. The evidence is related to the investigation or prosecution that resulted in the person's conviction.
4. A reasonable probability exists that the petitioner would not have been prosecuted for, or convicted of, the offense if exculpatory results had been obtained through the requested DNA testing and analysis.

Iowa (I.C.A. § 822.2)

Any person who has been convicted of, or sentenced for, a public offense and who claims: (among other things) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; * * * may institute, a proceeding to secure relief.

Pending Legislation in Iowa—SF 229

In order to gain approval for testing a petitioner must establish that:

1. Identity was an issue at trial,
2. DNA profiling was not obtainable because testing was not available at the time of the criminal proceedings.
3. The DNA evidence must have "the potential to produce material facts not previously presented and heard that would require vacation of the conviction or sentence in the interest of justice."

4. Applicant or state has the right to appeal.

Kansas (K.S.A. § 21–2512)

Persons convicted of murder or a or for rape as defined by K.S.A. 21–3502, may petition court for DNA testing that:

1. Is related to the investigation or prosecution that resulted in the conviction;
2. Is in the actual or constructive possession of the state; and
3. Was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Kentucky (KRS Chapter 422)

Authorizes a person who was convicted of and sentenced to death for a capital offense to request, at any time, DNA testing, if the court finds that all of the following apply:

1. Identity was an issue at trial.
2. The biological evidence was not previously subjected to DNA testing or, if it was, the type of testing requested in the motion must be capable of resolving an issue not resolved in the previous test.
3. Applicant must show by a preponderance of evidence that "it is possible to subject the biological evidence to forensic DNA testing or retesting, and an exclusionary result would necessarily exonerate the applicant."
4. There is a statute of limitations of 2 years.
5. A reasonable probability exists that either: the petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence.
6. The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted. The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.

Louisiana (Code Crim. Pro. art. 926.1 et al.)

A special remedy for post-conviction DNA testing is available until August 31, 2005 (except that time limit does not apply to defendants sentenced to death prior to the Act's effective date), provides that:

1. The evidence to be tested is available and in a condition that would permit DNA testing.
2. Articulable doubt based on competent evidence must be shown as to guilt of petitioner, and reasonable likelihood that the requested DNA testing will resolve the doubt and establish petitioner's innocence.
3. Application for testing must include factual circumstances establishing the timeliness of the application, identification of the particular evidence for which DNA testing is sought, and affidavit under penalty of perjury that applicant is factually innocent of the crime for which convicted.

4. Relief to be granted only if the DNA test results prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which convicted.

Maine (15 M.R.S. §§ 2137, 2138 (2001)

Person incarcerated for offense potentially punishable by imprisonment for at least 20 years may file a motion for post-conviction DNA analysis of evidence in the case and for a new trial based on the analysis results. To secure testing (among other conditions) the person must:

1. Present a prima facie case that identity was at issue during the person's trial.
2. If the DNA analysis shows that the person is the source of the evidence, the person's DNA record must be added to the state DNA database and data bank.
3. The court must hold a hearing if DNA analysis shows that the person is not the source of the evidence. The person must establish by clear and convincing evidence at the hearing that: only the perpetrator of the crime could be the source of the evidence; the evidence was collected, handled, and preserved in such a way that the court can find that the DNA profile of the analyzed sample is identical to the DNA sample initially collected during the investigation; and the person's exclusion as the source of the evidence, balanced against the other evidence in the case, is sufficient to justify a new trial.

Maryland (Crim. Pro. § 8–201)

Persons convicted of specified homicidal or sexual offenses may petition for DNA testing of scientific identification evidence that the State possesses that is related to the judgment of conviction. A court shall order DNA testing if the court finds that:

1. The evidence has not been previously subjected to the requested DNA testing for reasons beyond the petitioner's control, or a different type of DNA test must be requested having a reasonable likelihood of providing a more probative result.
2. The scientific identification evidence to be tested must have been subject to a chain of custody that is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
3. Identity must have been an issue in the trial that resulted in the petitioner's conviction.
4. There must be a reasonable probability that the DNA testing has the scientific potential to produce results materially relevant to the petitioner's assertion of innocence.

Massachusetts (Mass.R.Crim.P.), Rule 30

Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

Post Conviction Procedure:

1. Any grounds not in the raised in the original motion are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

2. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

3. Where affidavits filed by the moving party establish a prima facie case for relief, the judge on motion of any party, be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

Michigan (Mich. Comp. Laws 770.16 (2000)

Convicted felons may petition not later than January 1, 2006, for DNA testing of biological material identified during the investigation of crime if convict can show prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator to, the crime that resulted in the conviction. The petitioner must also establishes all of the following by clear and convincing evidence:

1. Evidence is available for testing but was not tested or was tested using inadequate technology.

2. If testing proves evidence not linked to convicted person, hearing determines whether new trial is warranted.

3. The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

Minnesota (Minn. Stat. § 590.01 (2001))

Motion for DNA testing must demonstrate the person's actual innocence. Additionally, the motion must meet the following conditions:

1. The evidence must have been secured in relation to the trial which resulted in the conviction;

2. The evidence must not have been subject to testing previously because the technology for the testing was not available at the time of trial or the testing was not available as evidence at the time of the trial.

3. Prima facie case must be shown that identity was an issue in the trial.

Mississippi (Miss. Code Ann. § 99–39–1)

Allows persons convicted of capital crime to petition for DNA testing that was not available at trial. *Ellis* v. *State*, No. 97–M–01326 which is and unpublished opinion.

Pending Legislation in Mississippi—(Miss. H.B. 217 (2002))

This bill will allow "all prisoners in custody for a capital death penalty conviction shall have the right to file a post-conviction motion for DNA testing."

Missouri (V.A.M.S. 547.035)

A person in custody claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person

is in custody may file a postconviction motion in the sentencing court seeking such testing. The motion must allege facts under oath demonstrating that:

1. Testing must "have the scientific potential to produce new, noncumulative evidence materially relevant" to the "assertion of actual innocence." For specific felonies listed in the bill, evidence shall be preserved for an unknown duration.

2. DNA test will demonstrate his innocence of the crime for which he is in custody.

3. There is evidence upon which DNA testing can be conducted; and the evidence must not have been previously tested because the technology for testing was not reasonably available at the time of trial, or the evidence to be tested was unknown or otherwise unavailable to both the movant and his lawyer.

4. Identity must have been an issue in the trial.

5. Granting testing requires judicial finding that a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

Montana (MCA 46–21–102(2))

MCA 46–21–102(2) was added in anticipation of a post conviction DNA testing request. It states "[A] claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later."

Nebraska (Neb.–Rev.–St. §§ 29–3001, 4118, 4120–4125)

At any time after conviction the inmate may file motion with trial court for DNA testing of material related to conviction in possession or control of the state which was not subject to testing or can be retested with greater accuracy using new techniques. Petitioners must meet a requirement that "testing was effectively not available at the time of trial," with exceptions for "current DNA techniques that provide a reasonable likelihood of more accurate and probative results" and the standard that "testing may produce noncumulative, exculpatory evidence relevant to the claim."

Nevada (Nev. Rev. Stat. Ann. § 34.726)

While there is no specific statute authorizing DNA testing, Nevada post-conviction statute permits DNA testing under certain circumstances. DNA testing is ordered by the court on a case by case basis, by filing a writ of Habeas Corpus petition. Additionally, Clark County, which include Las Vegas and surrounding communities, is reviewing every criminal case to determine whether DNA testing should be conducted.

New Hampshire

Pending Legislation in New Hampshire—(SB30) (HB 1258)

SB30—This bill expands the existing DNA testing program which requires testing of sexual offenders by including DNA testing of violent criminal offenders who have been convicted of the commission or attempted commission of murder, manslaughter, assault, kidnapping, robbery, or burglary. Testing would also be required for juvenile offenders who have been certified for trial as an adult and who are convicted of the commission or attempted commission of the same violent crimes.

HB 1258—This bill allows a person in custody pursuant to the judgment of court to, at any time after conviction or adjudication as a delinquent, apply to the court for forensic DNA testing of any biological material that:

1. Is related to the investigation or prosecution that resulted in the judgment.

2. Is in the actual or constructive possession of this state or the United States or has been retained by any other person under conditions sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any respect material to the DNA testing.

3. Was not previously subjected to DNA testing, or can be subjected to retesting with different DNA techniques that provide a reasonable probability of reliable and probative results.

New Jersey (N.J.S.A. 2A:84A–32a–b)

Convicted felon claiming actual innocence may request DNA testing if favorable results of the testing could have resulted in acquittal. The court must determine that all of the following criteria has been established before the motion can be granted:

1. The evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion; and the evidence has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced or altered in any material aspect.

2. The identity of the defendant was a significant issue in the case.

3. The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the offender.

4. The requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted.

5. The evidence sought to be tested was not previously tested, or it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results.

6. The motion is not made solely for the purpose of delay.

New Mexico (NMSA 1978, § 31–1A)

A person may petition for DNA testing when such tests were not available at the time of trial and will establish his or her innocence. The petition must be filed prior to July 1, 2002. To obtain testing, the petitioner must prove by clear and convincing evidence (among other conditions) that:

1. Identity was an issue in the trial.
2. The evidence was not tested previously because the technology for DNA testing was not available at the time of the trial, and if the evidence for which testing is sought had been admitted at trial, a reasonable judge or jury would not have been able to find him guilty beyond a reasonable doubt.
3. The evidence was secured and preserved by the law enforcement agency that investigated the case, and was subject to a chain of custody sufficient to establish that it was not substituted, tampered with, replaced or altered in any material respect.
4. testing must "be highly likely to produce evidentiary results that would have been admissible at the * * * initial trial; and if the evidence * * * had been admitted * * * a reasonable judge or jury would not have been able to find [the petitioner] guilty beyond a reasonable doubt."

New York (Crim. Pro. Law § 440.30)

Post-conviction DNA testing remedy is limited to cases involving convictions occurring before 1996. Before the court can order testing, the court must find that there must be a reasonable probability that the verdict would have been more favorable to the defendant if such testing had been.

Pending Legislation in New York—A09250

This bill amends the criminal procedure law to authorize an order for DNA testing in support of a motion to vacate a judgment regardless of when the defendant's conviction occurred.

North Carolina (N.C.G.S.A. § 15A–269)

A defendant may make a motion before a trial court for performance of DNA testing of any biological evidence that meets all of the following conditions:

1. The requested evidence is material to the defense.
2. Is related to the investigation or prosecution that resulted in the judgment.
3. The DNA was either not tested or newer testing will result in greater accuracy and probity or is likely to contradict prior results.
4. Granting post-conviction DNA testing requires reasonable probability that the verdict would have been more favorable to the defendant if the requested testing had been done.

North Dakota (N.D. Cent. Code, § 29–32.1—(2002))

An applicant for post-conviction relief has the burden of establishing grounds for relief. Post-conviction proceedings are civil in nature and a trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. A party opposing a motion for summary disposition under the Uniform

Post-Conviction Procedure Act must raise an issue of material fact. If the moving party establishes there is no genuine issue of material fact, the burden shifts to the non-moving party to show a genuine issue of fact exists. The resisting party may not merely rely on pleadings or unsupported conclusory allegations but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.

Section 29–32.1–12(2), N.D.C.C., authorizes denial of an application for post-conviction relief on the ground of misuse of process. A defendant is not entitled to post-conviction relief if the contentions are simply variations of previous arguments. An applicant for a post-conviction relief is only entitled to an evidentiary hearing if a reasonable inference raises a general issue of material fact.

Ohio

The State Attorney Generals's office has a voluntary program for death row inmates called the Capital Justice Initiative. A copy of the Capital Justice Initiative is available on the Ohio Attorney General's website: <www.ag.state.oh.us.> This program allows the petitioner to make an application to the Ohio AG's office for DNA testing if:

1. The DNA was not subjected to previous testing.
2. The expected results must be exonerative in nature and outcome determinative.
3. The results are retained by the AG's office for use as evidence and are of public record.

Oklahoma (title 22, §§ 1371, 1371.1)

Makes provision, until July 1, 2005, for committed defendants to request DNA testing where the defendant is factually innocent. Factual innocence requires the defendant to establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence.

Oregon (OR ST T. 14, Ch. 138)

Motions for DNA testing of specific evidence must be filed by January 1, 2006. A person may file in court a motion requesting the performance of DNA testing if the person was convicted for an aggravated murder or a felony, and present a prima facie showing that:

1. The identity of the perpetrator was an issue in the trial resulting in conviction or, for a retarded person, identity should have been an issue in the trial or plea agreement.
2. DNA testing, assuming exculpatory results, would establish the actual innocence of the person or entail a mandatory sentence reduction.
3. A reasonable possibility that testing will produce exculpatory evidence that would establish innocence or a mandatory sentence reduction.

Pennsylvania (S.B. 589 pn 2169, effective September 8, 2002, 42 P.A.C.S. § 9543.1)

The convicted felon claiming actual innocence may request DNA testing if the evidence is related to their conviction provided that:

1. The individuals did not request DNA testing at trial, and was convicted after 1995.
2. Petitioner must make a prima facie case showing that the identity was at issue.
3. No right to appeal.
4. Applicant must assert "actual innocence of the offense" in order to meet the standard for postconviction DNA tests.
5. In a capital case, the motion must "assert the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance if the applicant's exoneration of the conduct would result in vacating a sentence of death; of, in a capital case, assert that the outcome of the DNA testing would establish a mitigating circumstance."

Rhode Island (Chapter 10–9.1–10 (RI General Laws))

Statute applies to any person "convicted of and sentenced for a crime and who is currently serving an actual term of imprisonment and incarceration pursuant to said sentence," and authorizes a person to "file a petition with the superior court requesting the forensic DNA testing of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court." The superior court shall order testing if it finds that:

1. A reasonable probablity exists that the defendant would not have been prosecuted or convicted if the DNA results were exculpatory.
2. The evidence exists and is amenable to DNA testing.
3. The evidence or a portion of it was not previously tested using DNA testing or that the testing required will resolve an issue not addressed by previous testing.
4. The petition is presented in order to show actual innocence and not to delay the "administration of justice."

South Carolina (S.C. Code Ann. § 17–27–160)

Authorizes post-conviction DNA testing where inmate convicted of capital crime. The rules of discovery are applicable to DNA testing requests. It has been allowed when an appropriate showing has been made to the court on a case by case basis.

South Dakota (Case Law)

Jenner v. Dooley, 1999 SD 20; 590 N.W.2d 463 (1999);

Davi v. Class, 2000 SD 30; 609 N.W.2d 107 (2000)

Decisions allow persons access to DNA testing where they have been convicted of a capital crime and claim actual innocence.

Jenner v. Dooley, 1999 SD 20; 590 N.W.2d 463 (1999)

After careful consideration, the following guidelines apply to requests to post-conviction scientific analysis:

1. The evidence and test results must meet the Daubert standard for scientific reliability. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). A showing must be made that if the matter were presently tried the defendant would be entitled to the testing and the results would be admissible.

2. Because convicted defendants may not obtain reconsideration of their cases whenever some new technology promises to reveal another angle on the evidence against them, it must be shown that a favorable result using the latest scientific procedures would most likely produce an acquittal in a new trial.

3. Testing should not be allowed if it imposes an unreasonable burden on the State. See generally *State* v. *Fowler,* 1996 SD 78, P21, 552 N.W.2d 92, 96. An exorbitant cost may be grounds for denial, for example, especially if anticipated test results promise to be less than definite.

4. If testing is allowed, the court should impose reasonable safeguards to ensure the preservation and integrity of the evidence. With biological evidence, courts have generally found post-conviction testing most suitable when

(a) identity of a single perpetrator is at issue;

(b) evidence against the defendant is so weak as to suggest real doubt of guilt;

(c) the scientific evidence, if any, used to obtain the conviction has been impugned; and,

(d) the nature of the biological evidence makes testing results on the issue of identity virtually dispositive.

Tennessee (Tenn. Code Ann. §§ 40–30–401–413)

A person convicted of and sentenced for commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence. The court shall order DNA analysis if it finds that:

1. The evidence is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

2. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis.

3. The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis.

4. The application for analysis is made for the purpose of demonstrating actual innocence and not to unreasonably delay the execution of sentence or administration of justice.

Texas (Tex. Code Crim. Proc. art. 64.01–03)

A convicted person may submit to the convicting court a motion for DNA testing of evidence containing biological material if:

1. The evidence exists and is in a condition making DNA testing possible; and has been subjected to a chain of custody sufficient to

establish that it has not been substituted, tampered with, replaced, or altered in any material respect.

2. The evidence must not have been previously subjected to DNA testing: because DNA testing was either not available; or if it was available, the test was not technologically capable of providing probative results. However, if the evidence was previously subjected to DNA testing, it still can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

3. Identity must be an issue in the case and convicted person must show reasonable probability that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.

4. The request for the proposed DNA testing must not be made in order to unreasonably delay the execution of sentence or administration of justice.

Utah (Utah Code Ann. § 78–35a–301–304 (2002))

Person asserting actual innocence under oath may file a petition identifying specific evidence for DNA testing, the petition must allege that:

1. Evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted.

2. The chain of custody is sufficient to establish that the evidence has not been altered in any material aspect.

3. The petition identifies the specific evidence to be tested and states a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support.

4. The evidence was not previously subjected to DNA testing, or if the evidence was tested previously, the evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing.

5. The evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's actual innocence.

6. The court may not order DNA testing where DNA testing was available at the time of trial and the person did not request DNA testing or present DNA evidence for tactical reasons.

7. The defendant is entitled to relief only if the test results demonstrate by clear and convincing evidence that the defendant is actually innocent.

Vermont (13 V.S.A. § 7131–7137)

According to the Vermont Attorney General's office there has yet to be a post-conviction challenge based on DNA testing.

A prisoner who is in custody under sentence of a court and claims the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or of the state of Vermont, or is otherwise subject to collateral attack, may at any time move the superior court of the county where the sentence was imposed to vacate, set aside or correct the sentence. The court may entertain and decide the motion without requiring the production of the prisoner at the hearing but the

prisoner may attend if he so requests. If the court finds that the judgment was made without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to make the judgment vulnerable to collateral attack, it shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Virginia (Va. Code Ann. § 19.2–327.1 (2001))

Convicted felon may petition to circuit court that entered the original conviction for new testing of biological evidence if:

1. The evidence was not known or available at the time of conviction.
2. The evidence was subject to chain of custody sufficient to establish integrity.
3. The evidence is materially relevant, non-cumulative, and necessary and may prove actual innocence.
4. The convicted person has not unreasonably delayed the filing of petition after the evidence or testing procedure became available.
5. There is no right to appeal.
6. In a writ of actual innocence, the petitioner must allege "the reason or reasons the evidence will prove that no rational trier of fact could have found proof of guilty beyond a reasonable doubt."

Washington (Rev. Code Wash. (ARCW) § 10.73.170 (2002))

Until the end of 2004, imprisoned persons who have been denied post-conviction DNA testing may submit a request to the county prosecutor for post-conviction DNA testing, if:

1. The DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards, or DNA testing technology was not sufficiently developed to test the DNA evidence in the case.
2. Prosecutor must review the request based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis, and have the testing done if it is warranted.
3. Denial of a testing request by the county prosecutor may be appealed to the State Attorney General.

West Virginia (W. Va. Code § 53–4A–7)

Post trial DNA test results, which were not introduced at trial, could be considered in ruling on habeas petition.

Wisconsin (Wis. Stat. § 974.07 (2001))

Allows a convict at any time after being convicted, to make a motion in the court in which they were convicted for DNA testing if all of the following apply:

1. The evidence is relevant to the investigation or prosecution that resulted in the conviction.
2. The evidence is in the actual possession of a government agency. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with or, if the chain of

custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

3. The evidence has not previously been subjected to testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

4. For applications involving claims of innocence, must be a reasonable probability that no prosecution or conviction would have occurred had exculpatory DNA testing results been available.

5. For applicants relating to wrongful sentencing, the conviction or sentence in a criminal proceeding would have been more favorable.

6. May order testing if the conviction or sentence would have been more favorable.

Wyoming (Wyo. Stat. § 1–27–101 (2002))

No Statute and no provision for post conviction DNA testing.

ATTACHMENT D

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	No. of Death Row Inmates As of 12/31/01	Denied DNA Test
FED	No Policy Because No Inmate Has Ever Requested a DNA Test	23	0
AL	Administrative Policy	181	0
AR	ACA § 16-112-201-205; 207	40	0
AZ	Az. St §13-4240	121	0
CA	Ca. Pen. Code § 1405	606	1
CO	Case By Case Basis	6	0
CT	Conn. Gen. Stat. § 52-582 (2001)	7	0
DE	Del. Code. Ann. Tit. 11 § 4504	15	0
FL	Fl. St. § 925.11	370	0
GA	No Statute	121	0
ID	Id. St. 1949.02 and 1927.19	22	1
IL	Il. St. Ch. 725 § 5/116-3	160	1
IN	In. 35-38-7-5	36	0
KA	KSA 21-25-12	4	0
KY	KRS Ch. 422 HB 4	37	0
LA	La. C.Cr.P. Art. 926.1	90	0

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	No. of Death Row Inmates As of 12/31/01	Denied DNA Test
MD	Md. Crim. Proc. § 8-201	14	0
MO	Rev. St. Mo. 547.035	70	1
MS	Judicially Created Standard in Ellis v. State, 97-M-01326.	66	0
MT	Can Be Provided By MCA 46-21-102	6	0
NE	Ne. St. § 29-4120	7	0
NH	No Statute or Provision	0	0
NJ	NJ St. 2a:84A-32a	14	0
NM	NM St § 31-1A-1	3	0
NY	NY C. Cr. P. § 440.30	5	0
NC	NC Gen. Stat. 15A-269	215	0
NV	By Court Order	87	3[1]
OH	Voluntary AG Program	204	0
OK	OK Stat. Tit. 22 § 1371	103	1
OR	OR St. T. 14 Ch. 138	25	0
PA	42 P.A.C.S. 9543.1	244	0

1.Estimate.

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	No. of Death Row Inmates As of 12/31/01	No. of Death Row Inmates Denied DNA Test
SC	Case By Case Basis	73	1
SD	Judicially Created Standard in Jenner v. State, 590 N.W.2d 463 (S.D. 1999).	5	1
TN	Tn. Code Ann. 40-30-401	95	0
TX	Tx. Code Crim. Pro. 64.01-05	431	8
UT	Ut. Code Ann. 78-35A § 301-304	11	0
VA	Va. Code § 19.2-327.1	24	0
WA	R.C.W. 10.73.170	11	0
WY	No Statute	2	0
TOTAL		3554	18 (.51%)

Source: Committee telephone interviews with the Department of Justice and with Attorney Generals Offices for each State that has a capital punishment statute.

ATTACHMENT E

The Majority Report cites five cases to support its contention that incompetent and underfunded counsel resulted in "innocent" defendants being convicted. Majority Report at 19–20. A careful examination of the facts in these five cases does not support this assertion.

1. Albert Burrell—Burrell was sentenced to death for the 1986 robbery-murder of an elderly couple in Louisiana. (All facts discussed herein are from a trio of investigative news stories about this case published by a local Louisiana newspaper. See Christopher Baughman and Tom Guarisco, "Justice for None", The Baton Rouge Sunday Advocate, March 18–20, 2001, at A–1.) In 2000, a state judge granted Burrell a new trial on the basis that prosecutors had concealed the fact that they had given a reduced sentence to a prison informant who had testified against him. Burrell's codefendant also was given a new trial—in part on the basis that prosecutors had concealed evidence placing the murder weapon in Burrell's hands rather than the codefendant's. The principle evidence against Burrell was the testimony of Janet Burrell, his ex-wife and mother of his child. Janet Burrell stated at trial that she saw Burrell on the night of the murders with a large amount of cash and with blood on his clothing, and that Burrell admitted to her that he had committed the crime. Burrell's brother also testified against him. Janet Burrell later recanted her testimony, but subsequently withdrew the recantation, explaining that she had been pressured to recant by a friend of the Burrell family. Burrell's brother also recanted. The judge who ordered a new trial did not credit these recantations, and the original prosecutor has stated that he would try the case again. The current prosecutor, however, declined to retry the case. His office cited the lack of physical evidence—even the house where the crimes had occurred had been demolished. And as press accounts noted at the time, "[m]emories of witnesses and investigators have faded," and key testimony is "tainted"—including that of Janet Burrell, who could easily be impeached with her prior recantation. Finally, although Burrell's habeas counsel attacked trial counsel's supposed "shocking incompetence"—a common postconviction petition tactic—press accounts have noted that counsel established an alibi for Burrell at trial, attacked the prosecution's lack of physical evidence or percipient witnesses, and highlighted the inconsistencies in the prosecution testimony. Trial counsel's performance was not a basis for the court's 2000 grant of a new trial.

2. Federico Martinez-Macias—Macias was sentenced to death in Texas for the 1983 home-invasion robbery and murder of an older couple for whom he had once worked. Macias's codefendant, whom witnesses positively identified as being at the scene with an associate, testified that Macias was that associate and that Macias was

the actual killer. *Martinez-Macias* v. *Collins,* 810 F. Supp. 782, 792–95 (W.D. Tex. 1991). A habeas court found that Macias's trial counsel should have called a witness who would have given Macias an alibi, despite counsel's concerns that the witness was not credible and that his testimony would have opened to the door to evidence of Macias's past crimes. Id. at 797, 803–05. Macias had over two dozen prior arrests, including two robbery arrests and one conviction, and a recent burglary arrest. Id. at 819 n.75. The prosecution also was prepared to present evidence that, during the previous year, Macias had assaulted and robbed at their home an elderly couple for whom he had once worked. Id. at 799–800. The habeas court second-guessed trial counsel's tactical decision and found that he should have deemed this last offense too dissimilar to the present crime to be admissible as to identity under Texas law. Id. at 802–03. That court concluded that defendant had received ineffective assistance, despite finding that trial counsel—who had ten year's experience as an assistant district attorney and had "tried seven or eight capital murder cases"—"is, and in 1984 was, one of the best attorneys in El Paso." Id. at 790. (Incidentally, the habeas court also found ineffective assistance in counsel's failure to present evidence at the sentencing phase that, among other things, Macias never shot heroin in front of his stepchildren, but "would [only] take heroin behind the closed bathroom door." Id. at 816.) Ten years after the murders, "[l]ocal prosecutors said they were unable to get a new indictment [of Macias] because a witness had died and the memories of others are fading." "Man Freed After 9 Years on Death Row", The Dallas Morning News, June 25, 1993, at 14D.

3. Gary Nelson—The Majority Report describes Nelson as having been "exonerated" after 11 years on death row. Nelson was convicted in Georgia in 1980 of the rape and murder of a six-year-old girl. His conviction was reversed in 1991 when it was discovered that the prosecution had concealed evidence that undermined a hair analysis linking Nelson to the victim. Although the State had argued at trial that a limb hair found on the victim closely linked Nelson to the crime, prosecutors had failed to turn over an FBI report stating that limb hairs are generally unsuitable for identification purposes. See *Nelson* v. *Zant,* 405 S.E.2d 250, 252 (Ga. 1991). Although this error required reversal, other evidence still pointed to Nelson. The victim was last known to have gone to a house that Nelson shared with a roommate; Nelson claimed to have been working on his car at the time, and a man was seen working on a car at the house when the victim arrived; Nelson had a history of violence towards women, and had recently killed a man in a fight outside of a bar; and a child witness identified Nelson as "look[ing] like" the man she saw with the victim. Jeanne Cummings, "Attorneys: Lies, Sloppy Defense Landed Client on Death Row—Testimony on Slaying Tainted, New Team Argues", The Atlanta Journal-Constitution, August 15, 1989, at A1. Even the court that reversed Nelson's conviction on the basis of the withheld FBI report found that "the jury in this case might have arrived at the same verdict if the state had not suppressed this critical evidence." *Nelson,* 405 S.E.2d at 252. According to contemporaneous news accounts, local prosecutors were considering retrying

Nelson but were having great difficulty locating key witnesses 13 years after the crime had occurred. See Mark Curriden, "Man Convicted of Rape, Killing Could Go Free—Court Cited Evidence Withheld in '80", The Atlanta Journal-Constitution, October 28, 1991, at F1; Jeanne Cummings, "Murder Convict on Death Row Wins New Trial—'Critical' Evidence Withheld, Court Says—'Now a Very Old File'", The Atlanta Journal-Constitution, at C1.

4. Dennis Leon Fritz—Although the Majority Report discusses Fritz's case in the context of "innocent people [who] are sentenced to death"—and several tabloid-style news stories mistakenly refer to Fritz as having received a death sentence—the courts have made clear that Dennis Fritz "was sentenced to life imprisonment." *Fritz* v. *Champion,* 66 F.3d 338, No. 94–6327, September 11, 1995 (10th Circuit). At his trial, the strongest evidence used against Fritz was a state forensic chemist's opinion that numerous hairs found at the crime scene were linked to Fritz and his codefendant. See *Fritz* v. *Oklahoma,* 811 P.2d 1353, 1362 (Okla. Crim. App. 1991). Since then, it has been discovered that prosecutors had suppressed a report by the first state chemist to analyze the evidence in the case; she had concluded that none of the hairs at the crime scene could be linked to Fritz or his codefendant. See Diana Baldwin, "Experts Disagree on Hair Analysis", The Daily Oklahoman, May 27, 2001, at 1A. It is not apparent why Fritz's counsel should be faulted for neglecting to exploit evidence that prosecutors had failed to disclose.

5. Dennis Williams—Alone among the five examples cited in the Majority Report, evidence shows that Williams is actually innocent, and Williams was in fact sentenced to death. Again, however, the flaws in Williams's case have little to do with his public defender. Instead, Williams appears to be another victim of a culture of gross corruption and governmental misconduct in Cook County, Illinois. His case merits a thorough discussion of its facts and the context in which it arose.

THE SPECIAL CASE OF COOK COUNTY

Dennis Williams was arrested after a neighbor who had a grudge against him linked him to the brutal kidnaping, gang rape, and double murder of a young couple in Chicago in 1978. See *People* v. *Williams,* 444 N.E.2d 136, 139–40 (Ill. 1983). Chicago police and prosecutors manufactured the rest of the case against Williams. Paula Gray, an illiterate and mildly retarded woman who testified against Williams, was taken by police to the abandoned townhouse where the crimes occurred. She later recounted, "They kept yellin', 'This is where she got raped and killed—Dennis shot her twice in the head, didn't he? They takes me to a motel an' says, 'The same thing that happened to the lady, it will happen to you.'" William Freivogel, "Lessons from 13 Innocent Men", St. Louis Post-Dispatch, April 30, 2000, at B3. When Gray nevertheless refused to testify at one of the trials, prosecutors brought murder and perjury charges against her; she was convicted and sentenced to 50 years in prison. Gray was later persuaded to testify against Williams at his retrial in exchange for having all charges against her dropped. Prosecutors allowed Gray to lie and testify that she had not been promised anything in exchange for her testimony. See Ken Arm-

strong, Maurice Possley, "Reversal of Fortune", Chicago Tribune, January 13, 1999, at 1. Williams's prosecutors also concealed that burglary charges had been dropped against a jail informant who agreed to testify against Williams. The lead prosecutor also falsely stated to the jury that hair found in Williams's car matched the victims. Id.

Seventeen years after the murders occurred, private investigators discovered records of a police interview conducted five days after the bodies were found—records that were never turned over to defense attorneys—which implicated other suspects. Two of those suspects confessed in 1995, their guilt was confirmed by DNA tests in 1996, they and a third new defendant were sentenced to long prison terms in 1997, and Williams and his codefendants were released. See Janan Hanna, "Man Convicted of Ford Heights Killings Gets 65 Years", Chicago Tribune, January 30, 2001, at 3. One possible reason why one new suspect so readily confessed in 1995, even before any DNA evidence was tested, is that he was already serving a long prison term. He had murdered a woman in 1991, near the same location where the 1978 murders had occurred.

Appellate courts have reversed and remanded five Cook County murder and attempted murder convictions because of misconduct by the same assistant district attorney who prosecuted Williams. See "Reversal of Fortune", supra. Yet two years after Williams's trial, that prosecutor was made supervisor of Cook County's south suburban office by then-State's Attorney Richard M. Daley. In 1985, a death sentence secured by the same prosecutor was reversed by the Illinois Supreme Court, which accused him of "destroy[ing] the aura of dignity in the courtroom"; the prosecutor had personally attacked the defense attorney, judge, and a defense witness, and had physically intimidated the defense lawyer. Id. Yet six months after this reprimand, Daley promoted the same individual to direct Cook County's felony division, and later placed him in charge of training prosecutors and monitoring misconduct. Id.

Nor is the case of Dennis Williams's prosecutor an anomaly in Cook County. In 1984, a state appellate court reversed a conviction secured by another prosecutor, describing her actions as "a veritable hornbook of 'do nots.'" As a result of that court's rebuke, this person became one of only two prosecutors ever sanctioned for trial misconduct by the state's lawyer disciplinary agency, which expressed wonder that she had not been disciplined internally by her office. Yet the same prosecutor was later elected a Cook County judge, after receiving the crucial endorsement of the local Democratic Party through the influence of her former supervisor, now-Mayor Richard M. Daley. See Ken Armstong, Maurice Possley, "Break Rules, Be Promoted", Chicago Tribune, January 14, 1999. Another Cook County assistant district attorney, who had three convictions reversed for misconduct—including a reversal for knowingly using perjured testimony—has since been made a state appellate judge. Id. Yet another prosecutor had convictions for two murders, a rape, and an attempted murder reversed for what different appellate courts labeled "outrageous" courtroom behavior and "brazen misconduct." Five months after another court described his conduct as "an insult to the court and to the dignity of the trial

bar," Daley promoted this man to supervise the Cook County narcotics unit. Id.

A Chicago Tribune investigation found that 42 Cook County prosecutors who have had convictions reversed for misconduct later were made judges. A prosecutor who had a murder conviction overturned for misconduct subsequently was appointed the City of Chicago's Inspector General. Although many of these cases only involved improper argument—such as a prosecutor who told jurors that police "would have done us all a favor by killing [the defendant]"—many cases also involved failing to disclose evidence favorable to the defendant, allowing witnesses to lie, or racial discrimination in jury selection. "Break Rules, Be Promoted", supra. The Tribune's investigation described "a culture that fosters misconduct" in the Cook County State's Attorney's office. Notably, the same leadership also presided over what is one of the more horrific of the authentic "actual innocence" cases, the conviction of Anthony Porter. See John Kass, "With Porter Free, Who's Sorry Now? Not Our Mayor", Chicago Tribune, February 11, 1999, at 3. When asked if he would apologize to Porter after his exoneration, the former State's Attorney responded: "I'm not the person who has to apologize. America has to apologize." Id.

With all due respect, all of America is not Cook County under the Daley Administration. The extraordinary level of corruption and abuse that appears to have infected government operations there is fairly unique in the United States. While all Americans should be concerned about the crisis of government in Chicago, the particular problems that Daley's leadership has entailed cannot be used to indict all of America. Nor can Cook County's problems be blamed on anything other than a basic failure to hold leaders accountable for their actions, and to insist on integrity in government. When civic ethics are not enforced, fair and efficient operation of government invariably fades. The changes that Cook County needs are specific to that area, and can only ever be implemented through local action. Cook County's problems cannot justify the national mandates of this bill, nor are those problems even remotely addressed by S. 486's provisions.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 486, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman);

UNITED STATES CODE

* * * * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part	Section
I. CRIMES	1

* * * * * * *

PART I—CRIMES

Chapter	Section
1. General provisions	1

* * * * * * *

73. Obstruction of justice	1501

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CHAPTER 73—OBSTRUCTION OF JUSTICE

Sec.
1501. Assault on process server.

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1518. Obstruction of criminal investigations of health care offenses.
1519. Destruction or altering of DNA evidence.

* * * * * * *

§ 1518. Obstruction of criminal investigations of health care offenses

(a) Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator should be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section the term "criminal investigator" means any individual duly authorized by a department, agency, or armed

force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.

§ 1519. Destruction or altering of DNA evidence

Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under section 2292 of title 28, United States Code, with intent to—

(1) impair the integrity of that evidence;

(2) prevent that evidence from being subjected to DNA testing; or

(3) prevent the production or use of that evidence in an official proceeding,

shall be fined under this title or imprisoned not more than 5 years, or both.

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TITLE 20—EDUCATION

Chapter	Section
1. Office of Education [Repealed]	1

* * * * * * *

CHAPTER 28—HIGHER EDUCATION RESOURCES AND STUDENT ASSISTANCE

SUBCHAPTER I—GENERAL PROVISIONS

* * * * * * *

SUBCHAPTER IV—STUDENT ASSISTANCE

PART A—GRANTS TO STUDENTS IN ATTENDANCE AT INSTITUTIONS OF HIGHER EDUCATION

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PART D—FEDERAL PERKINS LOANS

1087aa. Appropriations authorized.

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§ 1087ee. Cancellation of loans for certain public service

(a) CANCELLATION OF PERCENTAGE OF DEBT BASED ON YEARS OF QUALIFYING SERVICE.—

(1) The percent specified in paragraph (3) of this subsection of the total amount of any loan made after June 30, 1972, from a student loan fund assisted under this part [20 U.S.C.A. § 1087aa et seq.] shall be canceled for each complete year of service after such date by the borrower under circumstances described in paragraph (2).

(2) Loans shall be canceled under paragraph (1) for service—

(A) as a full-time teacher * * *

* * * * * * *

(E) as a volunteer under the Peace Corps Act [22 U.S.C.A. § 2501 et seq.] or a volunteer under the Domestic Volunteer Service Act of 1973 [42 U.S.C.A. § 4950 et seq.];

(F) as a full-time law enforcement officer or corrections officer for service to local, State, or Federal law enforcement or corrections agencies*, or as a public defender (as defined in section 428L)*;

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

Part	Section
L. ORGANIZATION OF COURTS	1
* * * * * * *	
V. PROCEDURE	1651
* * * * * * *	

PART I—ORGANIZATION OF COURTS

Chapter	Section
1. Supreme Court	1
* * * * * * *	

PART V—PROCEDURE

111. General Provisions	1651
* * * * * * *	
133. Review—Miscellaneous Provisions	2101
* * * * * * *	

CHAPTER 113—REVIEW—MISCELLANEOUS PROVISIONS

Sec.
2101. Supreme Court; time for appeal or certiorari; docketing; stay.

* * * * * * *

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to * * *

* * * * * * *

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

(h) Upon notice that the requisite number of justices of the Supreme Court have voted to grant certiorari, the Director of the Bureau of Prisons, the Secretary of a military branch, or any other Federal official with authority to carry out a death sentence, shall suspend the execution of the sentence of death until the Supreme Court enters a stay of execution or until certiorari is acted upon and the case is disposed of by the Supreme Court.

(i) For purposes of this section, the Supreme Court shall treat a motion for a stay of execution as a petition for certiorari.

(j) In an appeal from, or petition for certiorari in, a case in which the sentence is death, a stay of execution shall immediately issue if the requisite number of justices vote to grant certiorari. The stay shall remain in effect until the Supreme Court disposes of the case.

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PART VI—PARTICULAR PROCEEDINGS

Chapter	Section
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CHAPTER 156—DNA TESTING

Sec.
2291. DNA testing.
2292. Preservation of evidence.

§ 2291. DNA testing

(a) APPLICATION.—Notwithstanding any other provision of law, a person convicted of a Federal crime may apply to the appropriate Federal court for DNA testing by asserting under oath that the person did not commit—

(1) the Federal crime of which the person was convicted; or

(2) any other offense that a sentencing authority may have relied upon when it sentenced the person with respect to the Federal crime either to death or to an enhanced term of imprisonment as a career offender or armed career criminal.

(b) NOTICE TO GOVERNMENT.—The court shall notify the Government of an application made under subsection (a) and shall afford the Government an opportunity to respond.

(c) PRESERVATION ORDER.—The court shall order that all evidence secured in relation to the case that could be subjected to DNA testing must be preserved during the pendency of the proceeding. The court may impose appropriate sanctions, including criminal contempt, for the intentional destruction of evidence after such an order.

(d) ORDER.—

(1) IN GENERAL.—The court shall order DNA testing pursuant to an application made under subsection (a) upon a determination that—

(A) the evidence is still in existence, and in such a condition that DNA testing may be conducted;

(B) the evidence was never previously subjected to DNA testing, or was not subject to the type of DNA testing that is now requested and that may resolve an issue not resolved by previous testing;

(C) the proposed DNA testing uses a scientifically valid technique;

(D) the proposed DNA testing has the scientific potential to produce new, noncumulative evidence which is material to the claim of the applicant that the applicant did not commit, and which raises a reasonable probability that the applicant would not have been convicted of—

(i) the Federal crime of which the applicant was convicted; or

(ii) any other offense that a sentencing authority may have relied upon when it sentenced the applicant with respect to the Federal crime either to death or to an en-

hanced term of imprisonment as a career offender or armed career criminal; and

(E) the identity of the perpetrator was or should have been a significant issue in the case.

(2) LIMITATION.—

(A) IN GENERAL.—The court shall not order DNA testing under paragraph (1) if the Government proves by a preponderance of the evidence that the application for testing was made to interfere with the administration of justice rather than to support a claim described in paragraph (1)(D).

(B) GOVERNMENT'S CLAIM.—The Government's claim under subparagraph (A)—

(i) may be supported by evidence of the defendant's unexplained delay in seeking testing;

(ii) may be supported by evidence that the defendant's attorney presented at trial an affirmative defense that is factually inconsistent with the current application; and

(iii) shall succeed if the defendant testified at trial in support of an affirmative defense that is factually inconsistent with the current application.

(3) TESTING PROCEDURES.—If the court orders DNA testing under paragraph (1), the court shall impose reasonable conditions on such testing designed to protect the integrity of the evidence and the testing process and the reliability of the test results, including a condition that the test results are simultaneously disclosed to defense counsel, prosecuting counsel, and the court of jurisdiction.

(e) COST.—The cost of DNA testing ordered under subsection (c) shall be borne by the Government or the applicant, as the court may order in the interests of justice, except that an applicant shall not be denied testing because of an inability to pay the cost of testing.

(f) COUNSEL.—The court may at any time appoint counsel for an indigent applicant under this section pursuant to section 3006A(a)(2)(B) of title 18.

(g) POST-TESTING PROCEDURES.—

(1) INCONCLUSIVE RESULTS.—If the results of DNA testing conducted under this section are inconclusive, the court may order such further testing as may be appropriate or dismiss the application.

(2) RESULTS UNFAVORABLE TO APPLICANT.—If the results of DNA testing conducting under this section inculpate the applicant, the court shall—

(A) dismiss the application;

(B) assess the applicant for the cost of the testing;

(C) submit applicant's DNA testing results to the Department of Justice for inclusion in the Combined DNA Index System; and

(D) make such further orders as may be appropriate, including an order of contempt.

(3) RESULTS FAVORABLE TO APPLICANT.—If the results of DNA testing conducted under this section are favorable to the applicant, the court shall order a hearing and thereafter make such further orders as may be appropriate under applicable rules

and statutes regarding post-conviction proceedings, notwithstanding any provision of law that would bar such hearing or orders as untimely.

(h) RULES OF CONSTRUCTION.—

(1) OTHER POST-CONVICTION RELIEF UNAFFECTED.—Nothing in this section shall be construed to limit the circumstances under which a person may obtain DNA testing or other post-conviction relief under any other provision of law.

(2) FINALITY RULE UNAFFECTED.—An application under this section shall not be considered a motion under section 2255 for purposes of determining whether it or any other motion is a second or successive motion under section 2255.

(i) DEFINITIONS.—In this section:

(1) APPROPRIATE FEDERAL COURT.—The term "appropriate Federal court" means—

(A) the United States District Court which imposed the sentence from which the applicant seeks relief; or

(B) in relation to a crime under the Uniform Code of Military Justice, the United States District Court having jurisdiction over the place where the court martial was convened that imposed the sentence from which the applicant seeks relief, or the United States District Court for the District of Columbia, if no United States District Court has jurisdiction over the place where the court martial was convened.

(2) FEDERAL CRIME.—The term "Federal crime" includes a crime under the Uniform Code of Military Justice.

§ 2292. Preservation of evidence

(a) IN GENERAL.—Notwithstanding any other provision of law and subject to subsection (b), the Government shall preserve all evidence that was secured in relation to the investigation or prosecution of a Federal crime (as that term is defined in section 2291(i)), and that could be subjected to DNA testing, for not less than the period of time that any person remains subject to incarceration in connection with the investigation or prosecution.

(b) EXCEPTIONS.—The Government may dispose of evidence before the expiration of the period of time described in subsection (a) if—

(1) other than subsection (a), no statute, regulation, court order, or other provision of law requires that the evidence be preserved; and

(2)(A)(i) the Government notifies any person who remains incarcerated in connection with the investigation or prosecution and counsel of record for such person (or, if there is no counsel of record, the public defender for the judicial district in which the conviction for such person was imposed), of the intention of the Government to dispose of the evidence and the provisions of this chapter; and

(ii) the Government affords such person not less than 180 days after such notification to make an application under section 2291(a) for DNA testing of the evidence; or

(B)(i) the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable; and

(ii) the Government takes reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing.

(c) REMEDIES FOR NONCOMPLIANCE.—

(1) GENERAL LIMITATION.—Nothing in this section shall be construed to give rise to a claim for damages against the United States, or any employee of the United States, any court official or officer of the court, or any entity contracting with the United States.

(2) CIVIL PENALTY.—

(A) IN GENERAL.—Notwithstanding paragraph (1), an individual who knowingly violates a provision of this section or a regulation prescribed under this section shall be liable to the United States for a civil penalty in an amount not to exceed $1,000 for the first violation and $5,000 for each subsequent violation, except that the total amount imposed on the individual for all such violations during a calendar year may not exceed $25,000.

(B) PROCEDURES.—The provisions of section 405 of the Controlled Substances Act (21 U.S.C. 844a) (other than subsections (a) through (d) and subsection (j)) shall apply to the imposition of a civil penalty under subparagraph (A) in the same manner as such provisions apply to the imposition of a penalty under section 405.

(C) PRIOR CONVICTION.—A civil penalty may not be assessed under subparagraph (A) with respect to an act if that act previously resulted in a conviction under chapter 73 of title 18.

(3) REGULATIONS.—

(A) IN GENERAL.—The Attorney General shall promulgate regulations to implement and enforce this section.

(B) CONTENTS.—The regulations shall include the following:

(i) Disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who knowingly or repeatedly violate a provision of this section.

(ii) An administrative procedure through which parties can file formal complaints with the Department of Justice alleging violations of this section.

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CHAPTER 165—UNITED STATES COURT OF FEDERAL CLAIMS PROCEDURE

Sec.
2501. Time for filing suit.

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2513. Unjust conviction and imprisonment.

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§ 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title must allege and prove that:

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(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of [$5,000] *$10,000 for each 12-month period of incarceration.*

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TITLE 42—THE PUBLIC HEALTH AND WELFARE

Chapter	Section
1. The Public Health Service [See Chapter 6A]	1
* * * * * * *	
46. Justice System Improvement	3701
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CHAPTER 46—JUSTICE SYSTEM IMPROVEMENT

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SUBCHAPTER I—OFFICE OF JUSTICE PROGRAMS

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SUBCHAPTER V—BUREAU OF JUSTICE ASSISTANCE GRANT PROGRAMS

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PART A—DRUG CONTROL AND SYSTEM IMPROVEMENT GRANT PROGRAM

§ 3751. Description of drug control and system improvement grant program

(a) PURPOSE OF PROGRAM.—It is the purpose * * *

(b) GRANTS TO STATES AND UNITS OF LOCAL GOVERNMENT; PURPOSE OF GRANTS.—The Director of the Bureau of Justice Assistance (hereafter in this subchapter referred to as the "Director") is authorized to make grants to States, for the use by States and units of local government in the States, for the purpose of enforcing State and local laws that establish offenses similar to offenses established in the Controlled Substances Act (21 U.S.C. 801 et seq.) and to improve the functioning of the criminal justice system with emphasis on violent crime and serious offenders. Such grants shall provide additional personnel, equipment, training, technical assistance, and information systems for the more widespread apprehension, prosecution, adjudication, and detention and rehabilitation of persons who violate these laws, and to assist the victims of such crimes (other than compensation), including—

(1) demand reduction education programs in which law enforcement officers participate;

* * * * * * *

(26) to develop and implement antiterrorism training programs and to procure equipment for use by local law enforcement authorities;

(27) enforcing child abuse and neglect laws, including laws protecting against child sexual abuse, and promoting programs designed to prevent child abuse and neglect; **[**and**]**

(28) establishing or supporting cooperative programs between law enforcement and media organizations, to collect, record, retain, and disseminate information useful in the identification and apprehension of suspected criminal offenders**[**.**]***;*

[(27)**]** *(29)* improving the quality, timeliness, and credibility of forensic science services for criminal justice purpose**[**.**]** *; and*

(30) prosecutor-initiated programs to conduct a systematic review of convictions to identify cases in which DNA testing is appropriate and to offer DNA testing to inmates in such cases.

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§ 3756. Allocation and distribution of funds under formula grants

(a) STATES.—Subject to subsection * * *

* * * * * * *

(f) TESTING CERTAIN SEX OFFENDERS FOR HUMAN IMMUNODEFICIENCY VIRUS.—

(1) For any fiscal year beginning more than 2 years after November 29, 1990—

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(3) For purposes of this subsection—

(A) the term "convicted" includes adjudicated under juvenile proceedings; and

(B) the term "sexual act" has the meaning given such term in subparagraph (A) or (B) of section 2245(1) of Title 18.

(g) RULE.—Funding under this section is subject to the special authorization rule set forth at section 201(l) of the Innocence Protection Act of 2002.

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THE STATE JUSTICE INSTITUTE ACT OF 1984

SHORT TITLE

SEC. 201. This title may be cited as the "State Justice Institute Act of 1984".

DEFINITIONS

SEC. 202. As used in this title, the term—

(1) "Board" means the Board of Directors of the Institute;

* * * * * * *

LIMITATIONS ON GRANTS AND CONTRACTS

SEC. 207. (a) With respect to grants made and contracts or cooperative agreements entered into under this title, the Institute shall—

* * * * * * *

(d) To ensure that funds made available under this Act are used to supplement and improve the operation of State courts, rather than to support basic court services, funds shall not be used—

(1) to supplant State or local funds currently supporting a program or activity; or

(2) to construct court facilities or structures, except to remodel existing facilities to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program.

SEC. 207A. GRANTS TO TRAIN DEFENSE COUNSEL.

(a) GRANTS AUTHORIZED.—The Institute may make grants to States and units of local government to conduct training programs to improve the performance and competency of defense counsel representing defendants charged with capital offenses in State and local courts.

(b) ELIGIBILITY.—Grants authorized by this section may only be made for the training of defense counsel in a State that has capital punishment.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $15,000,000 for fiscal years 2003 through 2007 to carry out this section.

SEC. 207B. GRANTS TO TRAIN STATE AND LOCAL JUDGES.

(a) GRANTS AUTHORIZED.—The Institute may make grants to State and local courts to conduct programs to train trial judges in handling capital cases.

(b) ELIGIBILITY.—Grants authorized by this section may only be made to a State or local court in a State that has capital punishment.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $15,000,000 for fiscal years 2003 through 2007 to carry out this section.

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Public Law 105–244

HIGHER EDUCATION AMENDMENTS OF 1998

AN ACT To extend the authorization of programs under the Higher Education Act of 1965, and for other purposes

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TITLE I—GENERAL PROVISIONS

* * * * * * *

TITLE IV—STUDENT ASSISTANCE

PART A—GRANTS TO STUDENTS

* * * * * * *

PART B—FEDERAL FAMILY EDUCATION LOAN PROGRAM

SEC. 411. LIMITATION REPEALED.

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"SEC. 428K. LOAN FORGIVENESS FOR CHILD CARE PROVIDERS.

"(a) PURPOSE.—It is the purpose of this section—

"(1) to bring more highly trained individuals into the early child care profession; and

"(2) to keep more highly trained child care providers in the early child care field for longer periods of time.

"(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $10,000,000 for fiscal year 1999, and such sums as may be necessary for each of the 4 succeeding fiscal years.".

* * * * * * *

"SEC. 428L. LOAN FORGIVENESS FOR PUBLIC ATTORNEYS.

"(a) PURPOSE.—The purpose of this section is to encourage qualified individuals to enter and continue employment as prosecutors and public defenders.

"(b) DEFINITIONS.—In this section:

"(1) PROSECUTOR.—The term 'prosecutor' means a full-time employee of a State or local agency who—

"(A) is continually licensed to practice law; and

"(B) prosecutes criminal cases at the State or local level.

"(2) PUBLIC DEFENDER.—The term 'public defender' means an attorney who—

"(A) is continually licensed to practice law; and

"(B) is a full-time employee of a State or local agency, or of a nonprofit organization operating under a contract with a State or unit of local government, which provides legal representation services to indigent persons charged with criminal offenses.

"(3) STUDENT LOAN.—The term 'student loan' means—

"(A) a loan made, insured, or guaranteed under this part;

"(B) a loan made under part D or E; and

"(C) a health education assistance loan made or insured under part A of title VII of the Public Health Service Act (42 U.S.C. 292 et seq.) or under part E of title VIII of such Act (42 U.S.C. 297a et seq.).

"(c) PROGRAM AUTHORIZED.—For the purpose of encouraging qualified individuals to enter and continue employment as prosecutors and public defenders, the Secretary shall carry out a program, through the holder of a loan, of assuming the obligation to repay (by direct payments on behalf of a borrower) a qualified loan amount for a loan made under section 428 or 428H, in accordance with subsection (d), for any borrower who—

"(1) is employed as a prosecutor or public defender; and

"(2) is not in default on a loan for which the borrower seeks forgiveness.

"(d) TERMS OF AGREEMENT.—

"(1) IN GENERAL.—To be eligible to receive repayment benefits under this section, a borrower shall enter into a written agreement that specifies that—

"(A) the borrower will remain employed as a prosecutor or public defender for a required period of service specified in the agreement (but not less than 3 years), unless involuntarily separated from that employment;

"(B) if the borrower is involuntarily separated from that employment on account of misconduct, or voluntarily separates from that employment, before the end of the period specified in the agreement, the borrower will repay the Secretary the amount of any benefits received by such employee under this section;

"(C) if the borrower is required to repay an amount to the Secretary under subparagraph (B) and fails to repay the amount described in subparagraph (B), a sum equal to the amount is recoverable by the Government from the employee (or such employee's estate, if applicable) by such method as is provided by law for the recovery of amounts owing to the Government;

"(D) the Secretary may waive, in whole or in part, a right of recovery under this subsection if it is shown that recovery would be against equity and good conscience or against the public interest; and

"(E) the Secretary shall make student loan payments under this section for the period of the agreement, subject to the availability of appropriations.

"(2) REPAYMENTS.—Any amount repaid by, or recovered from, an individual (or an estate) under this subsection shall be credited to the appropriation account from which the amount involved was originally paid. Any amount so credited shall be merged with other sums in such account and shall be available for the same purposes and period, and subject to the same limitations (if any), as the sums with which the amount was merged.

"(3) LIMITATIONS.—

"(A) STUDENT LOAN PAYMENT AMOUNT.—Student loan payments made by the Secretary under this section shall be made subject to such terms, limitations, or conditions as may be mutually agreed to by the borrower concerned and the Secretary in the agreement described in this subsection, except that the amount paid by the Secretary under this section may not exceed—

"(i) $6,000 for any borrower in any calendar year; or

"(ii) a total of $40,000 in the case of any borrower.

"(B) BEGINNING OF PAYMENTS.—Nothing in this section shall be construed to authorize the Secretary to pay any amount to reimburse a borrower for any repayments made by such borrower prior to the date on which the Secretary entered into an agreement with the employee under this subsection.

"(e) ADDITIONAL AGREEMENTS.—On completion of the required period of service under such an agreement, the borrower concerned and the Secretary may enter into an additional agreement described in subsection (d) for a successive period of service specified in the agreement (which may be less than 3 years).

"(f) AWARD BASIS; PRIORITY.—

"(1) AWARD BASIS.—The Secretary shall provide repayment benefits under this section on a first-come, first-served basis (subject to paragraph (2)) and subject to the availability of appropriations.

"(2) PRIORITY.—The Secretary shall give priority in providing repayment benefits under this section for a fiscal year to a borrower who—

"(A) received repayment benefits under this section for the preceding fiscal year; and

"(B) has completed less than 3 years of the first required period of service specified for the borrower in an agreement entered into under subsection (d).

"(g) REGULATIONS.—The Secretary is authorized to issue such regulations as may be necessary to carry out the provisions of this section.

"(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section for each fiscal year.".

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