S. HRG. 103-468

INNOCENCE AND THE DEATH PENALTY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 221

A BILL TO ALLOW A PRISONER UNDER SENTENCE OF DEATH TO OBTAIN JUDICIAL REVIEW OF NEWLY DISCOVERED EVIDENCE SHOWING THAT HE IS PROBABLY INNOCENT

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INNOCENCE AND THE DEATH PENALTY

THURSDAY, APRIL 1, 1993

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

The committee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum, presiding.

Also present: Senators Biden, Kennedy, Heflin, Simon, Feinstein, Moseley-Braun, Hatch, Grassley, Specter, Brown, and Pressler.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. The hearing will come to order. Good morning. This morning, the Senate Judiciary Committee holds a hearing on innocence and the death penalty.

Nearly 5 years ago, Walter McMillian was convicted of murdering a convenience store clerk. He had no previous criminal record, except for one misdemeanor charge. His trial lasted only 1½ days. The jury recommended that he be given a life sentence, but the State judge that presided over the case, who was an elected official, overruled the jury and ordered Mr. McMillian to be sentenced to death.

One month ago, Walter McMillian walked away from prison a free man. He had spent nearly 5 years on death row. He had pursued four unsuccessful appeals, but on the fifth appeal Mr. McMillian showed that he had ended up on death row because of a combination of perjured testimony and prosecutorial misconduct. Walter McMillian is here with us today to tell his story. He is the latest, but not the only instance in which an innocent man has been wrongly sentenced to death.

Today, we also will hear from Randall Dale Adams, who in 1979 came within 1 week of being executed. He was spared because the U.S. Supreme Court by a vote of 8 to 1 ruled that the jury that convicted him was unconstitutionally selected, a ground that many people refer to as a legal technicality. Ten years after his near execution, Adams' conviction was unanimously overturned by the Texas Court of Criminal Appeals. Adams, too, had been the victim of perjured testimony and prosecutorial misconduct.

The issue of capital punishment provokes strong feelings on both sides. A substantial majority of Americans and a substantial majority of Congress support the death penalty as a means of dealing with violent crime. While I share the view that we need effective

ways to reduce violent crime, I have opposed recent efforts to expand capital punishment.

My principal reason for opposing the death penalty is my concern that an innocent person might be sentenced to death, as has happened on too many occasions in the past. I am not here to say that scores of the 2,000 people who are on death row are innocent, but if there are only half a dozen, or even one, that is one too many. When the Government punishes an individual with death, there is no margin for error.

Walter McMillian and Randall Dale Adams are living proof that the criminal justice system makes mistakes. There are others as well. It has been estimated that since 1980, at least a dozen people wrongly convicted of murder have been released from death row. The authors of the book "In Spite of Innocence" found that in this century over 400 people have been wrongly convicted of capital or potentially capital crimes.

I believe that most Americans and most members of this body would be horrified at the prospect of executing someone who is innocent. Being concerned about executing an innocent person is not the same as being soft on crime. Instead, it is a matter of ensuring the fairness, integrity and reliability of our criminal justice system at the moment at which it inflicts the ultimate penalty.

The Government, as we all know, frequently makes mistakes. If we are going to rely upon and perhaps even expand the death penalty, we need to confront the fact that the criminal justice system makes mistakes and that innocent people like Walter McMillian and Randall Dale Adams can be made to pay with their lives.

But when we discuss the death penalty here in Congress, most of us act as though wrongful convictions just never happen. We seem almost completely preoccupied with the question of how to speed up the process of capital punishment, and we seem hardly concerned with the possibility that in our haste to carry out executions we might mistakenly sentence someone to death.

Unfortunately, that lack of concern seems to be matched, if not exceeded, by the Supreme Court of the United States. Justice Blackmun has written that the Court has displayed an, "obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please." But not even Justice Blackmun could have anticipated the callousness and the Alice-in-Wonderland logic of the Court's decision earlier this year in the case of *Herrera* v. *Collins.*

In *Herrera,* the Supreme Court ruled that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence. It was appalling to me that the Chief Justice, Justice Rehnquist, in his opinion for the Court was unable to clearly and unequivocally declare that the Constitution forbids the execution of innocent people. Instead, as the National Law Journal put it, his, "opinion puts forth the novel idea that innocence is not a necessary bar to carrying out a death sentence."

The attorney who argued the case for the State of Texas went further. She bluntly asserted that if a death row inmate receives a fair trial, it does not violate the Constitution to execute that inmate even if everyone agrees that he is innocent. When a govern-

ment lawyer can stand before the Supreme Court and argue that knowingly executing an innocent person does not violate the Constitution, then I think we have to ask whether our zeal for capital punishment has begun to blind our sense of justice.

Frankly, I was shocked by the Court's ruling in the *Herrera* case. I couldn't believe that I was hearing what I had learned on the news. That is why I introduced legislation to overturn the decision. If the Court won't grant a hearing to a death row inmate who has newly discovered evidence of innocence, then Congress must authorize that a Federal hearing be conducted in those rare instances.

I do not understand how we can allow an execution to go forward without conducting a formal inquiry into reliable new evidence which casts serious doubt as to whether or not the Government is executing the right person. If we fail to respond to the Court's opinion in *Herrera,* I believe we will make a mockery of the 14th amendment's guarantee that no State shall "deprive any person of life * * * without due process of law."

The Supreme Court, which is supposed to be the ultimate guardian of our liberties, seems bent on weakening safeguards designed to ensure that innocent people are not executed and that capital punishment is administered in accordance with our Constitution. It is likely that once again there will be proposals here in Congress to expand the death penalty and speed up the pace of executions. I recognize that the system by which we administer the death penalty is in need of reform, but as we move down the path of reform I hope that we keep in mind the testimony we will hear today.

There are some who might suggest that Mr. McMillian, Mr. Adams, and the other wrongly convicted persons who have been released from death row are testaments to the success of the system. After all, they were not executed. I do not share that assessment. I believe that these men should serve as a warning signal to those who would like to greatly accelerate the pace of executions or significantly shrink the appeal rights of death row inmates. We should keep in mind that if capital punishment worked as neatly and as speedily as some might wish, we might not be hearing from two of the witnesses who are here today.

I will say to my colleagues that I normally would not make that lengthy an opening statement. I do so because I feel so very strongly about this subject, and I apologize for its length, but not for its substance.

Senator Hatch?

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

Senator HATCH. Thank you, Senator Metzenbaum. We all feel strongly about this subject and it is important. Mr. Chairman, today's hearing, of course, has been organized by opponents of the death penalty, and they have a right to do that. I respect their views even though I disagree with them. My own State of Utah has a death penalty because some crimes are so heinous and so vile as to merit this ultimate sanction.

Last year, Utah executed William Andrews, who had lived on death row for 18 years. He was convicted of three vicious murders

for which nobody doubted his guilt. Throughout his 18 years of litigation, he failed to raise one single meritorious issue. He received more than 30 appeals in State and Federal courts. However, instead of considering legislation to shorten this litigation in Federal courts, this committee today is actually considering a legislative proposal to expand it.

The appropriateness of the death penalty is a matter of public policy which has been debated in Congress and State legislatures for many years. Currently, 36 States, the U.S. military, the Congress, and a clear majority of the American people have expressed their support for capital punishment. The Supreme Court has upheld its constitutionality.

All of this creates a tremendous dilemma for death penalty opponents. They have failed to abolish it through direct means. Thus, opponents of the death penalty are bent on imposing insuperable procedural barriers on the implementation of the death penalty or making the litigation of death penalty cases so protracted and so costly for the States that capital punishment will be eliminated as a practical matter.

Senate bill 221 is yet another effort to bar, for all intents and purposes, the implementation of justly imposed sentences that society has demanded for its most horrible offenses, and we cannot overlook the impact of inordinate delays in the implementation of justly imposed death penalties on the families of victims of such terrible crimes. We have such a family member here today as one of our witnesses on the second panel.

The subject of this hearing is innocence and the death penalty. Now, I want to be abundantly clear that I do not condone in any way the execution of an innocent person, and I don't know anybody who does. Nor would I defend a system that does not provide appropriate safeguards against such an execution, safeguards aimed at freeing the innocent, not ending the death penalty for the guilty.

The apparent catalyst for this hearing was, as Senator Metzenbaum has so stated, the Supreme Court's recent decision in the case of *Herrera* v. *Collins*. I want to remind my colleagues that the evidence in the *Herrera* case was absolutely overwhelming. Mr. Herrera is not an innocent man under the law. He was found guilty beyond a reasonable doubt by a jury of his peers and he was convicted of murdering a Texas police officer. He even pled guilty to the murder of a second police officer.

An underlying issue before the Court in *Herrera* was whether the current capital sentencing schemes of the States have a sufficient array of safeguards to prevent the execution of an innocent person. The Court correctly recognized that they do. In fact, two of the witnesses the committee will hear today are living testaments to this fact. Nevertheless, the Court in *Herrera* did leave open the door for consideration of future cases where the evidence of innocence is great and the State fails to provide a process for considering such claims after a person has been convicted.

In fact, in the actual decision written by Justice Rehnquist, who has been excoriated by my colleague, he said:

> We may assume for the sake of argument in deciding this case that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional and warrant Federal habeas

relief if there were no State avenue open to process such a claim. Senate bill 221, in contrast, will, as a practical matter, abolish the administration of the death penalty in every State.

So I look forward to today's testimony, and I note that Paul Cassell, a law professor at the University of Utah College of Law, will be testifying before the committee and he also will, I think, cite some of the statistics and facts and cover some of the material that Senator Metzenbaum has covered in his opening remarks. I want to extend a special welcome to him, and I would like to extend a special welcome to all of the other witnesses who have come a long distance to be here with us today and to testify in accordance with their beliefs, and I think this hearing ought to be a very interesting one today.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Hatch.

Senator Kennedy?

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. I can't let the comment of my friend and colleague from Utah pass about if this legislation passes, it abolishes the death penalty. It does no such thing.

I oppose capital punishment for several reasons. It is immoral for the Government to put a human being to death, and the infliction of death at the hands of government brutalizes our society. Moreover, there is no convincing evidence that the death penalty really deters crime. Our long experience with capital punishment demonstrates that it is inevitably applied in an arbitrary and discriminatory manner.

It is interesting, Mr. Chairman, that the 1988 crime bill expanded the death penalty in terms of drug kingpin convicts. The Justice Department has approved the death penalty in 23 different cases; 21 of those cases are minority individuals.

The most frightening aspect of the death penalty is the likelihood that innocent people will be executed. No system of justice, however wise its judges and juries may be, can eliminate this possibility. We accept the risk of mistake when the punishment is imprisonment because jailed defendants can be set free if they are found to be innocent, but the death penalty cannot be revoked.

If there is to be a death penalty, it must be subject to scrupulous postconviction review, but the trend of recent years in the courts and in Congress is to limit review. There is little doubt that habeas corpus reform will again be the subject of debate in this Congress. In my view, any habeas corpus legislation must address three fundamental issues.

First, we must ensure that capital defendants receive adequate legal representation at trial. About 40 percent of all death sentences are overturned after habeas corpus review. A major reason for that is ineffective assistance of counsel. The difficulty that we have in convincing our colleagues in the Senate of the United States to just ensure that any individual is going to have competent counsel is something which I fail to be able to understand.

Second, the reform must retain a meaningful opportunity for death row inmates to litigate all constitutional claims in Federal court. The Federal courts have historically served as the bulwark of constitutional protections and they must remain so. So if constitutional issues are raised, those ought to be addressed in the Federal court.

Third, there must always be a Federal forum for death row inmates to raise claims of innocence based on newly discovered evidence. Senator Metzenbaum's bill would protect that right and I am proud to be a cosponsor of it.

If we can agree, Mr. Chairman, that we must not execute the innocent, there must be a genuine opportunity to raise newly discovered evidence of innocence. States that close the door to newly discovered evidence after 60 or 90 days—60 or 90 days—then the door is closed, no matter how convincing new evidence in terms of the innocence of that defendant might be. But if it goes beyond that time in many States, it is just closed.

Executive clemency is not a sufficient answer. Constitutional rights can't rest on the exercise of completely unreviewable discretion. The bottom line is we must bend over backwards to prevent irreversible miscarriages of justice. This legislation, I think, is an extremely important piece of legislation to move us in that direction and I hope it will be approved.

Senator METZENBAUM. Thank you very much, Senator Kennedy.

The normal procedure this chair uses in conducting a hearing is to go back and forth, one Republican, one Democrat. Since the chairman of the committee is with us this morning, I have asked Senator Brown if he would mind if we heard from Senator Biden first, but before calling upon him I want to tell him I appreciate the fact that he has permitted me to chair this hearing. This is a hearing of the full Judiciary Committee. Senator Biden obviously is the chairman of that committee and he was gracious enough to permit me to go forward chairing this hearing this morning.

The CHAIRMAN. Well, I thank you very much, Mr. Chairman, but I would be happy to wait.

Senator BROWN. No, no.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

The CHAIRMAN. Thank you. Let me say that there is a very simple, straightforward reason why I think it is appropriate that you chair this hearing. I know of no person in the Senate in the 20 years I have been here who has been more consistent and forceful and concerned about what all of us will be discussing today: the injustice in the application of the law and the abuse of power, intentional and unintentional, that often occurs from well-intended initiatives made by those of us in Congress, the executive branch, and the Government, in general. So I quite frankly think it is appropriate that you chair this hearing.

I have a brief statement, Mr. Chairman, and I apologize. As you know, I am leaving for Bosnia tomorrow and I have a briefing with the NSC, and the only time they could brief me is at 11:00.

Today, the Judiciary Committee is going to hear testimony that will remind us of the frailty of our system of justice, a system that

I hope will be made clear again today. As well-intended as it is, our system is not perfect, and it remains a system where the ultimate injustice, the execution of an innocent person, remains a risk. There is no system of justice that has ever been conceived that does not have that risk as part of it—that an innocent woman or man will be imprisoned, or an innocent woman or man will suffer the ultimate punishment, irreversible, that their life will be taken for something that they are not responsible for.

I had occasion, Mr. Chairman, yesterday to meet with one of the truly great persons, in my view, that served in this body on another matter, the former Senator from Iowa, Senator Hughes. The most significant speech I have ever heard on the death penalty was a speech delivered by Senator Hughes when I was a freshman member of the Senate at age 30 in March 1973.

He is a powerful figure, both physically and intellectually, with a voice that, when he speaks, everyone listens. He is, like you, passionately committed to the notion that the death penalty is inappropriate, and he made a speech that I recommend everyone read in 1973. It is as relevant today as it was then.

I remember, after listening to the speech, doing one of the many imprudent things I have done as a Senator. I remember spontaneously rising on the floor and saying, before I could think about it, that I was not as moral a man as the Senator from Iowa, that I did not share his view that there were no circumstances under which society had a right to take the life of another human being. I thought there were circumstances, but that if the case could ever be made against the death penalty, it was made by the Senator from Iowa in the year 1973.

My opposition and concern to the death penalty under certain circumstances has been my conviction—and I don't want to sound like some of our colleagues who talk about, you know, when I was a prosecutor or when I was a defense attorney. I was one of those folks that you don't brag about on this committee. I was a public defender. I was proud of being a public defender. I was not a prosecutor; I have never been a prosecutor.

I was a public defender and I was assigned capital cases, and I was convinced that there were people who I was defending who were, in fact, innocent. There were clearly people I was defending in capital cases who were guilty, but there were those that I believed were innocent. When you defend someone in a capital case whom you believe to be innocent, if you have any moral grounding at all, the responsibility is awesome because you know if you make a mistake it may mean that person's life.

I think the lesson that hopefully will come out of this hearing is that we cannot take for granted the fairness of our system, and we must not lose sight of the risk and the existence of injustice within our system. Although I differ with my acting chairman on the death penalty, I thought this hearing should be held because it should be clear to everyone that if we are going to have a death penalty, it should be only under circumstances where every conceivable opportunity for an accused person to prove their innocence is made available.

I am quite fearful of the direction of the Supreme Court on habeas corpus. I am also very fearful of the rising tide of sentiment

for the death penalty that seems not to in any way calibrate the circumstances under which it would be made available.

So, for me, I hope this hearing will reinvigorate us to attempt in a tireless way to improve the system, to be vigilant for the weaknesses that exist in the system, and seek a higher degree of protection for those accused. In particular, those of us, like me, who are gravely concerned with the rise in violent crime in America, and who believe the death penalty is an appropriate sanction for the most heinous crimes, must work to ensure that the death penalty is not used to send an innocent woman or man to their death.

An error that sends a person to their death, despite their innocence, has no excuse. It is the very definition of injustice, and unfortunately this injustice still occurs today, as we will hear today. Two witnesses who will testify here today have firsthand experience with the frailties of our system. One of these men was put on death row before he was ever tried for any crime.

Two hundreds years after our Founders reminded us of the abuses of official authority, these witnesses today should remind us that we must never forget for even a single person that an accused is innocent until proven guilty. We actually had witnesses here in the last administration who raised the question of whether or not we are giving too much protection to the accused because we all know basically they are guilty or they wouldn't be arrested in the first instance.

It is important to me to be reminded that the law can be a tool for violence and destruction, arrayed against the innocent, as well as a tool for justice arrayed against the guilty. Throughout my career I have asked myself when this committee has reviewed criminal justice legislation whether the drafters, myself included, considered the possibility than an innocent man or woman may be one day caught within the lines of the law. That has always been the measure of my support for criminal justice legislation.

I have consistently preferred the option of life imprisonment without the possibility of probation or parole for those who are convicted beyond a reasonable doubt and have exhausted all of their appeals of heinous crimes within our society, and opposed mandatory death penalty proposals. I have worked to bar the execution of juveniles and the mentally retarded, which under our law is permissible at this very moment.

I have worked to limit proposals that would extend the death penalty to cases where the punishment is disproportionate to the crime, where there is no murder, where there is no death. Most importantly, I have worked to include procedural safeguards that will protect the innocent by requiring competent counsel at a trial level, by providing appropriate instructions to a jury against racial bias, and by ensuring that the Federal courts are open to hear claims of constitutional violations of a person's rights.

I will not support a death penalty that is drafted with an eye for vengeance rather than mercy, and I will not support attempts, as insistent as they have been in the last 12 years, to cut off wholesale the lifeline of the Constitution in criminal justice cases, the writ of habeas corpus.

I want to thank the witnesses for appearing today. We should all listen carefully, for herein lies the tale of a collective public trag-

edy. Where our system threatens to fail just one person by sending him to death despite his innocence, that threat indicts all of us and all of our efforts as we try to bring about a reasonable criminal justice system, a system that is fair, more just, and stable.

Again, I thank the witnesses. I apologize to my chairman for taking so long, and again I want to compliment him, for he is one person that I know in this Senate who, notwithstanding where public opinion is at the moment, has stood on principle on this issue, and he has been on the unpopular side of this issue in the last 10 years. I admire him for it.

I still think the death penalty in limited cases is appropriate. I still will support it, assuming the safeguards are there, but I will not support it if the crime bill that we have ends up with changes in instructions to judges not allowing for mitigating circumstances, or if habeas corpus is changed the way it has been suggested to be changed.

But notwithstanding my differences with the Senator, I want to say publicly, he has my admiration and, as I said, it is appropriate that he should be chairing this hearing.

Senator METZENBAUM. Thank you very much, Senator Biden. I really appreciate your comments, your participation, and your leadership of this committee.

Senator Brown?

OPENING STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BROWN. Thank you, Mr. Chairman. The death penalty, of course, has divided all of us for many, many years, and perhaps will continue to do so. I do think it is appropriate that we have these hearings and review this issue. I find myself a bit concerned, though, about our process, and I say this without meaning to hurl stones at anyone, but simply to comment on the way the world seems to develop. I would confess there is some disagreement over the way this issue has developed, but let me do a very brief outline of what I think has happened.

Our society has fundamentally disagreed over the value, the appropriateness of the death penalty. I personally think there are areas where it is appropriate, but that does not mean to indicate there aren't many others who hold a contrary view.

I have long thought Colorado's unique way of dealing with the death penalty had some advantages, and when I say unique, Colorado provided for a different standard of proof and different types of proof in cases where the death penalty could be brought. Those were standards that made a special measure of certainty over and above the standard of certainty required for conviction in normal cases. It required a special standard of certainty that was a safeguard against innocent people being sentenced to death.

I still continue to think that that approach has merit; that is, dealing with the standard of proof at the site of the conviction to provide additional certainty. But whether you take that view or believe there should be no death penalty at all, or whether you believe in stronger provisions for the death penalty, it seems to me what has happened in our country is that out of this controversy

has grown a feeling and a need to fight the death penalty whenever it is imposed.

That has led to defense counsel, in fulfilling their proper role of seeking every avenue of relief for their client, to seek countless delays in the process. The use of habeas corpus has in some areas been abused. The standards of ethics in the legal profession have changed over the years. You could well think the changes have been good; others may think it has been bad, but it has indeed changed. Our view of the appropriateness of bringing frivolous actions has changed. Our view—and I say our view; I mean our legal system's view of bringing actions that simply delay the process rather than bring what the attorney may feel is a valid legal point, has changed. It is far more tolerable today to do it than it was 20 years ago or 30 years ago, and legal ethics on that question have changed.

In addition, Mr. Chairman, one other thing has happened. We have recognized the need for free counsel for those who are indigent, who do not have the resources to defend themselves. I, for one, think that is appropriate, but it has changed things, also, because what one attorney might do when they are being paid for their time sometimes is different than what an attorney who is paid for by the Government will do.

We would be foolish to overlook that human tendency. I don't say that to hurl stones at anyone, but I think it would be foolish to think about this controversy without recognizing that habeas corpus has been abused in certain cases. Because it has been abused, this Congress has reacted and States have reacted with proposed restrictions on the use of habeas corpus.

Thus, I think the distinguished Senator from Ohio has been drawn to provide an important question for us to consider, and that is protections in the event that new evidence comes forward or there is other evidence of someone's innocence. Thus, we have gotten to this point through a legitimate effort to curtail the abuses of habeas corpus, and the response has been this kind of legislation that seeks to guarantee—once again, safeguard people who are truly innocent.

One option for us is to go back to what caused part of the problem to begin with, and that is not our disagreement over the death penalty. We do have a genuine disagreement over the death penalty and that will continue, but one option is to go back and examine what our legal and ethical standards are for attorneys in bringing suits, and also to examine the kind of habeas corpus actions that the Federal Government funds.

It seems to me a fundamental question here that is just as fundamental as any that have been raised in this chain of events that leads up to this kind of legislation is a question of what kind of responsibility an attorney, with a legal defense fund paid for by the Government, has in bringing the legal action. Must that attorney genuinely believe that the action they bring is accurate, is honest, is appropriate, is needed, or can that attorney justify their actions, paid for by the taxpayers' expense, by the fact that it serves a greater purpose; that is, delaying the execution of a citizen when that attorney believes that the death sentence should not be administered?

It may well be in our examination of this issue we may want to take a look at those factors as well because solving those problems may well be a better way to deal with this than either imposing tough new restrictions on the use of habeas corpus or trying to counter some of the more difficult problems associated with restrictions on the use of habeas corpus.

In any case, Mr. Chairman, I think it is appropriate for this committee to consider this and to deal in-depth with it. I appreciate the opportunity to hear the distinguished witnesses you have brought before us today.

Senator METZENBAUM. Thank you very much, Senator Brown, and we will try to work with you. We appreciate your comments.

Senator Feinstein?

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I want to just thank you for holding this hearing because for me early on in my Senate career this is a very important hearing. I think that the death penalty is probably one of the hardest questions that anyone in public life has to wrestle with, and just in a very brief moment I want to describe how I came to wrestle with it.

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 that time. I read a lot of books that said that 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 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 the 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. Then I watched in California the development of the serial murderer, the drive-by shooters, and saw the disregard with which people were holding the sanctity of life of other people.

I came, in the 1970's, to change my view with a great deal of difficulty to really believe that an individual by their actions can, in fact, abrogate their right to live. It was a very difficult decision for me, and since that time I have seen a lot of other carnage on the streets. I have talked with a lot of victims, and have come to believe that the death penalty plays a role if it is speedily carried out.

Now, I am getting to the point that the speed of the trial and the effectiveness of the sentence are both part of a functioning system of justice, and I have come to believe that our system doesn't

function well to effect any kind of deterrence. Trials are delayed, witnesses disappear, evidence is cold, it is much more difficult to get a conviction today.

Yet, there is always the haunting specter that someone who is innocent is put to death wrongly, and so I am very interested in how we handle this. In California, the people voted well over a decade ago to put back on the books a death penalty which had been delayed, and I know the Deputy Attorney General, Mr. Campbell, is here and will testify in this hearing.

The first person to go to death under the new statute over a decade after it was enacted was able to use the habeas corpus provisions year after year after year for some 12 or 13 years to postpone his sentence. I saw habeas being used in a way it was not meant to be used. So I am most interested to see how we can craft legislation which does provide some habeas, but does not also bend over backwards to allow habeas to be misused by an individual because in so doing I believe it just perpetuates a system that doesn't function to have any deterrent effect whatsoever.

Thank you very much.

Senator METZENBAUM. Thank you very much for a very moving statement, Senator Feinstein. Since Senator Brown and Senator Feinstein have both mentioned habeas in their comments, I just want to emphasize the fact that this bill does not relate to the habeas issue, which is certainly a controversial issue before the Senate.

Senator Moseley-Braun?

OPENING STATEMENT OF HON. CAROL MOSELEY-BRAUN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman. Having grappled with this issue for a number of years and having been active with regard to the debate on the death penalty as a State legislator, I have sat in more than one hearing over time in which the debate would rage back and forth over whether you were for or against the death penalty, and frankly I have come to the conclusion that you have well-meaning people on both sides of the issue who believe passionately in their point of view.

That, frankly, Mr. Chairman, is one of the reasons why this issue is such a difficult one, precisely because on the philosophy of the matter, on the principles of the matter of the death penalty, there are such strongly held views and rationally held views, frankly, from individual points of view. So that clash of ideas, I don't think we will ever resolve.

I have come down on the point of being in opposition to the death penalty over the years precisely because I have my own philosophy that I don't believe that it is appropriate for the State to act in that way. However, I recognize again Senator Feinstein's eloquent statement that there are many people who feel otherwise.

The problem for me and my view is that, on the one hand, if you talk about the death penalty, that is something that is impersonal, that is something that goes to crime and the big picture and the way the system operates. On the other hand, if you talk about death, that is a very personal matter, and I think that, if anything, the reason this hearing is so important is that it gives us an oppor-

tunity to view the process, to view the operations of the system from the personal perspective of an individual who frankly has almost been murdered, because certainly any time an innocent person is put to death that fits our definition of murder.

So by turning the microscope around, we get another view of whether or not the system is operating, and I think that this perspective will allow us to fine-tune the process that has been crafted by well-meaning people, to respond to the horror that Senator Feinstein and others have referred to, and no doubt will refer to. So by turning it around I think we get another perspective on the system, we get another view of it that will allow us to fine-tune our laws and to craft a system so that these kinds of travesties of justice don't occur.

If anything, our system of justice is based on the rights of the individual and a notion that there is some fairness inherent in it, but we all know all too often that there are instances of either circumstance, prosecutorial misconduct, defense incompetence. There are situations that occur that will give rise to cases such as we are going to hear today.

I would urge everyone to listen closely because by listening closely we can take an instructive lesson in how to make certain that our laws guard against this sort of individual persecution, this sort of travesty, and in that way, whether you are for the death penalty or against the death penalty, we can all, I think, feel that we have done a better job in making certain that our system of addressing these issues more closely complies and comports with our notions of fundamental justice in this system of laws.

So I welcome this hearing because it will give us an opportunity to address your legislation as well as other legislative efforts in regard to the issue of habeas corpus and habeas corpus reform so that we can address the clogging of the courts on the one hand, but also the very important matter of protecting innocent lives and protecting people from miscarriages of justice.

Thank you.

[The prepared statement of Senator Moseley-Braun follows:]

PREPARED STATEMENT OF SENATOR CAROL MOSELEY-BRAUN

The most bitterly debated and emotional subjects of our times: the death penalty. Many of the members of this committee support the death penalty; others, like you and I, oppose it. But I am quite sure that the one thing that all of us would agree on 15 that the execution of an innocent person is an intolerable event, one that flies in the face of the most deeply held notions of American justice.

Today, more than 2,400 Americans sit on death row, awaiting the ultimate punishment. As many jurists and legal observers have noted, "death is different" because of its finality. Accordingly, we have always treated death penalty cases somewhat differently. Have attempted to build multiple, and sometimes overlapping, safeguards into the judicial system so that every possible step is taken to avoid the execution of an innocent man or woman.

Yet as the stories of Mr. McMillian and Mr. Adams demonstrate, the system is an imperfect one at best. Yes, these two innocent men were eventually saved from the electric chair. But not every death row inmate who has been the victim of perjured testimony, or prosecutorial misconduct, or racism in a small southern town benefits from the attentions of a documentary filmmaker or "60 minutes." Not everyone is afforded his or her day in the court of public opinion. That is why we must insure that no American who faces the ultimate penalty is denied his or her day in the court of last resort—the availability of Federal habeas corpus relief.

The Supreme Court's recent holding in the *Herrera* case, that a death row inmate's claim of actual innocence does not entitle him to habeas relief, is deeply trou-

bling in an era when Congress and State legislatures are rushing to make more and more crimes punishable by death yet simultaneously curtailing the right to appeal at both the State and Federal levels.

One of the witnesses today has submitted written testimony to the committee that the risk of executing an innocent person is, and I quote, "too small to be a significant factor in the debate over the death penalty." I could not disagree more. I wonder if the families of Mr. McMillian and Mr. Adams believe that the risk that their loved ones almost died in the electric chair is an insignificant factor in this debate?

I would urge the committee to listen closely to the stories of Mr. Adams and Mr. McMillian. I would urge all of us to remember the words of Charles Dickens, who described the death penalty as "an irrevocable punishment [administered by] men of fallible judgment."

When human judgment becomes infallible, our system will be infallible. Until then, those who would strip the system of vital safeguards lead us ever closer to the day when we in the name of the State we will execute an innocent man. And that, in the words of justice Brennan's dissent in the *Herrera* case, "comes perilously close to simple murder."

Senator METZENBAUM. Thank you very much, Senator Moseley-Braun. Senator Simon, I apologize to you, but if I am going to go back and forth—are you under pressure of time?

Senator SIMON. You go right ahead with Senator Pressler and I will speak after him.

Senator METZENBAUM. Thank you very much. I just didn't want to be accused by Senator Hatch of recognizing too many on this side and not being fair and balancing.

Senator Pressler?

Senator PRESSLER. Mr. Chairman, I have a brief statement for the record and I look forward to hearing the witnesses, so I yield my time.

[The prepared statement of Senator Pressler follows:]

PREPARED STATEMENT OF SENATOR LARRY PRESSLER

Thank you, Mr. Chairman. We are here today to listen to testimony of proponents and opponents of S. 221. This bill would permit death row prisoners sentenced by State or Federal courts to petition Federal District Court to stay their executions upon presenting sworn affidavits or documentary evidence that either could not have been discovered in time for trial or, if proven, would establish that the prisoner is "probably innocent." The legislation would provide death row prisoners yet another means to delay the imposition of the ultimate sentence. Its provisions would be in addition to petitions for writs of habeas corpus which death row prisoners routinely use at present to avoid the death penalty.

I believe capital punishment has an important role to play in fighting crime and is an effective deterrent for particularly heinous, premeditated killings. Some claim that "all the studies" show that the death penalty has "no deterrent effect." I believe that is false, and I hope some of the panel members will be able to cite some studies which prove the deterrent value of capital punishment.

During the last session of Congress, I supported legislative efforts to amend the Federal criminal code to restore the death penalty for a variety of Federal capital offenses. In the current session of Congress, I have joined with many of my colleagues on this committee in cosponsoring S. 8, the Crime Control Act of 1993. Provisions of this bill also would provide for the imposition of the death penalty for various offenses and facilitate carrying out the sentence of death. I strongly support its provisions for habeas corpus reform. If adopted, they would prevent death row prisoners from abusing this extraordinary writ to endlessly postpone imposition of sentence. We must not hesitate to be tough on criminal offenders.

According to my reading of S. 221, obtaining a stay of execution would be extremely easy—even a sympathetic cellmate could swear to facts purporting to establish innocence. The courts would have to review the case, delaying imposition of the death penalty for months or more. Prisoners could refile another application for a stay as soon as a previous one had run its course. The death penalty would likely never be carried out.

I am anxious to hear today the testimony of these two distinguished panels of witnesses. I thank them for being here today to help us better understand the impact this bill may have on the criminal justice system.

Senator METZENBAUM. Thank you very much, Senator Pressler. You may get a medal for that. [Laughter.]

Senator Simon?

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. I am glad I yielded to you, Senator Pressler. [Laughter.]

Mr. Chairman, I think this really gets not only to the question of capital punishment, but the whole crime area. We have to be tough on crime, but we also have to be smart on crime. We tend to be the former, not the latter, and if I can move away from capital punishment just for a moment, we have more people in prisons than any other country on the face of the Earth. We have more per 1,000 population than any other country that records; we have 455 per 100,000 population. South Africa is a distant second with 311; Canada has 109.

I think I heard Senator Hatch, and I may be misquoting him, say that he is rethinking the mandatory sentences that we impose. I frankly am moving in that direction. I think we have made some mistakes and not discouraged crime as we should be.

I think Senator Feinstein hit the nail on the head when she talked about the speed of the trial. I think the evidence is overwhelming that it is the swiftness and the sureness of the punishment that deters crime, not the severity of it.

Then you get to the area of capital punishment; two factors, I think, have to be weighed. One is looking at what other countries do. Mexico doesn't have capital punishment, Canada doesn't have capital punishment, Western Europe doesn't have capital punishment. In fact, up until recently, except for some of the Third World nations, the only major nations to have capital punishment are China, the Soviet Union, South Africa, and the United States. South Africa has suspended capital punishment. I don't know what is happening in what was the Soviet Union and Russia today, but if you exclude Russia, it is China and the United States. We are the only nations that retain the death penalty other than Third World nations, and that ought to cause us to reflect a little bit.

Then there is a final and, to me, a clinching argument—that capital punishment is reserved for those of limited means. If you have enough money to hire the best attorneys, you don't get capital punishment, period. That is a reality in our society today. While that is also sometimes true of bank robbery or other things, the ultimate penalty of death should not be an economic penalty.

So, Mr. Chairman, I thank you for holding this hearing. I think this is an area where I know public opinion is strongly on the side of capital punishment. But I think this in area where we have to part with public opinion.

Senator METZENBAUM. Thank you very much, Senator Simon.

The Chair notes that normally opening statements don't take nearly this long. Normally, not this many members show up at committee hearings of this kind, but this is a very deeply felt issue.

I felt that to limit members of the committee to 2 minutes or 3 minutes or 5 minutes for their opening statements would have been inappropriate, so I apologize to those of you who are present, but I felt that in view of the nature of the hearing that I would not limit anyone in their statements.

I now call to the witness stand Mr. Walter McMillian; Mr. Bryan Stevenson, executive director of the Alabama Capital Representation Resource Center; Mr. Randall Dale Adams; Mr. Talbot "Sandy" D'Alemberte; and Elaine Jones. Mr. D'Alemberte is the past president of the American Bar Association, and Elaine Jones is of the NAACP Legal Defense Fund.

I am going to ask each of you to stand, please, because I am going to swear in the witnesses this morning. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. MCMILLIAN. I do.

Mr. STEVENSON. I do.

Mr. ADAMS. I do.

Mr. D'ALEMBERTE. I do.

Ms. JONES. I do.

Senator METZENBAUM. Thank you very much. The committee has asked the witnesses to hold their remarks to 5 minutes. In the case of Mr. McMillian and Mr. Adams, both of whom were the individuals who were on death row, we will make a little leeway on that, not too much.

Mr. McMillian, would you please proceed?

PANEL CONSISTING OF WALTER McMILLIAN, MONROEVILLE, AL; BRYAN A. STEVENSON, EXECUTIVE DIRECTOR, ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, MONTGOMERY, AL; RANDALL DALE ADAMS, GROVE CITY, OH; TALBOT D'ALEMBERTE, STEEL, HECTOR & DAVIS, MIAMI, FL; AND ELAINE R. JONES, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATION FUND, NEW YORK, NY

STATEMENT OF WALTER McMILLIAN

Mr. MCMILLIAN. Good morning.

Senator METZENBAUM. Would you bring the mike closer to you, please?

Mr. MCMILLIAN. Good morning, everyone. My name is Walter McMillian, born and raised in the small town of Monroeville, AL. I always was a hard-working man. I started off at an early age, about 11 years old, working on the farm with my mother. Later on, at the age of about 17, I started to work different jobs. At about the age of 20, I got married. Me and my wife had three beautiful children.

A little later on, I started working for myself, self-employed, pulp wood, and I continued to work pulp wood off and on for different ones and myself. Then I started working in Louisiana on a job, coming home on a season job like, and then I would come home like that.

Then I decided I would improve my pulp wood business and make it a little bigger and continue on pulp wood, so that was in 1982, I believe it was—1982, 1982. Then I started working, doing

real good at home. I had a good living going. So one Saturday morning, I believe, in 1986 there was a young girl killed in Monroeville at a cleaners. Earlier that same day my sister had called me and asked me about having a fish fry that morning at my house, she called my wife. When she called, me and my wife was—we was in the bed, and so my sister called and asked could she have a fish fry that morning at my house for the church. I said yes. I said, you don't have to ask about coming; you come on when you get ready. And she said, I wanted to call to be sure you were there, you know, so you could help us, you know, and I said, well, we are going to be here working on my truck, so you come on when you get ready.

And so shortly, the guy he was going to help me work on the truck, he came up shortly after my sister had called and we were ready to get started, which was somewhere around about 7:00, something like that, I imagine. And so I told him, I said, well, you know where everything is at, you go ahead and get started, I will help you in a minute. So, shortly, he went on out.

And so I had to go down the street there to get a pot. You all probably might know what I am talking about, but we was going to make some hogshead salad, what you call hogshead salad, the old-time way. And mother-in-law was going to make it for me, so she said if I get this pot, she would make it for me. So I went down there to borrow a pot from a friend of mine before we got started working on the truck. But I went in a labor truck of mine; I didn't go in the truck that we were working on.

Later a man came by. His name was Ernest Welch and he was looking for the guy that was working on my truck, and he told this guy, he said, my niece just got killed Jackson Cleaners in Monroeville. And so we sat there and talked about it a few minutes. Everybody come in, everybody talked about it, and went on.

So, well, time passed on by. Six months later, I am driving down the road one Sunday morning. The police, the sheriff, everything in town, I reckon, just blocked the road and stopped me right in the middle of the road, all kinds of guns, all kinds of pistols and everything on me. And I tried to ask what was wrong, what had I done, what was wrong. So the sheriff told me to shut up, don't ask no questions, turn around and put your hands in the air. And I am trying to find out what was wrong, what had I done, and he come out and said you charged for sodomy. I said sodomy what? I said what is that? And then kept on, shut up, nigger, don't say that word, I will blow your brains out. Don't say nothing, stuff like that, you know. And I said, why have you done me like this for, then? What is going on?

And eventually he took me and put me in a State trooper car and told me, he said, from now on, I tell you to shut up, you better shut up or I will blow your brains out. Don't talk when I tell you not to talk no more. I said, well—I sat there and then they went on back searching my truck and my truck was sitting right in the middle of the road, I mean off the highway right in the middle of the road.

So then they decided to take me to jail and then he asked me, he said—then I told him, I said, I want you take my truck to the top of the hill, leave it on the top of the hill, take my truck to my

house. So he said, we are going to take it to town and search it and see what is in there. He said, you got something in there illegal.

So we get to town, he locked me up, and the next evening they come back there and told me, they said they wanted to talk with me. They had me come to the front up there and he told me, he said—he asked me did I want to talk. I said talk about what? I ain't got nothing to talk about. And he said, well, we got you charged. He said, you are charged now with capital murder. I said, capital murder? I said, who? And he said this girl that was killed in the cleaners out there back in 1986, that Saturday morning. I said, man, I don't know nothing about that girl being killed. And he said, yes, he said, we got you charged for it, we are charging you for it. I said, man, I don't know nothing about that girl.

And then I went to thinking and I said, no, not me, you got the wrong man. I said, I had nothing to do with that, and they said, well, you are charged for it, and then they came back there and locked me up. The next thing, they done took me around to three or four different jails there and then the next thing I know, they carried me down to Holman Prison and put me on death row. I ain't had no trial, no nothing.

It was a year later before we went to court. They had this witness up there, Ralph Myers telling all kind of stories saying that I let him—I went and picked him up and brought him back, told him to drive. My arm was hurting and all this kind of crap, and ain't nothing I can do but sit there and listen to them lie on me. It is just a shame. It is a shame for a man to be treated like this, and I wish everybody would take notes behind it because just like the way they treated me, anybody could be treated the same way.

I thank you to be able to give this testimony.

Senator METZENBAUM. Are you finished, Mr. McMillian?

Mr. MCMILLIAN. Yes.

[The prepared statement of Mr. McMillian follows:]

PREPARED STATEMENT OF WALTER MCMILLIAN

My name is Walter McMillian. I was sentenced to die in the electric chair and spent nearly six years on Death Row in Alabama awaiting execution for a murder that I did not commit, a murder that I knew nothing about, a murder that I had nothing to do with. Today, the State of Alabama has acknowledged that I am an innocent man and that I was wrongfully convicted. What happened to me could have happened to you, or to anyone else. I was convicted and sentenced to death on the false testimony of one man. I am here today to urge you to do all that is in your power to prevent what happened to me from happening to anyone else.

I am now 51 years old. When I was arrested, back in June 1987, I had my own pulp-wood business. Pulp-wood is big in Monroe County, Alabama, in fact it may be the leading industry in the region, and what it involves is cutting down the pine trees and getting the wood to the paper mills. I had worked hard all my life. I had dropped out of school when I was a young boy and started working for my mother when I was only ten years old, plowing fields. As a young man, I had worked for a logging company, running a saw. In the early 1960's, when I was about twenty, I started my own pulp-wood business—by agreement, I would chop your pine trees down, cut them up and haul them to a wood yard, so that they could be shipped to paper mills. Gradually, I came to own a couple of pulp-wood trucks, power-saws, and a tractor. Along with my crew of three to four men, we would cut any man's pine, regardless of the terrain.

I also raised three beautiful children—Jackie, Johnny, and James—with my wife, Mini. Jackie now lives up in Huntsville, and works for the State of Alabama. My two sons are still in Monroeville, and one of my sons, Johnny, has three beautiful children of his own. My uncles and aunts, my sisters and nephews and nieces, and

of course my grandchildren, all lived near my family in Monroeville and shared with us many wonderful moments of celebration and happiness. We had a big family and many friends and lived our lives in a close community.

That's what we were doing on the morning of November 1, 1986—the morning that a young white lady, that I did not know, was tragically murdered at the Jackson Cleaners in Monroeville. At the time she was murdered, I was helping out at a fish-fry that my sister, Evelyne Smith, had organized to raise money for her Church. A fish-fry is where you all get together and fry fish and sell the fish to raise money for your Church. My sister Evelyne was the minister of her Church. This fish-fry was taking place in my back yard, behind my house, which is several miles outside of Monroeville in a rural area near Repton, Alabama. That morning, I was also helping my friend, Jimmy Hunter, a mechanic, who was working on my pick-up truck in my back yard. The transmission of my truck had been leaking, so Jimmy and I took the transmission out and we put in a new seal.

I learned about the tragic murder of that young lady, Ronda Morrison, when someone came by my house and told Jimmy Hunter and me that she had been killed earlier that morning in downtown Monroeville. We were all so upset about crime in our community. It was a shock for all of us. Six months went by and I did not hear much about the tragic incident at the Cleaners. I had heard that there was big reward money, something like $15,000, for information leading to the arrest of the person that committed that crime. But that's about all I heard until June 7, 1986, the day I was arrested.

That was a Sunday. It was about 11:00 a.m. in the morning, and I was driving my truck down Route 84, a straight shot to my house, when all of a sudden I was surrounded by the police. There were cars of every type—State Troopers, city cars, the Sheriff and his deputies. They were everywhere, all behind me, on the side, and they stopped me right in the middle of the road. They jumped out with all kinds of guns, rifles, pistols, shotguns, and shoved me up against my truck. They yelled at me to put my hands over my head, not to ask any questions and not to look back.

This had never happened to me before and it was extremely terrifying. I don't know whether you've ever looked straight into the barrel of a shotgun, a rifle or a pistol, but I can tell you, it is a very frightening experience. Particularly when you are a black man in Southern Alabama. They told me to shut up and not say anything or else they would blow my brains out. I kept on asking "why are you doing me like this, what's going on?" And all they would tell me is that I was charged with sodomy. I asked them what that meant. And someone responded in a loud angry voice—and in vulgar terms—that I had sexually assaulted a man. I didn't even know what sodomy meant, and to this day I cannot understand why they arrested me on that charge. They never told me where, when or how I had committed this crime. It was simply a way to make me seem really evil and dangerous and a way to get my truck. The charge was later dismissed by the court because there was no factual basis.

They put me in a State Trooper car and took me to jail. They took my truck to the station and kept it there. At the station, a jailhouse snitch named Bill Hooks examined my truck and later testified at trial that he had seen my low-rider near the Cleaners on the morning of the crime. A low-rider truck is a pick-up truck that has been altered to ride low to the ground. But I had only had my truck converted to a low-rider five months after the incident at the Cleaners, in May 1987. Because I had my truck converted to a low-rider after this murder, there was no way that anyone could have seen my low-rider truck near the Cleaners on November 1, 1986, the day that young girl was murdered.

Within a couple of weeks, I was transferred to Death Row at Holman Prison in Atmore, Alabama—a State correctional facility. There, on Death Row, I awaited my trial for about one year. No one on Death Row, no one at the prison, no attorney I have ever spoken with—no one has ever heard of a capital defendant being placed on Death Row prior to trial and prior to being sentenced to death in Alabama. The reason is that the confinement on Death Row is the most restrictive confinement in the entire State and is not suited to a person that needs to communicate frequently with his lawyers and prepare for trial. To this day, I do not know why I was placed on Death Row one year before my trial.

Death Row was a terrible experience. With the exception of forty-five minutes per day of exercise time and a few rare hours per week in the day room, my days were spent in my cell—twenty-three hours a day. My cell, a mere five-by-eight foot space, was my only world. Had it not been for the loving visits of my family and grandchildren, I may not have survived the experience. And even with their support, my experience on Death Row was traumatic.

I was wrenched from my family, from my children, from my grandchildren, from my friends, from my work that I loved, and was placed in an isolation cell, the size

of a shoebox, with no sun light, no companionship, and no work for nearly six years. Every minute of every day, I knew I was innocent, my family and friends knew I was innocent, and we all knew I had been wrongfully convicted for a crime that I had nothing to do with.

I have spent many hours—too many hours—trying to figure out why I was chosen to be the victim of this terrible injustice. I had no prior felony convictions and had not had difficulties with the law. I had worked hard all my life and had no debts. I had a family and friends and no one that I would consider my enemy. But I had made one mistake. One big mistake in Monroeville, Alabama. I had been seeing a white woman. And my son, he too had made one, terrible mistake. He had married a white woman.

The woman I had been seeing was named Karen Kelly. She was acquainted with this white man, Ralph Myers, who pled guilty to the brutal murder of another young woman that occurred at about the same time as the Ronda Morrison killing. Ralph Myers was the man that testified falsely against me.

My trial was a two-day nightmare. I don't know if you can understand how painful it is to have to sit quietly and watch, and say nothing, when people you don't know are taking an oath before God, making up lies as fast as they can speak, and accusing you of killing an innocent, 18-year-old girl in the prime of her life. I have a daughter, a beautiful, loving daughter that I cherish. How could I be accused of killing a young woman the same age as my own daughter? How could I have done that? What business would I have had, a black man known by all—black and white—in Monroeville, to walk into the Cleaners in downtown Monroeville, steal money and kill an innocent person? I had my own business, my own trucks, my family and friends, my life. What on Earth would have been my motive to do this?

I couldn't say a word as these people took the witness stand and lied about my whereabouts, and lied about my low-rider truck—that wasn't even a low-rider at the time of the crime—and lied about my doing something I would never do. Never. Something I had no business doing. It was agonizing to hear the lies and to sit there, watching.

But nothing was more painful than when the jury returned with a guilty verdict. We had put on a half-dozen friends and family members that had been to the fish-fry. They had seen me there all morning. They knew I couldn't have done this. They all testified that they had seen me and been with me all morning. But no one believed them. Fine, upstanding members of the black community—they were no match for a white, convicted felon. Ralph Myers, a self-proclaimed murderer, had more credibility to my nearly all-white jury than the upstanding members of our community who had gathered together to raise money for their Church. The verdict was a hurting thing. It was especially traumatic for my family. They had seen me all that morning. They knew I was innocent. The verdict to them meant that they were liars, that they were worthless. If they had not know for sure that I was innocent, then maybe they could have speculated whether I had committed the crime. But there was no speculation for my family and friends. They all knew what the justice system had just done. They understood that we were all being punished.

What followed were another four-and-a-half years on Death Row. While I was on Death Row, I saw seven other prisoners executed. I experienced the executions with the greatest pain and with enormous fear about whether this would happen to me. From my cell you could smell the stench of burning flesh. The smell of someone you know burning to death is the most painful and nauseating experience on this Earth.

What followed were also four-and-a-half years of hope and of prayers. I knew I was innocent and I knew that someday the truth would come out. I knew that some day my innocence would be proved. I had faith in the Lord. I had unwavering faith in the Lord. For nearly six years I prayed that that someday would not come after my execution.

There are many things that concern me as I sit here today. I am excited and happier that I can describe to be free. At times, I feel like flying. However, I am also deeply troubled by the way the criminal system treated me and the difficulty I had in proving my innocence. I am also worried about others. I believe there are other people under sentence of death who like me are not guilty.

When you are poor and under sentence of death you worry about a lot of things. One of the biggest worries is whether you'll get the kind of legal assistance you need to save you from execution. I feel like I was very fortunate, but a lot of others have not been so fortunate and for many Death Row inmates, it takes years to get the kind of legal representation and investigation necessary to prove their innocence. If Federal courts do not permit Death Row prisoners to prove their innocence, even after many years on Death Row, and prevent wrongful executions, the hope of many innocent people on Death Row will be crushed.

It is important that you understand how important hope is to condemned prisoners. I have survived these six long years, but I am a different man. I have suffered pain, agony, loss, and fear in degrees that I had never imagined possible. My life will never be the same now. That is something I have come to terms with. I have learned more knowledge about human existence in these last six years than I would ever have desired. And I would like to share just one thing with you. Justice is forever shattered when we kill an innocent man.

Senator METZENBAUM. Thank you.

Mr. Bryan Stevenson, executive director of the Alabama Capital Representation Resource Center, we are happy to hear from you, sir.

STATEMENT OF BRYAN A. STEVENSON

Mr. STEVENSON. Thank you, Senator Metzenbaum. It is a pleasure for me to be here this morning. I represented Mr. McMillian after he was sentenced to death in 1988. His case does present many disturbing questions and issues for this Senate and anyone who is concerned about justice in this society.

When I first met with him and he told me what he told you this morning, I was quite startled and quite disturbed by what I heard. As we began investigating this case and verified what he had told us, we became just really shocked by what had happened to him. He is absolutely correct when he tells you that he was put on death row for a year before he was ever tried and charged with any offense. I had never represented anyone before who had been sent to death row before trial, before conviction, before any kind of sentence, and waited there for 13 months before a trial.

He was tried in a proceeding that lasted 2 days. The State had no motive that they could articulate to the jury. They had no forensic or physical evidence to link him to this crime. They had simply the word of one man, a codefendant who had a lengthy criminal record, who testified that Mr. McMillian had somehow been involved in this crime.

No doubt that many of you are asking how this could even have happened to someone who was 46 years old like Mr. McMillian, who had raised a family, who had worked hard in that community all his life. The only thing that was ever presented to us by anyone connected with this case was a view that Mr. McMillian had been in a relationship with a young white woman by the name of Karen Kelly bothered many people. It was that fact that was constantly presented to us as the reason why they thought Mr. McMillian might have committed this murder because, in their minds, any black man bold enough to have a relationship with a young white woman was bold enough to commit the kind of crime that took place in Monroeville in November 1986.

As I began continuing to work on this case, I was further disturbed by the evidence of the case itself and the trial itself. Mr. McMillian did not receive a death verdict from the jury. He received a life verdict from the jury which was overridden by the trial judge, Robert E. Lee Key, Jr., as the statute in Alabama now permits trial judges in that State to do. It is a very serious problem that we meet in a number of cases. Nearly 25 percent of the people on death row in Alabama got life verdicts from juries that were overridden by elected trial judges.

I was frankly quite certain at the outset that we would be able to prevail on the courts of Alabama to recognize Mr. McMillian's innocence very quickly. I was startled at the opposition and the barriers that we encountered as we presented this case to court after court.

Thirty days after Mr. McMillian's trial, a witness came forward and acknowledged that one of the witnesses who testified against Mr. McMillian could not have been testifying truthfully because he was with him on the day of this crime and he could not have gone by the crime scene and saw Mr. McMillian's truck there, as he testified. That evidence was simply ignored by the trial judge who presided over the case.

We made an appeal to the Alabama Court of Criminal Appeals, presenting issues and complaints about the nature of this evidence as being wholly unreliable to support this conviction. That court rejected our arguments and upheld Mr. McMillian's conviction and death sentence. During the time of our representation, we continued to investigate the case and we found out that all of the witnesses had received something for their testimony. Two of the witnesses had gotten several thousand dollars in reward money. The main witness against Mr. McMillian had been permitted to avoid a death sentence in another county for a murder that he had pled guilty to. Those kinds of factors were not made known to the jury, and despite that evidence the Court of Criminal Appeals again refused to overturn Mr. McMillian's conviction and death sentence.

In August of 1991, the main witness against Mr. McMillian contacted my office and acknowledged that his testimony had been false. He told us that he felt badly about framing an innocent man for murder. At that point, I thought that we would achieve Mr. McMillian's release immediately. We did not.

When we presented that evidence to the State trial courts in Alabama, the evidence was vigorously opposed by attorneys for the State. They alleged that the confession from this codefendant was not valid, that it was not truthful. They denied us opportunities for discovery to prove what he was saying about the falsity of his testimony.

When I went to court and asked to be appointed to represent Mr. McMillian just for that proceeding, the State attorneys opposed our appointment so that we couldn't even get the $600, which is what Alabama provides to lawyers who represent someone in post-conviction, for our representation of Mr. McMillian. Throughout that effort, I was always startled at the opposition, the intense opposition we received.

As this committee is aware, we later uncovered that there was a great deal of evidence which was withheld from the jury that the State was aware of at the time of Mr. McMillian's trial. The witnesses against Mr. McMillian—the main witness had told several doctors and several other inmates that he was lying and he was going to frame an innocent man for murder. He had even told some of the police officers that they were asking him to frame an innocent man for murder. All of those statements which were recorded, which verified that this case was not a valid case, which verified that the witnesses against Mr. McMillian were lying, were with-

held, knowingly, intentionally withheld by law enforcement agents in this case.

There is a tremendous amount of enthusiasm for the death penalty in this country. We see it in the State of Alabama. We have 124 people on death row. Right now, we have over 200 people awaiting capital murder trials. It was certainly present at Mr. McMillian's trial. That enthusiasm is something that creates the kinds of conditions that make these kinds of wrongful, unjust convictions possible. It is something that this Senate ought to address.

There are problems in the resources available to indigent prisoners like Mr. McMillian in providing representation. Problems cannot be confronted until we step back from the enthusiastic attitude and atmosphere that surrounds so many capital cases and say we first want to make sure that poor people accused of these kinds of crimes get the resources that they need.

We have no public defender system in Alabama. My organization, which provides representation and support to people on death row, gets no funding from the State of Alabama. All the thousands of hours that we spent working for Mr. McMillian were never compensated by the State of Alabama, which is why it is so important that Federal courts be available to receive the kind of evidence that supports innocence in these cases.

It was fortuitous that we were able to devote the kind of time and energy necessary to prove Mr. McMillian's innocence in State court. If we had not been able to do that, the Federal courts would have been our only avenue of relief. I am frankly quite concerned that, after *Herrera*, that avenue of relief would not have been meaningful and Mr. McMillian would have proceeded ever closer to a terribly tragic, wrongful execution.

I appreciate this Senate's hearing this morning and welcome the opportunity to answer questions.

[Mr. Stevenson submitted the following:]

PREPARED STATEMENT OF BRYAN A. STEVENSON

I am an attorney and presently the Executive Director of the Alabama Capital Representation Resource Center in Montgomery, Alabama. The Resource Center is a private, nonprofit organization that provides legal assistance to death row prisoner in Alabama. I have been the director of the Resource Center since June of 1989 and have directed efforts to recruit lawyers for death row prisoners and improve the quality of representation for condemned inmates in Alabama for several years. Prior to the formation of the Resource Center in February of 1989, I was a staff attorney with the Southern Center for Human Rights in Atlanta, Georgia. Until 1989, assistance to death row prisoners was coordinated informally through volunteer efforts led by Eva Ansley in Dothan, Alabama, who is now a paralegal with the Resource Center.

In 1988, I initiated an effort with Ms. Ansley to improve postconviction litigation in Alabama and agreed to take on appeals for recently sentenced death row prisoners who were indigent and requesting legal assistance. Walter McMillian was one of four cases that took as we started this initiative in the fall of 1988 involving death row prisoners who had no funds to pay for legal representation but needed immediate legal assistance. Mr. McMillian had been convicted of capital murder on August 17, 1988 for the 1986 murder of Ronda Morrison in Monroeville, Alabama. He was later Sentenced to death by Monroe County Circuit Court Judge Robert E. Lee Key, Jr. on September 19, 1988. Judge Key sentenced Mr. McMillian to death despite the fact that the jury had returned a verdict of life imprisonment without parole. Alabama is one of only three States that has permitted trial judges to reject a jury's sentencing verdict and impose the death penalty in a capital case. It is the

only State in the country that permits such judicial override without requiring any explanation or justification for the override by the trial judge.[1]

I first met with Mr. McMillian late in 1988 and I was astounded by many of the things that Mr. McMillian told me and that I subsequently verified about his case and his situation. Mr McMillian was a 45 year-old pulp wood worker with no prior felony criminal convictions. After his arrest in June of 1987 for this offense, he spent 14 months in custody awaiting trial after the State moved for postponements of his trial. This kind of delay between arrest and trial is not unusual for indigent defendants and most capital defendants in Alabama are not tried within a year of their arrest. However, what was unusual about Mr. McMillian's situation was the fact that he spent 13 of the 14 months he awaited trial on Alabama's death row. I had never previously represented anyone who had been sent to death row before being tried, convicted or sentenced. Mr. McMillian's transfer from a county jail to death row was the result of a motion by the State prosecutor asking that Mr. McMillian be transferred to the custody of the State prison system. The trial court judge, Judge Robert E. Lee Key, granted the motion and Mr. McMillian was taken to Holman State Prison. At Holman, Mr. McMillian was given a death row prisoner's orientation, a death row prisoner's manual, placed in a death row cell and subjected to all restrictions and treatment received by every death row prisoner in Alabama although he had not been tried or convicted of any offense.[2]

A. THE TRIAL

When reviewed Mr. McMillian's trial record after it was complete in 1989, I was immediately struck by the perfunctory nature of the trial court proceedings. Mr. McMillian received a two-day capital murder trial. The trial began at 1:15 p.m. on Monday, August 15, 1988 and was complete by 1:52 p.m. on Wednesday, August 17. The penalty phase of Mr. McMillian's trial was conducted in less than two hours. Jury selection, which in many jurisdictions takes days and can in serious or complex cases take weeks, began at 9:00 in the morning on the 15th of August and was complete by noon.

I was also startled by the nature of the evidence against Mr. McMillian. Ronda Morrison was killed at a dry cleaning store located in the center of Monroeville, Alabama, a small rural community in South Alabama on a Saturday morning in broad daylight. Mr. McMillian was not charged with this offense until over six months after the crime. At Mr. McMillian's trial the State advanced no credible motive for the crime and presented no physical or forensic evidence linking Mr. McMillian to the murder. The State's case against Mr. McMillian turned entirely on the testimony of a white alleged accomplice named Ralph Myers, who had several prior felony convictions and another capital murder case pending against him at the time.[3]

The State also presented testimony from two additional witnesses. Bill Hooks testified that he drove past the cleaners on the morning that Ronda Morrison was murdered and saw Mr. McMillian's truck parked outside the cleaners. Although Ralph Myers had testified that the truck was some fifty yards away from the cleaners in another parking lot, Hooks' testimony was presented by the State as corroborative evidence. Hooks gave his statement to the police while he was in jail on a burglary charge. Immediately after giving this statement to the police, he was released from jail, had fines that he owed the City of Monroeville dismissed at the request of the district attorney and law enforcement officials, and he was permitted to avoid pay-

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[1] Nearly twenty-five percent of Alabama's death row prisoners have received life imprisonment without parole verdicts from juries that were rejected by trial judges who imposed the death penalty.

[2] There are clear restrictions against confining pre-trial detainees and State prisoners in the same areas. Even assuming that it was proper to put a detainee in a State prison, there are over a thousand general population inmates at Holman State Prison who are not under sentence of death. Administrative segregation and a host of other options would have afforded Mr. McMillian detention in a less abusive environment than death row.

[3] At trial Mr. Myers testified that he was unknowingly and unwillingly made a part of a capital murder and robbery on November I, 1986 when Walter McMillian saw him that Saturday morning at a car wash and asked Myers to drive McMillian's truck because his "arm hurt." Upon this somewhat implausible premise, Mr. Myers gave the only evidence at trial which implicated Walter McMillian in this crime.

Myers stated that he drove Mr. McMillian to Jackson Cleaners, subsequently went into the cleaners and saw McMillian with a gun, placing money in a brown bag. Another man, who was white, was also present in the cleaners. Myers testified this man had black-gray hair and allegedly talked to McMillian. Myers was allegedly shoved and threatened by McMillian when he was seen inside the cleaner. The mysterious third person, who is circumstantially presumed to be in charge, allegedly instructs McMillian to get rid of Myers, which McMillian can't do because he is out of something The mysterious accomplice is never identified or arrested.

ment of fines on subsequent traffic offenses Hooks was given money by the Sheriff before his testimony and ultimately was paid $5000 in reward money.[4]

A week before Mr. McMillian's trial, another alleged witness, a white man named Joe Hightower, came forward and stated that he also saw Mr. McMillian's truck in front of the cleaners. Mr. Hightower received at least $2000 in reward money. Both men testified at trial that they knew the truck belonged to Mr. McMillian because it was a "low-rider" or that it had been modified to sit close to the ground. While Mr. McMillian owned a low-rider truck at the time of his arrest, his truck was not modified until May of 1987. At the time of the crime in November 1986, his truck was not a low-rider.

On the morning of the crime, Mr. McMillian was at home working on his truck. He and a friend had completely removed his transmission and worked on the truck all morning and until early afternoon. His sister, Evelene Smith, had also organized a fish- fry, an event where fish and other fried foods were sold to people driving by Mr. McMillian's home to raise money for her church. Several people who were assisting in the fish-fry, people who stopped by Mr. McMillian's home to buy fish, and the man who assisted Mr. McMillian in working on his truck all testified that there was no way he could have been involved in the murder of Ronda Morrison on November 1, 1986.

I was quite surprised that the trial jury convicted Mr. McMillian on the testimony presented by the State. The testimony of over a half-dozen black witnesses who testified that Mr. McMillian was at home working on his truck was simply ignored. The testimony of Ralph Myers, who is white, was apparently given more credibility despite the fact that Myers had a lengthy criminal record, his testimony was implausible and despite the many incentives Myers had for lying to help himself.

Race clearly played a role in jury selection and review of the evidence. While the crime took place in Monroe County which has an African-American population of over 40 percent, venue was changed to Baldwin County, Alabama, which has a black population of less than fifteen percent Only one African-American denied on Mr. McMillian's jury after the State excluded other black potential jurors through peremptory strikes. The district attorney also improperly told the jury that Mr. McMillian was rumored to have had an affair with a young white woman. The introduction of this evidence had no purpose or relation to this case other than inflaming racial prejudice against Mr. McMillian.

Despite the extremely weak and contradictory evidence against Mr. McMillian, the Alabama Court of Criminal Appeals concluded on appeal that there was sufficient evidence to affirm Mr. McMillian's conviction and death sentence. *McMillian* v. *State,* 570 So.2d 1285 (Ala.Cr.App. 1990). Even after evidence was presented that established that witnesses testifying against Mr. McMillian had received reward money and other favors from the State, Mr. McMillian's conviction and death sentence were affirmed by the Alabama Court of Criminal Appeals. *McMillian* v. *State.* 594 So.2d 1253 (Ala.Cr.App. 1991).

B. THE INVESTIGATION

Throughout my representation of Mr. McMillian we continued to investigate his case and we constantly found evidence to support his innocence. We were able to confirm that Mr. McMillian's truck was not a low-rider in November of 1986; we gathered evidence which showed that Ralph Myers did not even know who Mr. McMillian was in March of 1987, some four months after they allegedly committed this crime together; we discovered that the State arranged for Bill Hooks to be removed from jail so that he could inspect Mr. McMillian's truck before Hooks gave a written statement stating he saw Mr. McMillian's truck at the crime scene; we also found evidence which proved that law enforcement officials knowingly concealed information which would have helped establish Mr. McMillian's innocence prior to trial.

In August of 1991, we were contacted by the State's witness Ralph Myers. Mr. Myers told us that his trial testimony against Mr. McMillian was false. Mr. Myers told us that he Was pressured by law enforcement officers to testify falsely against Mr. McMillian. Mr. Myers' admission that he testified falsely against Mr. McMillian

[4] Immediately after Mr. McMillian's trial, a witness by the name of Darnell Houston came forward and told the judge and the prosecutor that Bill Hooks was lying against Mr. McMillian. Mr. Houston explained that he worked with Bill Hooks on the day that Ronda Morrison was murdered and that Bill Hooks never drove into town where he could have seen the crime take place. Mr. Houston testified at a motion for new trial that Hooks could not have seen Mr. McMillian's truck. The trial judge ignored this man's testimony and refused to overturn Mr. McMillian's conviction. Moreover, the sheriff and prosecutor retaliated against this witness for coming forward by indicting him for perjury. The charges were later dismissed.

opened up additional avenues of investigation that also produced evidence of law enforcement misconduct and abuse. For example, we discovered that a month prior to Mr. McMillian's trial, Myers told several State doctors in a court ordered pre-trial evaluation that he was about to frame an innocent man for murder. Myers told the doctors that he had no knowledge of Mr. McMillian being involved in the murder of Ronda Morrison and that he was being pressured to testify falsely to help the State with its case. Myers gave statements to at least four State doctors that revealed that his testimony against Walter McMillian was false. The reports from these doctors were sent to the prosecutor and to the Circuit Court judge shortly before Mr. McMillian's trial but never disclosed to the defense or the jury.

We also uncovered other statements Myers made directly to law enforcement officials where Myers made it clear that he had no knowledge of Mr. McMillian's involvement in this offense and that any assertion to the contrary would be a lie.[5] These statements, made even before Mr. McMillian's arrest. were concealed from the defense and the jury. In fact, at Mr. McMillian's trial the prosecutor told the jury that Myers' accusations against Mr. McMillian were credible and believable because Myers consistently told everything he knew to the police from the very beginning. The prosecutor told the jury that Myers' testimony was reliable because he told the same story of Mr. McMillian's involvement in the murder from his arrest until trial. In fact, Myers gave at least three other recorded interviews where he emphatically denied that Mr. McMillian was involved in the Morrison murder.

We also discovered that the State had within its possession witness statements from other inmates to whom Myers had told that he was going to frame Mr. McMillian for a murder he did not commit. These statements were also withheld from the defense by State investigators. Additional evidence which clearly established that Mr. Myers' trial testimony was false was also withheld by law enforcement agents and State prosecutors.[6]

In May of 1992, we presented all of the evidence we uncovered before a Circuit Court judge in Baldwin County, Alabama, including testimony from Ralph Myers who admitted that his trial testimony was false. Despite all of this evidence, the court ruled against us and held that Mr. McMillian was not entitled to relief or a new trial. It was the fifth time since Mr. McMillian's capital murder conviction and death sentence had been imposed in 1988 that an Alabama State court had refused to grant Mr. McMillian relief or a new trial after legal challenges or newly discovered evidence had been presented. Although it is axiomatic that the State has an obligation under the Constitution to disclose any exculpatory material or favorable evidence to the defense prior to trial,[7] the State refused to concede error concerning the numerous and uncontradicted ways in which it had unlawfully withheld evidence from Mr. McMillian.

It took an additional nine months of litigation before we finally convinced the Alabama Court of Criminal Appeals to overturn Mr. McMillian's capital murder conviction and sentence of death. During the year and a half following Myers' admission that his testimony was false and the discovery of the State's unlawful concealment of exculpatory evidence the State vigorously opposed our efforts to achieve Mr. McMillian's release. Even after the State's only other witnesses, Bill Hooks and Joe Hightower, both admitted to State investigators in December of 1992 that their trial testimony against McMillian Was false, the State still refused to acknowledge Mr.

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[5] The concealed statements also supported Myers' assertion that he was pressured to testify falsely. The recorded interviews between Myers and law enforcement agents reveal that the State was pressuring Myers very heavily to alter his initial statements. One agent told Myers that if he continued to say he didn't know anything he would "burn" and get the electric chair. Myers was repeatedly told by agents that he was going to "lose", "end up in the electric chair" and never get of jail unless he changed his testimony.

[6] At trial the State argued that Ronda Morrison was killed in a twenty-five to thirty minute period between 10:10 or 10:15 and 10:40 or 10:45. The State presented evidence that Myers drove Mr. McMillian to the cleaners and Mr. McMillian went in the cleaners twice. Myers then left for ten minutes to get cigarettes. Myers returns and Mr. McMillian comes out of the cleaners and returns into the cleaners again where shots are then heard. Myers goes inside the building. Myers is allegedly threatened by Mr. McMillian and forced out of the building. The victim's body is moved and McMillian allegedly leaves and Myers drives.him away. The State told the jury and the trial judge that this account of what happened was not impossible because there were 25–30 minutes for the crime to take place.

It is now clear that the State was aware that Miles Jackson, the former owner of the cleaners, was at the cleaners at 10:30 in the morning on the day Ronda Morrison was murdered and that at 10:30 Ms. Morrison was alone and fine. A report prepared by the Alabama Bureau of Investigation (Al) in October of 1987 confirmed Mr. Jackson's presence at the cleaners. The testimony of Myers at trial was completely discredited by the ABI report and Jackson's presence and the statement that Ms. Morrison was alone and fine at 10:30 on the morning of the murder.

[7] *See Brady* v. *Maryland,* 373 U.S. 83 (1963); Ex parte Monk, 557 So.2d 832 (Ala. 1989).

McMillian's innocence. At no point prior to the reversal of Mr. McMillian's capital murder conviction did the State concede that Mr. McMillian's rights had been violated or that he was entitled to relief.

It was only after we filed a motion to dismiss all charges on March 2 of this year that the State finally acknowledged Mr. McMillian's innocence and joined us in seeking dismissal of the charges against him. The ease with which Mr. McMillian was convicted of capital murder and sentenced to death for a crime he did not commit, contrasted with the enormous difficulties we encountered in establishing his innocence and achieving his release, say much about the criminal justice system and innocence and the death penalty. That it took four and a half years of litigation with thousands of hours of investigation to free Mr. McMillian after wrongfully convicting him in two days shows us that there are disturbing problems which must be corrected within our criminal justice system.

C. REFORM AND NEW LEGISLATION IS NEEDED

In light of this Committee's consideration of legislation that would empower Federal courts to prevent the execution of innocent death row prisoners, it is particularly important that we recognize how Mr. McMillian's case and others like it undermine the integrity of the criminal justice system and public confidence. The United States Supreme Court's decision in *Herrera* v. *Collins* earlier this term was a tremendous blow to us as we attempted to secure Mr. McMillian's freedom. Often times the kind of work and investigation necessary to prove a death row prisoner's innocence cannot be accomplished until a case reaches Federal court.

Although Mr. McMillian obtained relief in State court, my staff and I devoted thousands of hours to this case during the years we represented Mr. McMillian None of this work was compensated by the State of Alabama. The Alabama Resource Center has never received any funding from the State of Alabama to assist death row prisoners in Alabama State courts like Walter McMillian. Without private donations from foundations, churches and individuals to the Resource Center for non-federal work, which is increasingly difficult to secure, our efforts on behalf of Mr. McMillian in State court would not have been possible. With 124 people under sentence of death in Alabama and a $600 cap on compensation for appointed State postconviction work, it is simply impossible for many death row prisoners to obtain the legal assistance needed to uncover all the evidence necessary to establish their innocence,

It is also important to recognize that Alabama State courts refused to conclude that Mr. McMillian had been convicted on false evidence or that he was innocent even after all of the evidence was uncovered. The Court of Criminal Appeals refused to overturn the judgment of the trial judge in Baldwin County—who must stand for election every six years—that there was insufficient evidence of perjured testimony or actual innocence. *McMillian* v. *State,*—So.2d—(Ala.Cr.App. Feb. 27, 1992). It should also be noted that even after evidentiary hearings in State courts, new evidence continued to unfold in Mr. McMillian's case when the State's two remaining witnesses Hooks and Hightower recanted their trial testimony. If Mr. McMillian had not won a new trial based on the State's failure to disclose favorable evidence before trial, Mr. McMillian's only forum for presenting this new evidence of innocence would have been in Federal court. However, the presentation of this evidence in Federal court after *Herrera* would have been meaningless since it "only" proved Mr. McMillian's innocence, not that his trial was otherwise unconstitutional.

Further, it must be nosed that even with the extremely restrictive possibilities for relief in State courts in Alabama, efforts are constantly being made to make the execution of the innocent even easier. For example, for the last several years legislation has been successfully approved by State legislative committees that would eliminate the Court of Criminal Appeals from review of all capital cases in order to facilitate executions more expeditiously.

There is tremendous enthusiasm for the death penalty in Alabama and across this country. The excited efforts by many prosecutors and law enforcement agents to achieve capital murder convictions and death sentences have caused many in the criminal justice system to accept general fear and frustration about violent crime as a substitute for specific evidence of guilt in some cases. This condition is exacerbated by the appalling shortcomings of indigent defense systems and the quality of representation available to poor people accused of capital crimes. Alabama has no public defender system and relies on appointed private counsel for most capital trials. Compensation for this kind of legal assistance is extremely limited. Lawyers cannot receive more than $1000 for the work they do out of court preparing a capital murder case for trial. This presents an enormous obstacle to thorough investigation and Preparation in many capital cases and results in unreliability concerning

the correctness of many convictions and death Sentences.[8] The risk of wrongful execution is distressingly high.

We must make sure that local bias, prejudice and anger about violent crime does not result In innocent people being wronghfully convicted, sentenced and executed At the outset of my representation of Mr. McMillian I never imagined that proving his innocence, in this case would be as difficult, time consuming and arduous as it was It frightens me to think that as I continue to provide legal assistance to death row prisoners without Federal legislation to modify the U.S. Supreme Court's decision in *Herrera,* It will only be more difficult next time.

ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER
MONTGOMERY, AL,
June 1, 1993.

Hon. HOWARD METZENBAUM,
Subcommittee on Antitrust, Monopolies and Business Rights,
Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: Please find enclosed additional materials that supplement the testimony I provided to the Senate Judiciary Committee on April 1, 1993 on the subject of Innocence and the Death Penalty. Enclosed is a copy of an article that another attorney with the Alabama Capital Representation Resource Center and I wrote concerning the problems most people accused of capital crimes have in obtaining competent legal assistance.[1] I also enclose the statute in Alabama limiting compensation for attorneys litigating innocence claims of death row prisoners to $600.00 per case.

Finally, I enclose a brief filed by the State of Alabama in the Walter McMillian case which sets out the State's position opposing any relief to Mr. McMillian despite the overwhelming evidence of his innocence. Contrary to the testimony of representatives from the State of Alabama at the April 1 hearing, the State was quite resistant to our efforts to achieve Mr. McMillian's release.

I think all of these materials support the view that there must be improved opportunities to present claims of innocence in Federal court when the death penalty has been imposed following the U.S. Supreme Court's decision in *Herrera.* I thank you for holding a hearing on this very important issue and I remain available to assist you,in any way if you have questions or concerns about this topic. Thank your for your interest and assistance.

Sincerely,

BRYAN A. STEVENSON,
Attorney at Law.

ALABAMA CODE

SECTION 15–12–23. SAME—POSTCONVICTION PROCEEDINGS

(a) In proceedings filed in the District or Circuit Court involving the life and liberty of those charged with or convicted of serious criminal offenses including proceedings for habeas corpus and coram nobis or other postconviction remedies, and in posttrial motions or appeals in such proceedings, the trial or presiding judge or chief justice of the court in which such proceedings may be commenced or pending may appoint counsel to represent and assist those persons so charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of such judge to assert or protect the right of such person.

(b) In proceedings filed in the District or Circuit Court involving juvenile offenses including proceedings for habeas corpus and coram nobis or other postconviction remedies and in posttrial motions or appeals in such proceedings, the trial or presiding judge or chief justice of the court in which such proceeding may be commenced or pending may appoint counsel to represent and assist those juveniles so charged

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[8] For a review of the problems with Alabama's indigent defense system *see* Friedman and Stevenson, "Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing," 44 Ala.L.Rev. 1 (Fall 1992).

[1] The above article entitled: Alabama Law Review, "Solving Alabama's Capital Defense Problems: It's A Dollars and Sense Thing," written by Ruth E. Friedman and Bryan A. Stevenson is retained in the Committee files.

or convicted if it appears to the court that the juvenile charged or convicted is unable financially or otherwise to obtain the assistance of counsel and it further appears that counsel is necessary in the opinion of such judge to assert or protect the rights of such person, or court appointed counsel is otherwise required by jaw or rule of court.

(c) It shall be the duty of such counsel as provided in subsections (a) and (b) of this section to represent and assist the person in such proceedings.

(d) The counsel appointed in such proceedings shall be entitled to receive for his services a fee to be approved by the judge appointing him. The amount of such fee shall be based on the number of hours spent by counsel in working on such proceedings and be computed at the rate of $40.00 per hour for time expended in court and $20.00 per hour for time reasonably expended in preparation of such proceedings; provided, that the total fees to counsel for such proceedings shall not exceed $600.00.

(e) Claim for such fee shall be submitted. approved and paid in the same manner as provided in subsection (e) of section 15–12–22. (Acts 1963. No. 526. p. 1136. Section 7; Acts 1971. No. 2420. p. 3851: Acts 1981. No. 81–717, p. 1204, Section 4.)

FIRST DIVISION

NUMBER 682.

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

WALTER McMILLIAN,

APPELLANT,

V.

STATE OF ALABAMA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

BRIEF AND ARGUMENT

ON RETURN TO REMAND

OF

JAMES H. EVANS

ATTORNEY GENERAL

AND

WILLIAM D. LITTLE

ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

STATEMENT OF THE CASE

The State of Alabama hereby adopts the statement of the Case contained in its original brief filed in this court, adding to that the following:

On September 21, 1990, this court remanded the defendant's case to the trial court for a hearing on whether the defendant's rights were violated by an alleged failure by the State to disclose favorable treatment to witnesses Bill Hooks and Ralph Myers. Upon return from remand, this court affirmed the defendant's conviction and sentence. *McMillian* v. *State,* 594 So.2d 1253 (Ala.Cr.App. 1991). After an application for rehearing was denied, the defendant filed a petition for writ of certiorari in the Supreme Court of Alabama.

The defendant subsequently filed a petition under rule 32 in the Circuit Court based on a claim of newly-discovered evidence. On November 27, 1991, the State of Alabama filed in the Alabama Supreme Court a motion to remand the case to the Circuit Court for an evidentiary hearing on the matters raised in the rule 32 petition. The Supreme Court granted this motion and remanded the case to the Circuit Court with directions to consider the issues raised in the rule 32 petition. *Ex parte McMillian,* 594 So.2d 1288 (Ala. 1992).

ISSUES PRESENTED FOR REVIEW

I. IS THE TRIAL COURT'S FINDING REGARDING THE ALLEGED PERJURY OF RALPH MYERS DUE TO THE AFFIRMED?

II. WERE THERE VIOLATIONS OF BRADY V. MARYLAND?

STATEMENT OF THE FACTS

The facts pertinent to the issues raised here are contained in the State's arguments regarding those issues.

ARGUMENT

I. THE TRIAL COURT'S FINDING REGARDING THE ALLEGED PERJURY OF RALPH MYERS IS SUPPORTED BY THE EVIDENCE AND IS DUE TO BE AFFIRMED

At the original trial in this case, Ralph Myers testified that on the day of the murder he drove the defendant to Jackson Cleaners and that he subsequently went into the cleaners and saw the defendant standing with a pistol in his hand behind the counter with the body of a young girl on the floor (R. 314–326).[1] At the remand hearing Myers testified that his trial testimony was false, and that he did not see the defendant on the day of the crime, did not drive the defendant to Monroeville that day, and did not go into Jackson Cleaners that day (R.R. 12–15).

In order to grant a new trial in a capital case due to perjured testimony, a trial court must be reasonably well satisfied that the testimony given by the witness at trial was false. *Ex parte Frazier,* 562 So.2d 560, 570 (Ala. 1989). The trial court here found that there was insufficient evidence to support the theory that Myers's testimony was false, and decreed that Myers's trial testimony was not found to have been perjured (R. 162).

In its order the trial court gave as the basis for its decision the following:

> Ralph Myers took the stand before this court, swore to tell the truth and proceeded to recant most, if not all, of the relevant portions of his testimony at trial. Clearly, Ralph Myers has either perjured himself at trial or has perjured himself in front of this court.
>
> The following areas of concern were considered in reaching this decision. The demeanor of the witness; the opportunity of the witness to have knowledge of the facts which he testified to at trial; the rational [sic], as stated by the witness for his testimony at the first trial; the rational [sic], as stated by defendant, for his recantation; the evidence of external pressures brought to bear on the witness prior to and after both trial and recantation; the actions of the witness that lend credence to his recantation; evidence adduced at trial in contradiction of the witness' testimony on details, and due to the nature of this case, any evidence from any source concerning the inability of the witness to have known the facts to which he testified to at trial.

(C.R. 161).

The question thus before this court is whether there was sufficient evidence on which the trial court could have based its conclusion. A review of the evidence will

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[1] References to the original trial transcript will be made "R.————." References to the transcript of the remand hearing will be made "R.R. ————." References to the clerk's record of the remand hearing will be made "C.R. ————." References to the supplemental record will be made "S.C.R. ————."

make clear that the trial court could reasonably have found that the perjured nature of Myers' trial testimony was not established.

Myers testified at the remand hearing that his original statements incriminating the defendant, and ultimately his trial testimony, were the result of intense pressure placed on him by law enforcement officers while he was in the Monroe County jail (R.R. 13–15). Myers said that those involved were ABI Agent Simon Benson, D.A. Investigator Larry Ikner, and Sheriff Thomas Tate (RR. 15). Myers claimed that these officers kept asking him whether the defendant was involved, and that Simon Benson provided him with the details of the Morrison killing (RR. 59).

Simon Benson specifically denied ever pressuring Myers to implicate the defendant in the crime or to lie about it, and said he did not provide Myers with the facts of the case (R.R. 220–221). Moreover, the interviews with Myers by these officerson June 1, 1987, and June 3, 1987, support his testimony.[2] The Morrison killing was mentioned in the 6/1/87 interview but certainly not in a threatening manner (C.R. 70, 72–73). In the 6/3/87 interview Myers was specifically questioned about his knowledge of the Morrison killing and the defendant's involvement in it (C.R. 116–123, 127–129, 133), but this was apparently because Myers had made a statement to a third party indicating he had participated and that a gun belonging to the defendant had been involved. There was no threat made to Myers to get him to implicate the defendant falsely.

Moreover, the assertion that Myers was pressured by Benson into testifying against the defendant is inconsistent both with the tone and substance of his taped telephone conversation with Sheriff Tate dated September 2, 1987 (State's Exhibit 1) and with the circumstances surrounding it. During this conversation Myers told Tate that he had actually gone into the cleaners just after the killing. Myers admitted at the hearing that there was no one present who pressured him into making his call (R.R. 58). Moreover, during the conversation Myers spoke of Benson affectionately, and indicated that he needed to get with Benson in order to given him the details of what he saw, even though Myers claimed at the remand hearing that Benson had provided him with the facts of the killing (R.R. 59). Tate said during this conversation that the officers were not pressing Myers, and Myers did not contradict this.

The evidence indeed supports the conclusion that pressure was on Myers to recant his testimony. Myers testified that he had been told while in prison that there was a contract on his life (R.R. 42–43). While Myers claimed that he understood the contract was from a law enforcement officer in Conecuh County (R.R. 73–78), and that he did not believe there actually was a contract (R.R. 44–45, 78), he certainly knew that the defendant had a motive for wanting him dead.

Myers claimed that he had decided to admit his perjury after he had turned his life around in a prison drug treatment program (R.R. 23). He admitted, however, that he had been kicked out of the program for violating confidentiality rules (R.R. 25–26).

Myers testified that he told his attorney, George Elbrecht, that he did not want to testify against the defendant because this would involve lying (R.R. 34). Elbrecht testified specifically that Myers never told him this (R.R. 325–326, 329–330). Elbrecht also testified that Myers never told him that Benson told him what to say (R.R. 326). Myers also claimed that he told Robbins Williams, a deputy at the Monroe County Jail, that he was not involved in the Morrison case (R.R. 38). Williams testified that Myers never said to him that he had nothing to do with the Morrison case (R.R. 341).

Myers testified at the remand hearing that he once refused in open court to testify against the defendant, and claimed that he did this because he knew his testimony would be false (R.R. 17). Elbrecht testified, however, that Myers told him at the time that his refusal was motivated both by fear of the defendant and concern with the sentence he would receive (R.R. 323–325). In Elbrecht's opinion, Myers balked at testifying in order to get a better sentence (R.R. 339).

Since the defendant's trial, Myers had met with FBI agent Al Lornimack at least three times (R.R. 63). While Myers told Lornimack about alleged wrongdoing by other law enforcement agents, he had never claimed that he had been pressured by any officers to testify against the defendant (R.R. 63, 346–347). Moreover, in an interview with probation officer Ann Large shortly after his sentence, Myers never said his testimony against the defendant was false (R. 352).

Last, but perhaps most important, the testimony of other witnesses at trial was consistent with Myers's trial testimony and inconsistent with his testimony at the remand hearing. Joe Hightower testified that he saw the defendant's truck parked

[2] Benson and Ikner were present at the 6/1/87 interview (C.R. 35), and Tate, Benson, and Ikner were present at the 6/3/87 interview. (C.R. 113)

at Jackson Cleaners on the morning of the crime (R. 223–224). Bill Hooks testified that he saw both Myers and the defendant at the cleaners shortly before he heard emergency vehicles going toward the cleaners (R. 257–261). This contradicted Myers's claim at the remand hearing that he was not with the defendant at the cleaners that day.

It is clear that the trial court's finding turned on the credibility of Ralph Myers. The credibility of a witness is for the trial of fact, whose finding is conclusive on appeal. *Hole* v. *States,* 521 So.2d 1383 (Ala. Cr. App. 1988). For this reason, and because there was ample evidence on which the trial court could have based its credibility finding, the trial court's decision on perjured testimony should be upheld.

II. THERE WAS NO VIOLATION OF BRADY V. MARYLAND

The defendant points to a number of items of evidence and claims that they were withheld from the defense in violation of *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Giglio* v. *United States,* 405 U.S. 150 (1972).[3] After each item is examined individually, it will be clear that there was no violation of the defendant's due process rights.

A. The defendant is not due a new trial from the failure to disclose Myers' statement of June 3. 1987

Two statements of Ralph Myers made to law enforcement officers, one made on June 7, 1987, and the other on September 14, 1987, were given to the defendant's attorneys before trial (R.R. 95, 225). A third statement, made on June 3, 1987, was evidently not (R.R. 95). This June 3rd statement was concerned mainly with Myers's alleged involvement in the murder of Vicki Pittman; however, Myers did deny that he killed Rhonda Morrison, and said he had no knowledge of the crime (C.R. 118–122).[4] The defendant claims that the failure to disclose this June 3rd statement violated *Brady* v. *Maryland, supra.*

In order for there to be a *Brady* violation, undisclosed evidence must be material. *Ex carte Cammon,* 578 So.2d 1091 (Ala. 1991). Materiality is established only where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability in this context is a probability sufficient to undermine confidence in the outcome. *Id.*

Materiality is not established here. At trial Myers testified that on the day of the crime he drove the defendant, in the defendant's truck, to a parking lot near the cleaners, and that he waited outside while the defendant went in (R. 315–319). A few minutes later the defendant came back out to the truck and then returned to the cleaners (R. 320). After hearing "popping noises", Myers entered the cleaners and found the defendant standing behind the counter with a gun and the body of a young girl on the floor (R. 323–331). The defendant then ordered Myers outside (R. 334). Myers went back to the truck; a few minutes later the defendant came out, and they both left in the truck (R. 335–337).

This testimony was supported by and consistent with the testimony of two other witnesses. On the morning of the crime, Bill Hooks saw Myers sitting in the defendant's truck near the cleaners and the defendant walking toward the truck (R. 257–261). The defendant got in, and the two men drove off together (R. 261). This sighting by Hooks occurred just before Hooks heard the sirens of emergency vehicles going to the cleaners (R. 261), thus tying it to the time of the shooting. Moreover, Joe Hightower also placed the defendant's truck at the cleaners on the morning Rhonda Morrison was killed (R. 223–224).

If the disclosure of the June 3rd statement had simply given the jury a choice between two unsupported statements by Myers, then there might be a reasonable probability that the result would have been different. But here, Myers' actual testimony at trial was corroborated by that of Hooks and Hightower, whereas there was no testimony that supported Myers June 3rd denial that he had any knowledge of the crime. Furthermore, Hooks's testimony that he saw Myers at the cleaners at the time of the crime is specifically inconsistent with Myers's statement that he was not involved.

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[3] The defendant also cites Ex carte Monk, 557 So.2d 832 (Ala. 1989). Monk, however, deals not with the duty of the State to provide exculpatory evidence, but instead with the authority of the trial court in capital cases to order complete disclosure of the State's entire file.

[4] The defendant claims that there are other still undisclosed statements by Myers concerning the Morris ion killing (defendant's brief, p.34 n. 18). This is unsupported by the record. The statement of June 1, 1987, does make reference to other interviews with Myers; nothing in this June 1st statement, however, indicates that these interviews were about the Morrison case.

In light of the inconsistency between Myers' June 3rd statement and the testimony of Hooks and Hightower, the jury would have seen the June 3rd statement as exactly what it was: the initial denial to officers of any knowledge of or involvement in the crime by an experienced, habitual criminal. There is thus no reasonable probability that with disclosure of this statement the result would have been different.

B. The defendant is not due a new trial based on the statement of Charles Isaac Dailey

ABI Agent Simon Benson, involved in the investigation of the Morrison killing, was also investigating the death of Vicki Pittman. As part of the Pittman case, he interviewed Charles Isaac Dailey, a suspect in that case. In the course of that interview, Dailey claimed that Myers told him that he, Myers, and Karen Kelly planned to "put it off" on "Johnny D" (R. 175, 178).[5]

The defendant claims that this statement is exculpatory evidence because it could be used to impeach Myers. This is incorrect. Dailey's statement of Myers's alleged statement is clearly hearsay, and thus would be inadmissible. C. Gamble, McElroy's Alabama Evidence, section 242.01(l) (4th Ed. 1991).

Nor can the defendant claim that Dailey himself could have been called at the trial to testify to Myers's alleged statement. Dailey did not testify at the remand hearing, and thus it cannot be determined how he would have testified on thismatter. The defendant has therefore failed to establish that there was impeachment evidence available as a result of Dailey's statement.

Moreover, Dailey's statement of Myers' alleged statement is irrelevant to the issues at the defendant's trial. At most Dailey's statement shows that Myers at one time planned to accuse the defendant falsely in a separate, unrelated criminal case. This would not tend to show that Myers's testimony regarding the Morrison killing was false.

In addition, Dailey's statement, even if admissible, would not be material. As was stated above, Myers' testimony regarding the defendant's involvement in the crime was corroborated by the testimony of two independent witnesses, Bill Hooks and Joe Hightower, who placed Myers, the defendant, and the defendant's truck at the cleaners at the time of the crime. This testimony both supported Myers's trial testimony and established that the defendant was involved. There is no reasonable probability that the jury would have rejected this testimony by Hooks and Hightower, and also that of Myers, solely on the basis of hearsay regarding Myers's alleged actions in a separate case.

C. The defendant is not due a new trial based on the ABI report regarding Miles Jackson

The defendant claims that he is due a new trial based on the alleged failure to disclose to the defense an ABI report referring to a statement by Miles Jackson. In this statement Jackson evidently said that he was in the cleaners at 10:30 a.m. on the day of the killing and that Rhonda Morrison was alive and alone at that time (C.R. 199).

The defendant's argument should be rejected because the testimony at the remand hearing showed that this report was given to the defense prior to trial. ABI agent Simon Benson testified that the ABI report in question was given to the defendant's two trial attorneys at a pretrial meeting at the district attorney's office as part of a general disclosure of the State's file in response to a discovery request (R.R. 228–234). While one of the defendant's trial attorneys, Bruce Boynton, testified that he had never seen the report before and that there was no copy of it in his case file, he admitted that the file which he brought to court was not the entire original file (R.R. 270–271). The other trial attorney, J.L. Chestnut, did not testify at this remand hearing.

In order to establish a Brady violation, the information in question must have been suppressed by the prosecutor. *Ex parte Cammon,* 578 So.2d 1091 (Ala. 1991). Because the evidence at the remand hearing supports the conclusion that this ABI report was disclosed before trial, the defendant's argument should be rejected.

D. The defendant is not due a new trial based on the Taylor Hardin records of Ralph Myers

The defendant argues that he is entitled to a new trial based upon the records concerning Ralph Myers from the Taylor Hardin Secure Medical Facility. After a consideration of the facts, however, it should be clear that these records should not

[5] "Johnny D." is given at one point as the name of "Johnny D. Williams" (C.R. 175), and at another as that of "Walter D. McMillian" (C.R. 176).

considered to be in the possession of the State for purposes of *Brady*. Moreover, there is no due process violation here because the statements by Myers reflected in the records are not material.

After he initially refused to testify against the defendant, Myers was sent to Taylor Hardin for a determination of whether he was competent to stand trial (R.R. 18–19, 328–329; C.R. 205). While he was there, and in the course of discussions with him by staff psychologists and psychiatrists for the purpose of making this evaluation, Myers evidently made statements that he had no knowledge of the charged crime (evidently the Morrison killing) and that he was being pressured by law enforcement officers to give a statement regarding this crime which included details provided by the officers (C.R. 149–159).[6] Myers also evidently said that officers were pressuring him to testify against another person in one of two murders (C.R. 155), and that officers wanted him to say, with regard to a 1986 laundromat killing, that he had driven some people to the laundromat and that they, the other people, had killed a girl there (R.R. 157).

Myers's evaluation was evidently ordered pursuant to *Code of Alabama 1975*, section 15–16–22, which authorizes a trial court to order the examination of a capital defendant by a Lunacy Commission in order to determine, among other things, his competence to stand trial. Section 15–16–22(c) provides as follows:

> (c) As soon as such commission on lunacy has reached a conclusion, within the time and in the respect as hereinabove set forth, as to the mental condition of such defendant, it shall make a full written report thereof to the clerk of the court in which the indictment against said defendant is pending, which report shall be placed on file and be accessible to the court, to the district attorney and the counsel for the defendant.

While this statute requires that the report on the issue in question be submitted to the clerk, there is no requirement that the underlying diagnostic evaluations by the individual psychologists and psychiatrists, which reflect the patient's statements, be also included.

The confidentiality of Taylor Hardin records is also the subject of section 22–50–62. This provision reads as follows:

> No employee of any of the facilities under the management, control, supervision or affiliated with the Alabama Mental Health Board shall be required to disclose any record, report, case history, memorandum or other information, oral or written, which may have been acquired, made or complied in attending or treating any patient of said facilities in a professional character, when such information was necessary in order to evaluate or treat said patient or to do any act for him in a professional capacity, unless a court of competent jurisdiction shall order disclosure for the promotion of justice; provided, that where a person is a defendant in a criminal case and a mental examination of such defendant has been ordered by the court, the results or the report of such mental examination shall be forwarded to the clerk of said court and to the district attorney and to the attorney of record for the defendant.

This statute differentiates between the "results or the report" of the mental examination, which shall be provided to the clerk and the attorneys, and the much broader category subject to confidentiality which includes "any record, report, case history, memorandum or other information, oral or written." The statements made by Myers in the course of diagnostic interviews would fall outside of exception to the general rule of nondisclosure.

Moreover, disclosure of Myers's statement without specific court order would be contrary to general Alabama law regarding privileged communications between mental health professionals and their patients. *Code of Alabama 1975*, section 34–26–1, *et seq.*, governs the practice of psychology. Section 34–26–2 provides as follows:

> For the purpose of this chapter, the confidential relations and communications between licensed psychologists and licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

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[6] The Taylor Hard in statements are not contained in the supplemental record of exhibits provided in response to the defendant's motion to supplement the record (S.C.R. 205). It appears, however, that the statements are contained in reports which are attached as appendices to the defendant's Memorandum in Support of Application for Relief on Remand (C.R. 149–159).

The statements made by Myers to the members of the Lunacy Commission would have come within this protection.

Nothing in the record indicates that the statements made by Myers actually were provided to the prosecution, and the defendant in brief has made no direct claim to the contrary. In order to establish a Brady violation, the defendant must show that the evidence was in the possession of the State. *Henry Hays* v. *State,* No. 91–1111 (Ala. Cr. App. February 28, 1992), ms.op. at 10–12. The defendant here has failed to show that the prosecution actually had the statements in the question.

The question then becomes whether the court should find as a matter of law that possession of the statement by Taylor Hardin should be attributed to the prosecution for *Brady* purposes simply because Taylor Hardin is a State agency.

Although it appears that there is no Alabama case law on point, analagous cases from other jurisdictions indicate that the answer should be "no." In *Pina* v. *Henderson,* 752 F.2d 47 (2nd Cir. 1985), a State parole officer's notes of an interview were not considered within the State's possession under *Brady* where the parole officer did not work with the police or the prosecution in the case. The mental health professionals here were acting under order from the Circuit Court in evaluating Myers competence to stand trial; thus it cannot be said that they were working with the prosecutor. In *Demps* v. *Wainwright,* 805 F.2d 1426, 1431–1432 (11th Cir. 1986), a memo in the hands of a State prison official was not attributable to the prosecution for *Brady* purposes. In *United States* v. *Edgewood Health Care Center,* 608 F.2d 13 (1st Cir. 1979), *cert. denied,* 444 U.S. 1046 (1980), the First Circuit held that a Federal prosecutor had no affirmative duty to find exculpatory information in the possession of separate Federal agencies.

The cases relied on by the defendant are easily distinguishable. *Estelle* v. *Smith,* 451 U.S. 454, 466–467 (1981), the Supreme Court dealt not with Brady but instead with whether a psychiatrist should be considered an agent of the State for purposes of requiring Miranda warnings. Moreover, the Supreme Court held that a psychiatrist was not to be considered as part of the prosecution unless he went beyond simply reporting to the trial court on the issue of competency and actually testified for the State at a capital sentence hearing. Here the Lunacy Commission merely filed a report on competency. In *Sexton* v. *State,* 529 So.2d 1041, 1045 (Ala. Cr. App.), *cert. denied,* No. 87–1047 (Ala. 1988), the social worker was also a witness for the State. In *Ex parte Geeslin,* 505 So.2d 1246 (Ala. 1986), the prosecutor acknowledged that he was aware of the health department report and had in fact developed a rebuttal to it. As was argued earlier, there is no evidence here that the prosecution knew of Myers's statements at Taylor Hardin.

Even if the statements made by Myers at Taylor Hardin could be considered to have been in the possession of the prosecutor for *Brady* purposes, the defendant would not be entitled to a new trial because these statements were not material. As has been argued above, Myers's trial testimony of the defendant's involvement in the killing was corroborated by the testimony of two other witnesses, Bill Hooks and Joe Hightower, who placed Myers, the defendant, and the defendant's vehicle at the crime scene around the time of the killing. Furthermore, Myers's statements at Taylor Hardin claimed not only that he had no knowledge of the Morrison killing, but also that he was being pressured and threatened by officers to testify to facts which were untrue. Neither the June 3, 1987, interview nor the June 9, 1987, interview, however, revealed any such threats or pressures; these interviews thus were inconsistent with Myers's claim.[7]

For the above reasons, the defendant's arguments regarding Myers' Taylor Hardin statements should be rejected.

E. The defendant is not entitled to a new trial based on Myers's statements of March 16, 1987 and June 1, 1987

The defendant argues that he is entitled to a new trial based on the nondisclosure of two other statements by Myers, one dated March 16, 1987, and the other June 1, 1987. These arguments should be rejected.

With regard to the March 16th statement, Myers said in this statement that he had been trying to find out information for Simon Benson (S.C.R. 167–173). At the remand hearing Benson said that any statement by Myers that he was at this time getting information for Benson about the Vicki Pittman killing was false (R.R. 168–169).

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[7]The June 3rd interview was, of course, not used at trial. The defendant has claimed, however, that this interview should have been disclosed because it could have been used to impeach. While this interview is inconsistent with Myers's trial testimony, it is also inconsistent with his statements at Taylor Hardin and also his testimony at the remand hearing in which he claimed that there was pressure placed upon him; this June 3rd interview reveals no such pressure.

The defendant's argument must be rejected for two reasons. The first is that Myers' statement is not necessarily inconsistent with Benson's testimony. The March 16th statement is rambling and confusing, but it does not appear that Myers said he was looking for information about the Pittman killing (S.C.R. 168–173). Indeed, Pittman's body was not discovered until March 29, 1987 (R.R. 170–171). Myers may have been searching for other information.

Even if Myers's statement on March 16th could be considered false, it is not impeachment evidence. At trial Myers made no statement regarding working for Simon Benson on the Pittman case or any other case, so the March 16th statement did not contradict any trial testimony. A witness may not be impeached using specific bad acts by him which have no relevancy except to show that he is a person of bad character or is untruthful in general. C. Gamble, *McElroy's Alabama Evidence,* section 140.01(10) (4th Ed. 1991). Because the March 16th statement was unrelated to trial testimony, it could only reflect generally on Myers's general character or veracity. Thus this specific bad act was inadmissible.

The same is true with regard to the June 1st statement. This statement at most shows that Myers had made false statements to law enforcement officers about other unrelated matters. A witness may not be impeached using specific acts of misconduct by him which have no relevancy except to show that he is a person of bad character or is lacking in veracity. C. Gamble, *McElroy's Alabama Evidence,* section 140.01(10) (4th Ed. 1991). Because the alleged false statements here are on unrelated matters, these bad acts can only reflect on Myers' general veracity. Thus they would be inadmissible.

Furthermore, with regard to both statements, the defendant's argument must be rejected because neither statement is material. As has been argued before, Myers's trial testimony was corroborated by the testimony of two other witnesses, Bill Hooks and Joe Hightower, who placed Myers, the defendant, and the defendant's vehicle at the cleaners around the time of the crime. There is no reasonable probability that this independent testimony, and also Myers' own testimony, would have been rejected by the jury because Myers had lied about separate, unrelated matters.

For the above reasons, the defendant's arguments regarding these statements must be rejected.

F. The defendant is not due a new trial based on the ABI report regarding Albaro Banos

In a footnote (p. 41, n.22, of defendant's brief) the defendant argues that he is due a new trial for failure to disclose information about an alleged suspect, Albaro Banos. This is without merit because the information about Banos is clearly not material. While Banos was listed as a suspect on an ABI report (R.R. 123), this was only because he was seen in the general area of the cleaners on the morning of the crime and there were blood stains on his shoes (R.R. 107, 123–124). Banos was never placed at the actual scene of the crime (R.R. 107), and he evidently provided an explanation for his actions (R.R. 107). There is no indication that the blood was in any way linked to the crime. Banos was cleared and was never arrested (R.R. 107). There is no reasonable probability that these facts, even if known to the jury, would have changed the results.

CONCLUSION

For the above reasons, the defendant's conviction and sentence are due to be affirmed.

Respectfully submitted,

JAMES H. EVANS,
BY: WILLIAM D. LITTLE,
Assistant Attorney General.

CERTIFICATE OF SERVICE

I hereby certify that I have this the ——— day of August, 1992, served a copy of the foregoing by placing same in the United States Mail, postage prepaid and addressed as follows:

Hon. Bryan A. Stevenson
Hon. Michael P. O'Conner
Montgomery, AL 36104

WILLIAM D. LITTLE,
Assistant Attorney General.

Senator METZENBAUM. Thank you very much, Mr. Stevenson.

Our next witness is Randall Dale Adams, who was also on death row, of Grove City, OH. I don't think he was from there originally. I think that you have with you the attorney who handled your appeal, Randy Schaffer. Do you want to introduce him and have him stand up?

STATEMENT OF RANDALL DALE ADAMS

Mr. ADAMS. Yes. Mr. Randy Schaffer.

Senator METZENBAUM. We are very happy to have you with us and we congratulate you on the effort you made on behalf of this man and saving his life.

Mr. SCHAFFER. Thank you, Senator Metzenbaum.

Mr. ADAMS. Thank you, Senator Metzenbaum and the rest of the Senators that have gathered here together, because I believe this is a very important issue and I have listened very intently to each of you that have made an opening statement. You know, I think everyone can understand the opinions and the thoughts that you have on the issues, and that is one reason, again, I am happy to be here.

My name, of course, is Randall Adams. My story was depicted in the film "The Thin Blue Line" which was released in 1988 across the country. I am from Ohio; as Senator Metzenbaum stated, from Columbus, OH. I had gone to Dallas to try to find work and was in the Dallas area less than 2 months when I was picked up at my job site, arrested, and charged with the killing of a Dallas police officer, was indicted for capital murder. Within a few months—in fact, in April 1977, I was taken to trial. Ultimately, I was convicted and sentenced to death.

The trial lasted around 4 days, I believe it was. I took the witness stand in my own behalf and at the end of my testimony my attorney and I felt at the end of that trial—we felt that we had won the case. On the last afternoon of what we thought would be the last day of trial, the State reopened its case and introduced three witnesses that they stated had passed the scene of the crime and, you know, could positively identify me. Under oath, they, of course, testified for the State basically that they had passed the scene, and one witness testified that she had picked me out of a lineup.

Until that time, I had never been in trouble. I had never been convicted of anything other than one OMVI when I was in high school and had just learned to drive. You know, having never gone to a courtroom, having never needed an attorney, my family and I altogether was completely baffled by the system. We trusted in the system. We hoped the system, and believed in the system, that the system would work in the end.

All the way up until my conviction, we, of course, had that belief and trust that the American legal system was fair. Little did we know that the prosecutor was hiding evidence from us. Little did we know that the three witnesses now, of course, have committed perjury. We knew that at the time, but at the time of a trial if witnesses are sprung on you as surprise witnesses, how are you supposed to defend yourself? You can't do it at that point, and that is

basically the time you must do it. If you cannot defend yourself at that point, you get convicted.

I understand and I believe that most prosecutors in America are honest, are ethical, but as many of you Senators have mentioned, mistakes do happen. If they are honest and ethical mistakes, it is understandable and maybe we can correct these mistakes. But when they are unhonest, when they are unethical, what do we do? Do we shut our courts down?

We have a limit now for 90 days of shutting down habeas. We did not have some of the evidence that finally caused my release for close to 9 years. I came 72 hours from execution in 1979. Thankfully, the Supreme Court stayed my execution. Thankfully, the Supreme Court in an 8 to 1 decision overturned my case. Yes, some people in America may say it was a technicality. I have the right to a fair trial. I have the right for justice, and when that justice is used by a prosecutor to hide evidence, to pay witnesses, I think we are in a sorry state, and I am not just talking about Texas, which is where this happened. I think it happens everywhere at some point at some time, and because of that we really need to watch what we are doing.

Again, I want to thank you for allowing me to be here. I will kind of brief through this very quickly here. In December 1988, a new judge in the Dallas criminal—well, the Texas Court of Criminal Appeals made a ruling and in that ruling he stated that my hearing—well, anyway, I do believe you have this statement in front of you and you can read a lot of this.

But my conviction was originally upheld by the Texas Court of Criminal Appeals. My death sentence went to the Supreme Court in a Federal appeal. Of course, the Supreme Court removed my death sentence in 1980. I was given an automatic life sentence through the governor's office, a commuted sentence, and had to begin appealing a life sentence. It took my attorney, Randy Schaffer, and my family and myself another 8½ years to finally get that life sentence removed.

It took, of course, very good legal assistance. It took the film "The Thin Blue Line." It took an investigation by Earl Morris. It took even cooperation from the State, unknowingly. The district attorney turned over my file to the filmmaker, Earl Morris, because he thought he was doing a favorable film at the time, and there was no way my attorney could have had that file at that time, but he turned it over to a film producer, which allowed us new evidence to present back into court. In 1988, we were given evidentiary hearings and, of course, my case was overturned at that point.

Again, I thank you.

Senator METZENBAUM. How many years were you in the penitentiary?

Mr. ADAMS. I was locked up a total of 12 years and a few months. I was under a sentence of death for 3½ years,.and again came 72 hours from execution.

Senator METZENBAUM. Has the State provided you with any compensation for your loss of time?

Mr. ADAMS. Texas has what I like to call a little-known law that says you cannot sue Texas unless Texas allows you to sue them.

Of course, Texas does not want me to sue them, so they have denied that suit.

Senator METZENBAUM. Mr. McMillian, did you receive any compensation from the State of Alabama?

Mr. MCMILLIAN. No, sir.

[The prepared statement of Mr. Adams follows:]

PREPARED STATEMENT OF RANDALL DALE ADAMS

My name is Randall Dale Adams and my story was depicted in the film *The Thin Blue Line.* In May of 1977 I was convicted of capital murder in Dallas, Texas. I am from Ohio and had only been in the Dallas area two months prior to my arrest. Until this case I have never been convicted of anything more serious than driving while under the influence of alcohol, and that was in 1966. The evidence against me at trial was perjured.

In December of 1988, a new judge recommended to the Texas Court of Criminal Appeals, that I should be given a new trial. That judge told the *Austin American Statesmen* that if he were to make a decision based upon the evidence, he would have found me not guilty. A judge of the Texas Court of Criminal Appeals concluded that the state was guilty of suppressing evidence favorable to me, deceiving the trial court during my trial, and knowingly using perjured testimony.

My conviction was originally upheld In the Texas courts within a year and a half of my trial. In May of 1979, a U.S. Supreme Court justice stayed my death sentence 72 hours prior to my execution. In June of 1980, the U.S. Supreme Court In an 8–1 vote held that the jury that convicted me was biased in favor of the death penalty and therefore my conviction was unconstitutional. Some people might say that is a technicality but it is a technicality that saved my life. The governor of Texas commuted my sentence to life imprisonment without giving me a new trial. I was placed into the general prison population.

In mid 1983, my new lawyer Randy Schaffer filed a petition for a writ of habeas corpus in Federal court. A second hearing on my petition uncovered evidence of my Innocence. In November of 1988, after a State trial court habeas hearing a new trial was recommended by that court and the State dropped all charges.

I was, and am innocent of the murder charge. Perjured testimony was presented at my trial, the prosecutors concealed evidence that would have helped me prove my innocence at trial.

If not for Earl Morris, who produced the film *The Thin Blue Line* and my lawyer Randy Schaffer, and the availability of appeals based on evidence that I did not know of until years after my trial, I would have been executed for a crime I did not commit.

I appreciate the Judiciary Committee examining these death penalty issues. My case is a testament to the fact the criminal justice system makes mistakes. These mistakes can have terrible and even tragic circumstances. I was, myself, three days from being executed. I spent 12 years of my life in jail for a crime I did not commit. I can't get that time back. I cannot convey to you the impact of those lost and desperate years on my family.

It's extremely important there be effective safeguards that can minimize the possibility that other people will have to undergo the ordeal that I experienced.

Thank you very much for taking the time to hear my story.

Randall Adams Case. Procedural History (DRAFT):

Dec 76 Arrested.

Apr 77 Trial began.

May 77 Convicted.

Nov 78 Appealed to Texas Ct.App. (1st State habeas).

Jan 79 State appeal denied without a hearing; conviction affirmed.

May 79 U.S. Supreme Court, on direct appeal, stayed sentence 72 hours prior to execution.

Oct 79 U.S. Supreme Court argument.

Jun 80 U.S. Supreme Court holds conviction unconstitutional because jury selected was biased in favor of death penalty, *Adams* v. *Texas* (8–1, with Rehnquist dissenting); remands for "proceedings not inconsistent with this opinion."

(?) Governor of Texas commutes death sentence to life imprisonment, without new trial.

Aug 80 Removed from death row.

Oct 81 State Ct.App. decides that U.S. Supreme Court decision did not require new trial; upholds life sentence.

85 Federal habeas hearing in district court before Judge "Toll." Prosecutors had given movie researchers file and information that they had reused to give Adams, so Federal habeas hearing provided forum for defense to learn of file and important exculpatory testimony, issues that had not been raised in the State habeas. Toll ruled against Adams, but then it was discovered that he had represented prosecutors in Adams' civil rights action against them and therefore had a conflict of interest Adams' motion to strike Toll's ruling was granted, and his attorney dismissed the Federal habeas without prejudice.

Nov 88 2d State habeas (hearing), raising new issues based on evidence finally uncovered through Federal hearing and movie research (main issue: State knowingly used perjured testimony in obtaining conviction).

Mar 89 State trial court hearing habeas "recommends" new trial (only Ct.App. can "order" new trial; usually a formality).

Mar 89 State drops charges.

Mar 89 Released.

Senator METZENBAUM. Thank you.

Mr. D'Alemberte, you are past president of the American Bar from Miami, FL. We are happy to hear from you, sir. Thank you for being with us.

STATEMENT OF TALBOT D'ALEMBERTE

Mr. D'ALEMBERTE. Thank you, Mr. Chairman, Senator Hatch, members of the committee. It is customary to say you are happy to——

Senator METZENBAUM. Do you want to bring the mike a little closer?

Mr. D'ALEMBERTE. It is customary to say you are happy to be before the committee, but I must tell you that it is a rather cruel thing to bring a lawyer in to discuss a case he has lost, so I am not entirely happy to be here to discuss the *Herrera* opinion. It is a case that I argued in the Supreme Court last term.

Let me say quickly I was quite moved by the statements made earlier, as I think anybody has to be on hearing of a innocent person who has been convicted, served time in prison, and been under the very substantial threat of execution. These stories, I don't think, are numerous if we looked around our prisons, but we certainly know they happen.

In my own State of Florida, I can think of two cases, each one handled by close friends of mine, that are very similar stories—the *Pitts* and *Lee* story in Florida that ultimately led to Governor Askew taking some action to free *Pitts* and *Lee* who were under a death sentence, and I think most members of this committee know from reviewing the files of the recently appointed Attorney General that she had investigated a case called "James Richardson," a man who was in prison for allegedly killing his children, and she concluded that indeed he was innocent and, as the stories are told, that indeed there was evidence that was not made available to the defense in that case, as so often happens.

If I may, I would really like to talk about three quick matters relating to the *Herrera* opinion. The first, Senator Hatch, goes to a comment that you made about Herrera being guilty, and I concede that that is not only said, but it is said several times within the *Herrera* opinion. But the point that I would like to make is that a Federal district judge, the person we normally look to when we start talking about who handles these problems, looked at the *Herrera* case. Judge Hinojosa was a 1983 appointee. He lived his life and served for 10 years in south Texas, served on the bench there.

Senator METZENBAUM. A Reagan appointee?
Mr. D'ALEMBERTE. Yes, sir.
Senator HATCH. I know him well. He is a fine judge.
Mr. D'ALEMBERTE. I think a very well-regarded judge from all I understand. He had entertained a habeas petition from Herrera at an earlier time and rejected it. He said that these other earlier claims were not meritorious and rejected them. He is not a person who is particularly soft on crime or anything. He is a person who looked at the fact of innocence, however, and said that he was uncomfortable and that he thought that these facts ought to be presented to a court.

Now, that has never happened. Judge Hinojosa was not allowed to go forward. The fifth circuit came in and issued an opinion without hearing oral argument or having any real briefing and said that you may not have a hearing on a mere claim of innocence. If it is just innocence, you don't get heard, the fifth circuit said. And, of course, it was that opinion of the fifth circuit that was reviewed by the United States Supreme Court and affirmed. It is always shocking when you talk to any lay person to say mere innocence is not going to get you into court, but that is where we are.

If you look at the *Herrera* opinion, you see these statements about Herrera being guilty. Coupled with that is the idea that somehow we don't have to look at even the threshold showing very seriously because, after all, these are just affidavits. There was no testimony taken. But, you see, that is exactly our point. The appellate courts have not allowed the district judge to take testimony, and now for the appellate court to say, well, these are just affidavits, they have not been cross-examined, is exactly our point. We wanted to put forward the evidence before a court and we wanted to have an opportunity to present that evidence and to have it cross-examined.

The second point I would like to make relates to the flood gates question. I know whenever you get into these areas—and I have heard some in the statements made by the Senators as this hearing commenced—that there is a great worry that whenever you start tampering with the law you are suddenly going to open up the flood gates of litigation. We have heard that repeatedly.

Indeed, the argument came up, in a way, during the *Herrera* oral argument because Justice Stevens pointed out that he had dissented in an earlier opinion, *Jackson* v. *Virginia,* and the basis of his dissent was that if you had the kind of review proposed in *Jackson* you would actually open up the flood gates. But Justice Stevens said he was simply wrong; there had been no flood gates.

We had a case not too long ago arising out of Florida, the *Alvin Ford* case, and that case related to the question of whether you would execute a person who was mentally ill and the United States Supreme Court said we should not. And at that time it was charged that we would have this vast flood gate of litigation, and it simply hasn't happened. And I would say to you simply on that question that it is much easier to fake mental illness than it is to fake innocence, that the courts are fully competent to examine the question of innocence.

Finally, if I may conclude by making some reference to that portion of the Court's opinion which points to clemency as a relief, I

hope that you have a chance to read the *Herrera* opinion carefully, and even the Court itself puts forward the Texas standard on clemency. Essentially, to get anywhere, and no one has—at oral argument, Texas conceded that they have not given clemency now for 18 years, or so, to anybody on death row. It did not give it to Randall Dale Adams. He was actually seeking to be released from prison after the trial court had found that he was innocent. Before the appellate review, he sought to go to that Texas board. They didn't even give it to Randall Dale Adams in that context.

Clemency is not an effective remedy. It is a political remedy. It is the most passionate forum that you could put us into. You know that the people who are dealing with clemency questions are out there in this very environment that all of you have described, an environment in which the death penalty is politically popular. And particularly where you have got a police officer, as in Randall Dale Adams and as in Herrera, who was killed, then you will find that it is not going to be very popular thing for a Texas governor to grant clemency and it will not happen. It has not happened, and therefore I think all of this points to the necessity of looking at some measure to look at innocence.

You don't have to favor abolition of capital punishment to look at this innocence question and say we ought to have some way to make sure that the integrity of the system is preserved.

Senator METZENBAUM. I will have some questions for you later, but how does the president of the American Bar Association happen to be representing Mr. Herrera?

Mr. D'ALEMBERTE. I was asked to do so. Senator, I made the mistake that some of us make in public life sometimes of talking about what lawyers ought to be doing in terms of giving pro bono service and somebody came to me and offered me the opportunity to live up to my own rhetoric, so I——

Senator METZENBAUM. This was a pro bono case?

Mr. D'ALEMBERTE. Yes, sir.

[The prepared statement of Mr. D'Alemberte follows:]

PREPARED STATEMENT OF TALBOT D'ALEMBERTE

I am delighted to join this panel and I appreciate the Committee's interest in the subject of innocence. I am Talbot D'Alemberte from Florida. I have served on an American Bar Association Task Force looking into post conviction relief, I have handled, on a *pro bono* basis, several post Conviction Cases for Florida death row inmates and a Florida clemency matter. I argued the case styled *Herrera* v. *Collins* in the United States Supreme Court last term.

The testimony you have heard relating to Walter McMillian and his lawyers is truly amazing and, though I doubt that there are great numbers of innocent people on death row, I do know that the conviction of innocent people is not at all beyond our experience, In my hole State, Florida, we have known a number of such cases and I have had good friends tell me about the investigation, During the term of Gov. Reubin Askew, his office conducted an investigation into the case we know as *Pitts and Lee* and determined that they had been wrongfully convicted. One of my law partners, who was then the Governor's General Counsel, participated in the investigation of that case and found that there was a miscarriage of justice. I have another former law partner who investigated a case where the prisoner, James Richardson, was convicted of having killed his own children. When evidence pointing to his innocence surfaced, the governor asked her to investigate and she determined that James Richardson was innocent. I learned from both these friends something about how the justice system can fail to protect the innocent.

My personal direct contact with the innocence issue came last year when I was asked to participate in the presentation of Lionel Herrera's case to the United States Supreme Court. Leonel Herrera had been convicted of murder, had completed

several post conviction proceedings (including Federal court proceedings) and had been on the very eve of execution when a Federal district judge, a 1983 appointee sitting in south Texas, held that the evidence offered to the court in support of an innocence claim was sufficient to entitle Leonel Herrera to a hearing.

The Federal Appellate Court, the fifth circuit, reversed and held that a mere claim Of innocence not connected to any other claim of constitutional dimension was not sufficient to support jurisdiction of a Federal court.

When the case was reviewed by the United States Supreme Court, only three of the Justices (Blackmun, Stevens and Souter) supported Herrera's right to have this evidence heard and tested by the rules of evidence. The six Justices who made up the majority placed their judgment over that of the district judge and decided that the evidence, including testimony from a person who claimed to be an eye witness, need not be received. This decision prevented a Federal district judge who wanted to hold a hearing on new evidence of innocence brought forward by Herrera from holding that hearing. This new evidence created enough uncertainty in the mind of that judge to prompt him to order a hearing prior to Herrera's execution. But the rule laid down by the Supreme Court is that a death row inmate who has new evidence of his innocence is not entitled to judicial review of that new evidence. That means that executions may go forward even though there might be credible reason to have doubts about the defendant's guilt.

A significant portion of the majority opinion was devoted to outlining the reasons why clemency, rather than a court hearing, was the appropriate remedy for a capital defendant who has a claim of innocence based on newly discovered evidence. The court's elaborate discussion of the clemency remedy sent a strong signal to lower courts that it is not within their province to entertain claims of innocence based on new evidence.

Let me elaborate on a number of troublesome aspects of the opinion which merit further comment.

AFFIDAVITS V. COURT TESTIMONY

A number of apologists for the *Herrera* opinion have pointed to the language in the court's opinion, particularly that of the concurring opinion of Justice O'Connor and Kennedy which concludes that Leonel Herrera is guilty. It is strange to me that people find so much confidence in that particular language which after all, is based in large part on the fact that Leonel Herrera's evidence was not Presented in open court nor subject to cross-examination.

In our system, we frequently look to trial judges as the people who are closest to the situation and best able to make judgments about the sufficiency of the pleadings and the bona fideness of the evidence. But look at the *Herrera* decision, where we have appellate judges displacing the district judge in these areas. These appellate judges, who have never heard the evidence, decide whether to believe a person who has put forward an affidavit saying that he was an eye witness to the events. The person's testimony is never heard. It may give these judges distant from the facts some comfort to say that, after all, the eye witness was and relative of the defendant and that the person who is implicated in the murder is now himself deceased, but surely there are circumstances when relatives are indeed eye witnesses and it should be entirely understandable that a witness who might not want to come forward and implicate their own parent would be relieved from any reluctance to testify following the parent's death.

My simple point is that these credibility questions are normally made by the district judge who hears the evidence, not appellate judges who do not. Moreover, these decisions are best made by judges familiar with the local circumstances.

It is particularly grating to read passages where appellate judges refer to the "absence of cross-examination" when it is those very judges who are blocking the evidentiary process including cross-examination.

CLEMENCY

The *Herrera* opinion discusses executive clemency and suggests that this is the "fail safe" for the criminal justice system. The opinion recites the Texas rules. If these rules on pardon are read closely, you will see that they are designed by the same person who wrote the immortal rule "Catch 22." In Texas, pardons for innocence depend on the support of "trial officials of the court of conviction" and since these are the very officials who will not hear the evidence of innocence, it is clear that there is going to be no process for determination of innocence, no possibility to present evidence and no pardon.

The court lingered on pardon as the real "fail safe" even after the Assistant Attorney General at oral argument conceded that clemency has not been exercised in a death case in Texas for the last 15 to 13 years.

The reliance on clemency is also curious because it is a political process subject to the passions off that process. In States like Texas where political Campaigns may be waged in part by candidates who argue that they are more likely to execute the most people, clemency is not an attractive step for a politician.

If we are to have a safety valve to protect the innocent, we need to engineer that safety valve so that it actually works. In our design, we should want the mechanism to operate in the least politically volatile environment, not the most passionate, and we should want a process which has established procedures for dispassionate review. We have traditionally thought that the judiciary, not the executive branch, was best suited to protect our civil liberties and we have learned that Federal judges with life tenure can be better trusted with certain tasks than State elected judges.

The *Herrera* opinion rejects this view and suggests that the "fail safe" device be trusted to the most political, most passionate branch, the branch which has the least settled process and no history of performance. The design of a safety valve by the *Herrera* majority is a poor design and it will not work.

FLOODGATES

There are some people who have suggested that creating a remedy for those with a bona fide claim of innocence will create a flood of litigation. I note that this floodgates argument is made repeatedly in context of death penalty post conviction and it is almost never correct. Justice Stevens made an observation to that effect during the course of oral argument in the *Herrera* case.

One of the more recent references to the possibility of a floodgate occurred after the decision of the Supreme Court in the *Alvin Ford* case which held that a person who is mentally ill may not be executed. The opponents to the *Ford* decision argued strenuously that there would be large numbers of prisoners faking insanity and large volumes of litigation relating to this. In fact, no such problem has developed.

It is much easier to fake insanity than it is to fake innocence and a procedure which allows for innocence claims to be made should not create any large number of cases. it is amusing to see that the very people who argue that no process is necessary to protect innocent people on death row also advance the floodgate argument. My personal hunch is that there are not large numbers of people on death row but have practiced law long enough to have confidence that the judicial processes are sufficiently sound to allow the courts, without great effort, to sort between those cases which deserve hearing and those which do not.

The situation which is jest plainly intolerable is one where there is no process at all and that appears to be the situation following *Herrera.*

CONCLUSION

It is curious to me that where our most serious legal questions are involved, often there is not sufficient time to develop a full study and a well considered result. *Herrera* is such a case. A district judge, Judge Hinojosa, a Reagan-era appointee sitting in South Texas who was very familiar with the case and the environment in which it arose, determined that Leonel Herrera's case deserved an evidentiary hearing. The fifth circuit, without providing an occasion for oral argument or full briefing, overruled him and held that there could be no hearing for innocence, thereafter, there were briefs to the United States Supreme Court and an argument lasting one hour. The *Herrera* opinion now controls the law of innocence, yet I have an unsettling feeling that justices simply did not understand the case or the perspective of the death row inmate with a bona fide claim of innocence,

It is important that someone give these questions adequate attentions and I am delighted that this Committee has decided that this inquiry is worth its time.

I do not think there is anything more important than designing the safety valve for the innocent person who is sentenced to die. What is needed is some reliable, nonpolitical avenue of relief where a prisoner can litigate a bona fide claim of innocence.

The courts are able to sort out the bona fide claims of innocence from the trumped up claims and there are abundant protections to assure that we are not dealing with phoney cases. False witnesses may be prosecuted for perjury; lawyers who put forward claims with no basis may be disciplined

The former Attorney General of Texas has said that the execution of an innocent person is a prosecutor's worst nightmare. It ought to be the worst nightmare of all

people who care about the justice system. The problem is that the *Herrera* decision takes us closer to making this nightmare a reality

Since the vast majority of Americans do not want to see innocent people executed, it is important to have legislation which allows a well-pled claim of actual innocence to be considered by the Federal courts. Sen. Metzenbaum has proposed a workable solution to the problems created by the *Herrera* decision in Senate Bill 221. The integrity of our justice system demands that there be some method available for innocent people to bring their evidence to court.

Senator METZENBAUM. Ms. Elaine Jones of the NAACP Legal Defense Fund, I know it was somewhat not comfortable for your schedule to be with us, but I am very glad that you are with us.

STATEMENT OF ELAINE R. JONES

Ms. JONES. Thank you, Senator Metzenbaum and members of the committee.

I listened to Sandy D'Alemberte talk about his role in *Herrera* and as president of the American Bar Association. I think, well, the American Bar Association has come a long way because Sandy D'Alemberte is president, he argued *Herrera* in the Supreme Court, and I have spent as head of the NAACP Legal Defense Fund—I am with an organization who, for 30 years, has dealt with this issue of capital punishment in a defense posture, and I have represented in Alabama and other States people who have been accused of capital crimes. I, too, have served with the American Bar Association. I was elected to its board of governors, and so we served there together.

Let me say that, first, as I have indicated, the NAACP Legal Defense Fund for 30 years has been involved in looking closely, since 1964, and litigating this issue of capital punishment. We realized and recognized early, early, quite a long time ago that race plays a very significant factor in terms of the imposition of this sentence. We wish that were not the case, but it is. The facts, the studies, the evidence shows that.

However, you know, I am pleading guilty to the committee this morning in terms of my position on the death penalty. You know, I am making it clear that I was one of the counsel of record in *Furman* v. *Georgia* which abolished the death sentence and the death penalty in 37 States back in 1972. So I am telling the committee that because I think it is important for us to understand, though, that I have known for many years now that the law—that *Furman* is no longer the law, and that what has happened is that this country has moved toward the death penalty, and as a lawyer I recognize that and that that is the system in which I am operating.

Now, if that is the case, then I say to all persons, whether you support or oppose the death penalty, it is very, very important that this legislation be supported. Especially those who support the death penalty need to understand that under no circumstances should we close the courthouse door to a death-sentence prisoner who has a strong claim, a strong claim of probable innocence because, as others have pointed out earlier, the integrity of the system depends on our extreme care when we as a society are exacting the ultimate penalty.

When I hear the stories of Randall Adams and Walter McMillian—and we all hear them and we sit and we think, well,

they are here so the system must be working. Not so, ladies and gentlemen of the Judiciary Committee. What this means is they are sitting here because an extraordinary combination of factors came together in a system that otherwise condemns.

They are here because of extraordinary work by counsel over an extended period of time. They are here because there were support systems in place that would not let their cases go. They are here because an extraordinary bit of luck occurred in their situations. For example, Mr. Adams told us about how the records were released to a movie producer that his counsel could not get, and only because the movie producer then shared them with the counsel and the counsel had sought the records—so we have got to understand that these men are the exception, not the rule, and we also must understand that our system is fallible. We do the best we can with it, but it is fallible, and we have an obligation as a society to make sure that when we are talking about death that we make sure that the courthouse door is open to those with strong claims of probable innocence.

Now, I listened to Senator Hatch this morning and I heard what he said when, Senator Hatch, you told us—you talked about justly imposed death penalties. Well, when you say justly imposed death penalties, we have to be careful about a mechanical application of our rules, of existing rules.

The issue is not justly imposed, but whether or not those procedures do, in fact, afford a full measure of justice, the procedures that we have in place, and when society is taking life we know there is a problem when we have death-sentence individuals who have strong showings of justice and the courthouse door is closed—strong showings of innocence that they can make and the courthouse door is closed.

Adams and McMillian are two cases. You know, I have represented and tried capital cases. I have also had the experience of seeing men I knew who were innocent, I knew were innocent, who were sentenced to death, and in three of those cases back in the early 1970's in Alabama, because of diligence, because of the kind of time and commitment—and there was an organization behind me and we were not part of a State indigent defense system. We made sure we had funds and pushed, and although they were stretched we used them, and we used them to free those three men from death row in Alabama.

But this is a very important issue. We cannot take lightly this issue of fairness in our system, and I echo the remarks of Sandy D'Alemberte on the question of limitations of clemency. We have to understand that we are in a political process when we are talking about State court judges and when we are talking about clemency, and it is very tough. I don't have to tell this committee about elective politics and problems and issues that can arise. But it is very important that we have a forum in which these claims can be raised even if it is at the 11th hour because we are talking about death.

Thank you very much.

[The prepared statement of Ms. Jones follows:]

PREPARED STATEMENT OF ELAINE R. JONES

I am Elaine Jones. I am director-counsel of the NAACP Legal Defense and Educational Fund. I am grateful for the opportunity to speak to the committee on an issue that really has no peer—the wrongful conviction and condemnation of a fellow citizen.

My organization has long been concerned with the administration of capital punishment and with the potential for—indeed the inevitability of—its application to innocent persons. Our involvement began over 30 years ago with our recognition that the consideration of race—a factor that has long distorted the search for truth—is often *the* dispositive factor for a prosecutor to seek the death penalty, and for the sentencer to impose it. As a punishment for rape, death was reserved almost exclusively for African-American offenders. Since, we haveparticipated in some of the landmark cases that have shaped modern capital jurisprudence.[1]

The topic for this morning—citizens wrongly convicted of capital offenses—is one that many might wish to believe is a relic of a bygone era, a rare phenomena that occurred only before our Constitution was read to guarantee indigents appointed counsel, before the post-*Furman* Eighth Amendment procedural protections, and before the development of existing post-conviction remedies.

But the mere presence of Walter McMillian and Randall Dale Adams, and their nightmarish accounts as condemned innocents, leave no doubt that citizens who have committed no crime can still today be hauled into court, convicted of a capital crime, sent to death row, and, in the absence of intervention by skilled counsel and luck, dispatched to the electric chair or death gurney. I am sure that their stories and heartaches distress you as much as they do me.

In my time this morning, I wish to make three points. First, as Mr. McMillian's and Mr. Adams' cases so eloquently demonstrate, it takes no great effort to wrongly convict an innocent person. The momentary decision to withhold a particularly exculpatory piece of evidence, the use of one crooked witness or misleading exhibit, or testimony from an earnest but mistaken eyewitness, can without more guarantee a conviction. All that is needed is a dishonest cop, a savvy informant, a mistaken eyewitness, or an ambitious prosecutor who will cut whatevercorner is necessary. Indeed, an innocent citizen can be convicted in the absence of foul play.

Second, to later uncover this crucial *and* deadly flaw, and prove up innocence, can take years, hundreds of hours of labor, and the expenditure of considerable resources. And when, as in Mr. McMillian's case, innocence is so uncovered and demonstrated, it is not because "the system works." It is more often that the truth emerges in spite of the system. Innocence is shown only after the condemned, counsel, and others tirelessly navigate through the increasingly strong and tricky currents of finality. Moreover, fortuity and luck are often more responsible for an innocent prisoner being set free than is any systemic safeguard.

Third, our legal systems's capacity to hear claims of innocence—both at trial and later in the process—must be enhanced. It is time for the Congress to review the causes of wrongful conviction and take measures to reduce their occurrence.

1. CONVICTING THE INNOCENT: ALL IT TAKES IS ONE BAD APPLE ON THE PROSECUTION TEAM OR A MISTAKEN WITNESS

As the experiences of Mr. McMillian and Mr. Adams show, citizens who are wrongly convicted today are often the victim of a dishonest police investigator. a con-artist informant, or a prosecutor who will go to whatever length necessary to secure the conviction and death sentence.

a. The dishonest investigator

Jerry Banks' life was forever altered by a crooked sheriff's investigator. Banks, then a happily married young African-American father of three, was twice convicted and death-sentenced in Georgia.[2] While out hunting one day, he came upon the bodies of a white high school band instructor and one of his former female students.

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[1] *See e.g., Furman* v. *Georgia,* 408 U.S. 238 (1972)(Court struck down all existing capital statutes because of arbitrary, capricious and racist application); *Coker* v. *Georgia,* 433 U.S. 584 (1977)(death is an inappropriate and excessive sentence for rape and other crimes in which death does not result); *Lockett* v. *Ohio,* 438 U.S. 584 (1978)(Eighth Amendment requires that sentencer be free to consider wide range of mitigating evidence during sentencing phase of trial); *Estelle* v. *Smith,* 451 U.S. 454 (1981)(Fifth and Sixth Amendment rights to silence and counsel apply to capital sentencing proceedings). *See also Zant* v. *Stephens,* 462 U.S. 862 (1983); *McCleskey* v. *Kemp,* 481 U.S. 279 (1987).

[2] *Banks* v. *State,* 268 S.E.2d 630 (Ga. 1980). Banks first conviction was overturned because the prosecution withheld exculpatory material. *See Banks* v. *State,* 218 S.E.2d 851 (1975).

As would any good citizen, Banks immediately notified the police. This act of civic duty led to him being charged with the murders.

No evidence or motive linked Banks to the crime until an investigator planted some shotgun shells that matched Banks' old shotgun near the scene of the crime. This evidence was strong enough to twice persuade juries to convict Banks for the murders and to sentence him to death.[3] As was the case with Walter McMillian, the State expended little time and few resources to send an innocent man to death row.

Clarence Lee Brandley, another African-American, was railroaded after the lead investigator insisted, from the beginning, that the entire investigation be directed toward building a case against Brandley.[4] The investigator repeatedly ignored leads that might inculpate someone other than Brandley, such as attemptingto explain the presence of a caucasian pubic hair on the victim's body. This investigator also intimidated one witness, and threatened to kill another if the witness, testimony was not consistent with his theory of the case.

In part, this dogged determination to "get" Brandley was driven by racism. As one witness later testified, Brandley was charged with the crime after it was determined "that 'the nigger' * * * was big enough to have committed the crime; therefore 'the nigger was elected.'"[5]

The disgraceful tactics witnessed in *Banks and Brandley* are not aberrations. With increased pressure upon police nationwide to solve crime swiftly or be subject to media ridicule, misconduct seems to be on the rise. **60 Minutes** aired a story last Sunday that profiled a former New York State Patrol officer, David Harding, who is now in prison for manufacturing fingerprint evidence and testifying falsely in a number of trials.[6] Harding has told investigators that he was encouraged by superiors to falsify evidence and that other police investigators did as he did. His claim was echoed by Gerald Arenberg, a retired police officer andExecutive Director, National Chiefs of Police, who regularly hears of reports of faked evidence. He explained:

> What you learn in police school is to obey the law, the constitutional rights of citizens. Then you go out and start riding with older officers who are more experienced. And they say, Well listen, what they taught you in police school, forget about it because this is the real world. Now in order for us to make cases, we're going to have to do—take some shortcuts.[7]

b. The con-man informant

It's hardly news that capital prosecutions, like a growing number of drug prosecutions, often rely heavily upon the testimony of a "snitch witness" or informant to make out a crucial portions of the case. Sometimes, it turns out this evidence is worthless as it is offered solely to gain favor in the inmate's own case. Mr. Adams certainly understands this point; the most critical evidence against him came from David Harris who later confirmed that his trial testimony inculpating Mr. Adams was untruthful, and had been given to secure a deal in his own case.[8] Mr. McMillian was similarly victimized.

The Federal courts have also confronted unreliable snitch testimony in numerous cases. For example, in *Brown* v. *Wainwright,* 785 F.2d 1457 (11th Cir. 1986), the Federal Appeals Court threw out a capital murder conviction and death sentence when concluded that the State's key witness lied about the absence of a deal.[9] As posttrial proceedings showed, this witness acted primarily to save his own neck.

The dangers of over reliance upon snitch testimony have come to haunt authorities in Los Angeles, and have raised enormous doubts about the credibility of numerous convictions. In 1989, Leslie White, an inmate at the L.A. County Jail, showed authorities how easily he could gather enough information about a case to

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[3] At both trials, Banks was represented by an attorney who was later disbarred. *See Banks* v. *State,* 268 S.E.2d at 631. Counsel's fee was a retainer of $10, "a kettle of fish and some collard greens." Brenda Mooney, *Banks' Release Has Kids 'Jumpin Like Squirrels,'* Atlanta Constitution, December 24, 1980 at p.1.

[4] *Ex parte Brandley, 781 S.W.2d 886 (Tex.Cr.App. 1989).*

[5] *Ex parte Brandley,* 781 S.W.2d at 890.

[6] *Officer Harding,* CBS 60 Minutes, March 28, 1993 at 12–16.

[7] *Id.* at 16.

[8] *Ex parte Adams,* 768 S.W.2d 281 (Tex.Cr.App. 1989).

[9] At the time the deal was struck, this witness was facing murder and armed robbery charges. Some months after trial, this witness recanted his trial testimony that incriminated Brown and said that he had testified falsely to receive favorable treatment in his own cases. He later recanted a portion of the recantation. *See* 785 F.2d at 1461–62. The State made no effort to again try Joseph Brown for this crime because it had little evidence—apart from this witness—which inculpated Brown.

concoct a confession that could later be used against a suspect.[10] White learned his trade as he had been in and out of prison 30 times since he was nine years old. In many of his own cases, he was released early by making a deals with prosecutors for testimony.

As a result of White's disclosure, the L.A. County District Attorney's Office had to review more than 200 murder cases in Southern California in which 'informants were used. Sixteen people convicted using informant testimony are on Death Row. Prosecutors have since confessed error in at least two murder cases because of unreliable informant testimony.[11]

Such use of informants, who have everything to gain and little to lose by telling the police what they wish to hear, is growing and is lessening the integrity of the system. A recent report notes that "various governmental agencies paid crooks somewhere between $40 million and infinity" to help solve crime.[12] Information and evidence plied by dollars and deals is often later shown to be false as many informants "are pathological liars."[13]

c. The crooked prosecutor

While many prosecutors throughout the country steadfastly comply with constitutional and ethical standards while enforcing the law, some do not. The pressures associated with capital cases often tempt the prosecutor to disobey the law. Failure to win a conviction or death sentence in a widely publicized case can harm a promising career. We have seen prosecutors withhold evidence or let witnesses testify falsely to insure convictions in our own cases.

Mr. Adams' case, the district attorney lied to the trial court about the status of a crucial State's witness, and failed to disclose to the defense evidence that would have shown this witness committed perjury.[14] In the *Brandley* case, the prosecutor presented evidence that he knew was not truthful. The prosecutor in *Brown* not only failed to correct the key State witness' testimony that no deal was made, but affirmatively argued to the jury that the false testimony was true.

James Joseph Richardson's prosecution was plagued by similar problems. Nearly 22 years after being convicted for the poisoning deaths of his seven children, Mr. Richardson was released from prison when Attorney General Janet Reno, then serving as a special prosecutor appointed by the Governor, found that the trial prosecutor withheld crucial evidence that could have resulted in acquittal, allowed witnesses to lie and made no attempt to correct their testimony.[15]

In *McDowell* v. *Dixon,* 858 F.2d 945 (4th Cir. 1988), in a case where the surviving victim's identification was crucial, the prosecutor failed to disclose a report wherein the witness first told police her assailant was white. Mr. McDowell is Africa-American. In *Ross* v. *Kemp,* 393 S.E.2d 244 (Ga. 1990), the prosecutor allowed several false statements by a key witness to go uncorrected.[16]

d. The mistaken witness

In the Jerry Banks case, the State's ballistics witness testified truthfully that the shell casings provided to him by investigators had been fired by Mr. Banks' gun. This testimony was crucial as it served to link Mr. Banks to the murders. As we now know, this evidence was misleading because the expert witness had been provided with planted evidence.

We know that innocent persons can be convicted where witnesses believe they are telling the truth. In several recent cases, men who have served years in prison for sexual assault have been cleared by new DNA evidence. For examples in 1982, Kerry Kolter was convicted of rape. The victim made a courtroom identification that he was her assailant. After serving 11 years in prison, DNA testing showed conclusively that Mr. Kolter was not the victim's assailant. The victim continues to believe that Mr. Kolter assaulted her.[17]

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[10] Mark Curriden, *No Honor Among Thieves,* ABA Journal, June, 1989 52.

[11] Ted Rohrlich, *D.A. Admits Murder Trial Was Unfair,* Los Angeles Times, August 2, 1990, p. A1.

[12] *The Informers,* CBS 60 Minutes, March 28, 1993 at 1.

[13] *Id.* at 3.

[14] *See Ex parte Adams,* 768 S.W.2d at 285–87.

[15] *See* Curriden, *supra* at note 10, at 54.

[16] Full habeas relief was granted in this case on the ground that Mr. Ross' elderly attorney, who was a former Imperial Wizard of the KKK, failed to provide minimally adequate counsel. The Court found it unnecessary to reach the prosecutorial misconduct claim.

[17] Jonathan Rabinowitz, *Rape Conviction Overturned on DNA Tests: Reversal Comes After Man Served 11 Years in Prison,* New York Times, December 2, 1992 at B6. Upon his release, Kolter "tearfully embraced his parents," and remarked that "I'd like to tell the rape victim that

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2. CLEARING THE INNOCENT: OVERCOMING EXTRAORDINARY ODDS AND THE INDISPENSABLE ROLE OF LUCK

In the wake of a case like Walter McMillian's or Randall Dale Adams,' it is often said that such vindication "proves the system worked." But as you hear their stories, what is clear is that their vindication came in spite of the system, and indeed was dependent upon their ability to overcome the very strong presumption that anyone who is convicted of capital murder is indeed guilty. And that effort requires enormous amounts of time, resources, and lucks.

a. The system literally obstructs challenges based upon innocence: the absence of defense, resources and law enforcement aversion to reopening the question of guilt

After conviction, strong institutional forces take hold and make revisiting the issue of guilt a most difficult task. First, few indigent inmates possess the resources necessary to marshall a comprehensive reinvestigation of their cases, and many States still fail to provide adequate compensated counsel for post conviction proceedings. As you have heard, Mr. McMillian's innocence investigation consumed *thousands* of hours. Mr. Stevenson's office was barely able to conductsuch an investigation, and attend to their numerous other responsibilities.

Indeed, the efforts of other counsel, many who have volunteered their services because of the failure of the system to provide *any* counsel, have also run into many hours of time and considerable out-of-pocket expenses. Counsel for Jerry Banks donated several thousand hours before they identified the witnesses who finally could show that the State convicted the wrong man. One of his attorneys commented after Banks was freed that "no single lawyer could have adequately handled Banks' case, which involved 4000 hours of legal work. He said there should be a board of approved attorneys to handle death penalty cases."[18] The records in *Adams* and *Brandley* show that similar amounts of time and out-of-pocket expenseswere required to vindicate those claims of innocence.

Moreover, prosecutors and law enforcement officers stubbornly refuse to concede error even when there is no question that they convicted the wrong person. That was certainly the case for a long time in Mr. Adams' and Mr. McMillian's cases. In *Brandley,* even after it became clear that the State's case was fundamentally flawed and based upon perjured testimony and the suppression of much exculpatory material, the State fought hard to keep its judgment and for its right to Mr. Brandley's execution. To our knowledge, none of those officials have yet declared that they convicted the wrong man.

In a recent Pennsylvania case, prosecutors went so far as to wrongly accused a fellow law enforcement officer with fabricating evidence to win a conviction and to preserve that "win" on appeal. *Commonwealth* v. *Smith,* 615 A.2d 321 (Pa. 1992). The State's theory in this case was that Smith and a fellow teacher named Bradfield killed another, teacher. Smith's defense claimed that Smith had nothing to do with, this killing, and that Bradfield alone killed the teacher at a New Jersey beach. The Court described the issue in the following terms:

> One of the Commonwealth's witnesses was Corporal John Balshy, a former Pennsylvania State trooper who had investigated the Reinert murders and had been present during the victim's autopsy. He testified on cross-examination that he had used adhesive lifters to remove granular particles which looked like sand from between the victim's toes. The Commonwealth excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters. The Commonwealth then presented the testimony of other State police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false. The prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury. A few days later, *while appellant's trial was still in progress,* the Pennsylvania State police discovered the missing adhesive lifters in their evidence locker at the State police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth suppressed the discovery. Then for more than two years, while appellant's case was on direct appeal, the Commonwealth continued to suppress the fact that it had in its possession the disputed exculpatory evidence, vigorously arguing all the while that this court should affirm appellant's death sentence. Meanwhile, Corporal Balshy was made the scapegoat for the mis-

I have no bad feelings toward her. I do not doubt that she is an honest woman, and I'm convinced that she believes in her identification." *Id.*

[18] Mooney, *supra* note 3 at 3–A.

> conduct on the theory that he had fabricated and "planted" the evidence after the autopsy. It was even argued by the Commonwealth at appellant's trial that the defense had paid Balshy to concoct his testimony about the sand and the lifters. Investigations conducted after trial by the State police and the attorney general's office concluded that there was no evidence of perjury or falsification of evidence by Balshy. Finally, on July 12, 1988, the attorney general's office informed defense counsel that the missing lifters had been discovered, though *even then,* there seemed to be some hesitancy concerning the prosecutor's duty to disclose the evidence.

615 A.2d at 323–24 (*emphasis in original*). The Court noted appropriately that the "deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness * * *" *Id,* at 324.

Moreover, where detection of innocence will reflect badly upon law enforcement, the inmate runs squarely into the "code of silence" long observed by law enforcement in this country. As the Executive Director of the National Association of Police Chief reminded us this past Sunday evening, "as police officers, we protect each other. We're a very thin blue line. It's you against us, and so we're not likely to turn in a brother officer." [19]

b. Assistance from extralegal sources and luck are also critical ingredients to vindicating innocence

While Randall Dale Adams and Walter McMillian owe their lives literally to their postconviction attorneys, lawyers who we are proud to know and who personify the very finest traditions of the Bar, neither might be present today had it not been for additional resources that came to their aid.

In Mr. Adams' case, it is now well known that despite counsel's best efforts, some of the crucial prosecution documents which pointed to perjury and suppression of exculpatory evidence was discovered by an independent movie producer, Errol Morris. While law enforcement officials felt no duty to provide this information to counsel, they gladly revealed this crucial information to Mr. Morris. And it was only with his pursuit of the story, in combination with counsel's independent efforts, that the truth of Mr. Adams' wrongful conviction was fully brought to light.[20]

Moreover, Mr. Banks' cause was greatly aided by sustained interest by the media in Georgia, as Mr. Brandley's defense team received considerable support from a large coalition of concerned individuals from throughout the United States as well as the media.[21]

Yet the vindication of innocence often falls short without the intervention of fortuity and luck. Take Mr. McMillian's case. In retrospect, Judge Robert E. Lee Key's decision to override the jury's recommendation of life to impose a death sentence saved Mr. McMillian as it meant that lawyers at the Alabama Capital Resource Center could handle his case. Because Alabama provides only meager funds for posttrial representation of indigents, it is a certainty that Mr. McMillian's court appointed counsel would have lacked the resources to conduct the type of investigation that was required to show his innocence. There is *no* doubt in my mind that but for the sentence of death, Mr. McMillian would not be with us today.

In the same sense, the decision of film maker Morris to interview residents of death row in Texas, as opposed to condemned inmates in more than 30 other States, brought he and Mr. Adams together. Had Mr. Morris chosen Florida or California instead, Mr. Adams might not be with us today.

Indeed, no one in the New York State Criminal Justice System discovered investigator Harding's shenanigans—the CIA did. The fact that Harding was fabricating evidence was learned only when Harding sought employment with the CIA, and told his interviewers that he would be willing to violate the law for thegood of the country.[22]

Other noncapital cases make the point as well. Alberto Ramos was convicted in New York of raping a 5 year-old girl at a day care center where he was employed.

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[19] CBS 60 Minutes, *supra,* note 11 at 16.

[20] This case shows why it is nonsense to assert that Mr. Adams' case demonstrates that the system works. Law enforcement officials successfully blocked the legal process from learning the truth; it took extralegal resources to overcome that blockade.

[21] *See* Nick Davies, *White Lies: Rape, Murder and Justice Texas Style,* Pantheon Books, New York 1991.

[22] CBS 60 Minutes, *supra* at note 6, at 13.

The conviction was based "essentially on the testimony of [the child]."[23] Ramos' defense was that he never raped the child; the child's doctor testified that the child described an explicit sex act that the doctor believed no child age 5 could know about without having experienced the act. Ramos was convicted, was given the maximum sentence, and his conviction was affirmed on appeal.

Through new counsel, Ramos sought postconviction relief. During the pendency of these proceedings, Ramos received a tip that would allow him to demonstrate that he had been wrongly convicted. Shortly after his conviction, the child's parents filed a suit against the day care center. Pursuant to their investigation, they learned that day care center records and other documents showedthat the child often masturbated in class, simulated sexual intercourse to her peers, and had alleged falsely that a 5 year old boy had touched her just prior to her complaint against Ramos, *and* that these files had been in the possession of the prosecutor at the time of trial. The parents' investigator turned this information over to Ramos' counsel.

But for this unrelated law suit *and* the tip from the investigator, Ramos might well have never learned that at the time of his trial, the prosecutor possessed evidence that raised very grave doubt about the veracity of the young complainant. In dismissing the conviction, the trial court wrote that this sort of case "require[s] great care and balance on the part of the district attorney." Order at 8. The Court concluded:

> The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system. Ramos—a first offender—was sentenced to the maximum at the same time that the sentencing judge called on the Legislature to prescribe a harsher term. It is no wonder that Ramos, in rage, is said to have cried out, "Kill me now, I want to die."

Id, at 9. Shortly thereafter, Ramos was discharged from custody a free man.[24]

And in a recent Georgia drug case, Rusty Strickland spent six months in jail for possession of a white substance that turned out to be soap.[25] At his arrest and at his preliminary hearing, he insisted he was innocent, and even begged courtroom personnel to smell the evidence. None would. A chemist from the crime lab testified at the hearing that testing showed the substance to be cocaine.

On the eve of trial, the prosecutor learned that the chemist—an essential witness—was on vacation, and sought new testing and another expert. This new expert determined the substance was soap and the charges were dismissed. But for the first chemist's vacation schedule, Strickland might well today be under a long mandatory sentence for drug trafficking.

3. VINDICATING THE INNOCENT: OUR LEGAL SYSTEM MUST POSSESS THE CAPACITY TO BETTER HEAR CLAIMS OF INNOCENCE BOTH AT TRIAL AND IN LATER APPEALS

Unless we are prepared to allow innocent, wrongly convicted individuals to be executed, it is important that Congress act. To stand aside will surely guarantee one result—the next Walter McMillian who fails to draw stellar counsel, or is unable to marshall the facts to show his innocence, will be executed.

In the short run, the Congress will best serve the interests of justice by providing a Federal forum for the entertainment of innocence claims. Existing law, as articulated by the Supreme Court's recent decision in *Herrera* v. *Collins,* 122 L.Ed.2d 203 (1993), fails to provide an adequate approach to this problem.

The *Herrera* majority establishes a rule that seems to view innocenceclaims as arising in two respects only. First, there are those that will raise doubt, even considerable doubt about guilt, but will be unable to satisfy the "extraordinarily high" *Herrera* standard because the petitioner ultimately is guilty. Second, there might be truly exceptional ones—like the person who finds an authentic videotape of the crime which shows proves his innocence shortly before his scheduled executions[26]—and presents it to the court. Under such extraordinary circumstances, the *Herrera*

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[23] *People* v.*Ramos,* Supreme Court of New York, Bronx County, Part 21 No. 3280/84 (Order vacating conviction) at p. 1.

[24] Marie Newman, *Man Freed After Serving 7 Years for Rape,* New York Times, June 3, 1992 at B1.

[25] Trisha Renaud, *Open and Shut, and Wrong.* Fulton Daily Law Reporter, September 28, 1992 at p. 1.

[26] Justice Kennedy posed this situation to counsel for the State during oral argument and asked whether *that* showing would entitle a Federal court to grant a stay and entertain the claim. The State responded it would not and maintained that the only remedy is executive clemency. No condemned inmate in Texas has been awarded clemency during the past 20 years.

majority in *dicta* seems to hedge and say a Federal court might be able to entertain the claim.

This approach to wrongful conviction is inadequate. It presumes a set of circumstances that do not exist—that condemned habeas petitioners, regardless of whether they have counsel, or suffer from a mental illness, or are illiterate, etc., nevertheless possess the ability to demonstrate innocence if they are in fact innocent.

We now know that Walter McMillian did not commit the crime that he was death-sentenced for. We know that not because Mr. McMillian uncovered by himself all of this proof and one day presented it at the courthouse. Much of the evidence which demonstrated that the key State witness had committed perjury, as well as other corroborative evidence, was secured through discovery.

Had Mr. McMillian faced proving his innocence under the *Herrera* test, he would have failed, and would have been executed. Fairly applying that standard to Mr. McMillian, even a sympathetic judge would have had to deny a stay *and* deny requests for discovery because Mr. McMillian—without discovery—could not demonstrate his innocence.

Herrera's assumption that the innocent condemned can, if they are diligent, uncover *and,* prove their innocence without access to State files and records, is inconsistent with the Court's more realistic assessment that the State's superior ability to collect and gather evidence creates a duty to disclose exculpatory evidence in certain circumstances.[27]

Senate Bill 221 is a reasonable approach to this problem. It requires a substantial showing of innocence before a stay can be imposed, but correctly leaves considerable discretion to the district court.

Senator METZENBAUM. Thank you very much, Ms. Jones.

The committee will have 10-minute rounds for each member.

Mr. McMillian, you spent nearly 5 years on death row for a crime which you did not commit.

Mr. MCMILLIAN. Yes, sir.

Senator METZENBAUM. Did you ever think that anything as horrifying as this could happen to you or to anybody else?

Mr. MCMILLIAN. No, sir, I never did believe—I never believed that nothing like that could happen to no one until it happened.

Senator METZENBAUM. Do you believe that your race played a role in your conviction?

Mr. MCMILLIAN. Yes, sir, I know it.

Senator METZENBAUM. Why do you say you know it?

Mr. MCMILLIAN. Just because the way the sheriff talked to me after he arrested me and stuff. It was the things he said, and I had a relationship with a white lady and then my son married a white lady and had three children by her, and I pretty well know it, you know.

Senator METZENBAUM. Mr. Stevenson, let me first congratulate you on the job you did for your client. I think it was a superb piece of legal work. I don't think there is any greater accomplishment for a lawyer than to free an innocent man from death row.

In reviewing the *McMillian* case, it seems apparent that it was relatively easy to convict Mr. McMillian, but extraordinarily hard to win his release. Why was it so easy to frame your client and so difficult to free him?

Mr. STEVENSON. Well, again, I think it points to some of the things that this committee recognized in its opening statements. There is such tremendous support for the death penalty in the society. The law enforcement officers in this community could not solve this crime. Seven months had gone by. I think they were quite ready to believe anything that anyone told them about someone

[27] *See generally Brady* v. *Maryland,* 373 U.S. 83 (1963) and progeny.

who might have committed this crime. I think they didn't want to hear that this man was innocent. They didn't want to pay attention to the witnesses who came into court and verified that Mr. McMillian could not have committed this crime.

But more than that, I think that there were not systematic safeguards that would protect people like Mr. McMillian from being wrongfully convicted. There were no assurances that he would get the kind of investigative assistance that he needed, that he would get the kind of representation that he needed, and that created an environment where it was just very easy to achieve this conviction. Certainly, the death sentence in a State where you can override a live verdict from a jury makes it incredibly easy to impose a death sentence.

The difficulty really, I think, was measured, in fact, because we have all become very cynical about claims of innocence. You hear that and you see that in the *Herrera* opinion. You hear it when you talk to people about other innocent folks on death row, most people are just not willing to believe that innocent people are wrongly convicted which without a great deal of proof which requires a great deal of effort. And even when you make that effort and you present that proof, we still don't want to believe it.

Senator METZENBAUM. In your testimony you stated that the Supreme Court's decision earlier this year in the *Herrera* case was a tremendous blow to us as we attempted to secure Mr. McMillian's freedom. How is that so?

Mr. STEVENSON. Well, I think the Court is sending messages to all the lower courts, not just the legal holdings that they issue, but the messages that they send, and I think the message in *Herrera* to most judges in the lower courts is that you need not be concerned with evidence of innocence like you ought to be or like you might have been previously. And, obviously, when innocent people come into court and all that exists is evidence of innocence, that makes us discouraged.

Senator METZENBAUM. One of the shocking things about the *McMillian* case that I noted was that the judge who presided over Mr. McMillian's trial overruled the jury's recommendation that Mr. McMillian be given a life sentence. Instead, he imposed the death penalty.

It is my understanding that State judges in Alabama are elected officials, and that is also the case of a number of other States which have the death penalty. Does the fact that State judges are elected affect the way in which death penalty cases get handled in a State court?

Mr. STEVENSON. No question. I think there are many decisions and issues that we will not get from many State court judges who believe that their political careers turn on those decisions, even if those decisions are not the right ones. That certainly is an influencing factor, and I think it relates to this whole question of clemency. We will not see clemency granted to death row prisoners in Alabama, I don't believe, in the present political environment. We can't even get hearings of clemency appeals and executions in capital cases in that State, and I think it is one of the reasons why we need life-tenured judges who can review these cases and decide.

Senator METZENBAUM. Mr. Adams, let me ask you the same question I asked Mr. McMillian. You actually came within a week of being executed, which is unbelievable. You spent 12 years in jail for a crime you did not commit. Before this horrible nightmare happened to you, did you ever in your whole life believe that such a major mistake could happen in our criminal justice system?

Mr. ADAMS. Senator Metzenbaum, as I stated earlier, all the way up until they actually—the jury came back and convicted me, we believed that there was no way the American system could convict me, you know, but that was our belief, that was our faith and trust in the system and we were shattered when we realized it wasn't so.

Senator METZENBAUM. Later witnesses will claim that your case shows that the criminal justice works. You were a man who was wrongfully convicted of a crime and you were eventually exonerated. How would you respond to that?

Mr. ADAMS. Well, I think it shows just the opposite in many ways. First of all, it took over 12 years. Second, it took a film and film producer to be given evidence that my attorney, by law, could not get, had no right to according to the district attorney, but yet he would turn it over to a film crew, a film producer—evidence that exonerated me, evidence that was hidden at my trial. So I think it shows just the opposite, actually. It took the mass public outrage after watching the film and millions of signature sent to the governor of Texas to finally ultimately release me.

Senator METZENBAUM. While you were awaiting execution in the penitentiary, what was going through your head?

Mr. ADAMS. You know, when you are given a sentence of death it is usually placed 30 days away, and the only way I can describe that is you begin a very short path of 30 steps and each day you take one more step and you come closer to a very dark wall that you cannot see into, you cannot see out of. It is just there and it is getting closer.

Again, I came 72 hours before my execution date was stopped. I was a nervous wreck. I was—the only way I can describe it is you have to make peace with yourself. Had my execution taken place, I think I could have been man enough to—I am happy with myself, I am happy with who I am. I knew the truth about my case, my family knew the truth about this case, so we could have lived with it. I am just happy to be alive one more day.

Senator METZENBAUM. Maybe that is an appropriate statement that you could have lived with it.

Mr. ADAMS. Up until I would not have lived anymore.

Senator METZENBAUM. Very, very difficult for both you and Mr. McMillian.

Mr. D'Alemberte, what is the practical effect of the *Herrera* decision on death row inmates who have new evidence of their innocence?

Mr. ADAMS. I am sorry. Was that for me or——

Senator METZENBAUM. It was for Mr. D'Alemberte.

Mr. D'ALEMBERTE. Senator, I think it just simply says that if innocence is all you have got, if you are merely innocent, you are not going to get into Federal court, and so I agree very much with Mr. Stevenson. I think it has been devastating, and I must say I am

a little bit surprised because I actually had gone into this case somewhat optimistic that the promise of the safety valve that was to be there for the person who was innocent—a lot of the cutbacks on habeas have occurred with courts stating that they would limit habeas, but there would always be this safety valve to give us some protection.

But all I see in the safety valve now is clemency, and I know enough about the political process myself from a little bit of elective office to know that that is not—certainly, in States that I know something about is not an effective safety valve.

Senator METZENBAUM. But clemency says you are still guilty, but we are going to make the penalty a little less.

Mr. D'ALEMBERTE. Clemency, pardon, any of those are simply not effective because of the political environment in which they are raised, and again I think one of the best examples of that is that it didn't even work where the facts had already been proven to a trial court in Randall Dale Adams' case. We haven't had clemency in Florida for 10 years. Alabama counsel arguing the *Herrera* case indicated that it had not been available for, I think, 18 years.

Senator METZENBAUM. Let me see if I can get two more questions, one for you and one for Ms. Jones. Before the *Herrera* case got to the Supreme Court, you went before a Federal district judge in Texas, Ricardo Hinojosa. Judge Hinojosa is a Reagan appointee. He wanted to hold a hearing on the new evidence presented by Herrera. Why did he want to hold that hearing and why was he prevented from holding it?

Mr. D'ALEMBERTE. As I understand the record, Senator, he wanted to hold a hearing because he thought there was a real question of Leonel Herrera's guilt. He understood the circumstances in south Texas and he wanted to see that evidence was taken. He, first of all, wanted to give the Texas courts an opportunity to have that hearing. They did not.

He set a hearing 3 days away. There was not any substantial delay; there was not any of this great time. He had an evidentiary hearing set for 3 days later, and instead of going to that evidentiary hearing which could have been handled very expeditiously, the State of Texas instead took the case up to the fifth circuit and the fifth circuit again, without briefs, without oral argument, said that you may not consider—the Federal courts may not consider innocence, and that is why your bill is so important.

Senator METZENBAUM. Thank you. I am just going to have one question for Ms. Jones even though I know my time has run out. The two men with us today who were freed from death row both benefited from considerable media attention. Mr. Adams' story became the subject of a movie, while Mr. McMillian's story was looked at by "60 Minutes."

Have we reached the point at which you cannot free an innocent person from death row unless you have both an airtight legal case and attention from the media?

Ms. JONES. Regretfully, Senator, that seems to be the case, and the recent instances where innocence has been established show that the media attention is required and the airtight case, and all of that and more is required. It takes assistance from extra-legal sources. In addition to media, it takes luck, it takes years of labor,

it takes hundreds of hours of work, and it takes expenditure of considerable resources. It takes all of that.

Senator METZENBAUM. Thank you very much.

Senator Hatch?

Senator HATCH. Well, thank you. I want to say to you, Mr. McMillian, and you, Mr. Adams, that I am glad you are both here and I am happy that in the end it turned out all right for you. It was a terrible, terrible experience in both cases. Neither of you should have had to go through what you have been through, and we respect you and we respect what you are saying here today.

Although the system did not work for you during the trial phase, and so forth, I want to thank both of your attorneys, who are excellent attorneys, for ultimately seeing that your innocence was found to be so. In the end, we are just happy to have you here and you have, certainly, our sympathy, and I personally believe that in both cases the States ought to acknowledge the injustices that they have done to you and they ought to somehow compensate you.

Ms. Jones, I just want to say this to you. I have tremendous respect for you and what your organization does, and I want to talk about Mr. Stevenson, too. I have been sitting here thinking I know that in some of these States it is very difficult for African-American people and others who are low-income people to be treated fairly.

As I understand it, Mr. Stevenson, your organization can—it is funded partially by the State?

Mr. STEVENSON. No, sir.

Senator HATCH. Who funds you, the Federal Government?

Mr. STEVENSON. We get grants from the Federal Government for the work we do in Federal court.

Senator HATCH. Yes. You are funded partially by the Federal Government, but only in the appellate process?

Mr. STEVENSON. Only in postconviction for the work we do in Federal habeas, yes, sir.

Senator HATCH. Yes, the postconviction process. I am wondering if we shouldn't in these kinds of matters—and as I understand it, your organizations are in basically every capital crime State?

Mr. STEVENSON. That is correct. We are trying to recruit counsel or provide assistance.

Senator HATCH. The Federal Government then funds you to a degree——

Mr. STEVENSON. That is correct.

Senator HATCH [continuing]. With regard to postconviction proceedings?

Mr. STEVENSON. That is correct.

Senator HATCH. Well, I am wondering if this committee shouldn't really look into funding you for preconviction proceedings up through the trials and see that these people have adequate counsel in these capital crime States. I have also noted through the years the tremendous amount of difficult work that the NAACP has done on behalf of African-Americans and others throughout this country, and I want to compliment them for it.

Now, all of that said, I am still going to come to Mr. D'Alemberte, who is a friend, and ask a couple of questions about the *Herrera* case because the issue being framed here is that the conclusion in the *Herrera* case was one of injustice and one that lit-

erally did not give Mr. Herrera a chance to fairly present evidence of his innocence.

Now, Mr. D'Alemberte, Justice O'Connor in her concurring opinion in *Herrera* describes the evidence of Herrera's guilt as, "overwhelming," in her words. In her words she says,

> The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981. Petitioner's new evidence is bereft of credibility. Not even the dissent expresses a belief that petitioner might possibly be actually innocent, nor could it. The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," but instead is himself the established perpetrator of two brutal and tragic ones.

Now, Justice O'Connor also observed that, "Of all the judges to whom Herrera presented his claim of actual innocence—more than 20 judges by my count—not one has expressed doubt about Herrera's guilt." That is Justice O'Connor.

I want to just make sure that there is no dispute that that is what is in the record.

Mr. D'ALEMBERTE. That is what is in the opinion.

Senator HATCH. In the opinion.

Mr. D'ALEMBERTE. Yes, and, of course, that—Senator, my quarrel with that, although I must confess I am a great fan of Justice O'Connor and Justice Kennedy, who joined that opinion——

Senator HATCH. Sure.

Mr. D'ALEMBERTE [continuing]. My quarrel with that is that they put themselves in the place of Judge Hinojosa. In our system we normally look to the trial judges to make some judgment about credibility. What is so startling to me about the *Herrera* opinion, Senator Hatch, is that what seems to be happening is that not only is the decision about credibility being made at the appellate level rather than the trial, but that the appellate court is making that without ever hearing the testimony.

Senator HATCH. I understand, but according to the Supreme Court's account of the proceedings below, the district court in *Herrera* granted a stay in order to permit him to present his claim—Federal District Court Judge Hinojosa.

Mr. D'ALEMBERTE. Yes, sir, and set that hearing three days away.

Senator HATCH. Yes, to permit him to present his claim of actual innocence in State court. As Justice O'Connor points out, the judge did not himself express any doubt about Herrera's guilt—Judge Hinojosa didn't. In addition, the State courts had already addressed and rejected Herrera's claim of actual innocence.

Now, if, as Ms. Jones indicated and Mr. Stevenson, who we have had testify here before, for whom I have great respect, both of them—if it is because of prejudice or something else, we have got to provide some better means so that people have better representation in these matters.

But the key question addressed by the Supreme Court is what evidentiary threshold must be met in order to entitle a claimant to a hearing. I mean, that is the way I view it, and the Court is as well positioned as the district court to decide that Herrera did not meet that threshold. In other words, the Supreme Court is just as well positioned as Hinojosa was to decide that he didn't meet that threshold.

But let me just ask you a couple of things about the case. As I understand it, Mr. Herrera was convicted in the 1981 murder of Texas Police Officer Enrique Carrisalez. That is correct, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. He also pled guilty to the murder of police officer David Rucker, is that right?

Mr. D'ALEMBERTE. After he had been beaten fairly severely, yes, sir.

Senator HATCH. So you are saying that that was a guilty plea under duress?

Mr. D'ALEMBERTE. Yes, sir, and hospitalized.

Senator HATCH. OK. Now, evidence at Herrera's trial for the Carrisalez murder showed that on the evening of September 29, 1981, Carrisalez spotted a car speeding away from the area where Rucker's body, shot to death, had just been found. Is that correct? That is the record.

Mr. D'ALEMBERTE. That was at trial. Certainly, that was the evidence, yes, sir.

Senator HATCH. OK. That is all I am asking is if these things are true. The evidence also——

Mr. D'ALEMBERTE. They are not true, Senator, but that is——

Senator HATCH. No, but I mean whether the record shows it.

Mr. D'ALEMBERTE. That is right.

Senator HATCH. The evidence—and we are talking about evidence here—the evidence also showed that Officer Carrisalez pulled the car over and was shot to death by the driver, right?

Mr. D'ALEMBERTE. Your Honor, that is correct.

Senator HATCH. And that Officer Carrisalez died 9 days after that, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. Now, when Herrera was arrested it is true, isn't it, that a lengthy letter in his own handwriting was found on him, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. And in the letter Herrera stated that he was, "terribly sorry," for having, "brought grief to the lives," of, "Rucker," and the "other officer." Is that correct?

Mr. D'ALEMBERTE. That is correct.

Senator HATCH. That is what his own letter said?

Mr. D'ALEMBERTE. That is the letter which he never had an opportunity to explain to any court.

Senator HATCH. But it was on him at the time and that is what it said, right?

Mr. D'ALEMBERTE. That—there was a letter found on him after he had been the subject of a rather massive manhunt and——

Senator HATCH. Fine, but that is what was found on him——

Senator METZENBAUM. Why don't you let him finish, Senator Hatch?

Senator HATCH. Sure, sure.

Mr. D'ALEMBERTE. And I think the record is fairly clear, Senator, that he also—again, he had a rather severe drug problem, I think, when he wrote that letter and I don't think that is contested.

Senator HATCH. All right, but this is what the letter said, those are the facts in the letter, right?

Mr. D'ALEMBERTE. Yes, sir, and that letter—I think I am correct, Senator—at no point says that he is the person who shot the policemen.

Senator HATCH. All right. It said he was terribly sorry for having brought grief to their lives.

Mr. D'ALEMBERTE. Yes, sir, but the letter, in context, also points out that there were police who were involved in drug activity.

Senator HATCH. All right.

Mr. D'ALEMBERTE. And when we put this letter in context, you really understand why Judge Hinojosa wanted to have a hearing.

Senator HATCH. But isn't it also true that Officer Carrisalez, on his death bed, identified Herrera as his attacker?

Mr. D'ALEMBERTE. He did, under very suspicious circumstances which, on review, brought a divided Texas Court of Criminal Appeal, yes, sir.

Senator HATCH. All right, and Carrisalez's squad car companion also identified Herrera, is that right?

Mr. D'ALEMBERTE. Did, and please, Senator, you understand that our contention, supported by an eyewitness, is that it was his brother and they are quite similar in appearance.

Senator HATCH. Who had died in 1984, a long time before this matter was brought to the court?

Mr. D'ALEMBERTE. That is correct, sir; that is correct.

Senator HATCH. And it was also shown that the car that Carrisalez stopped was registered to Herrera's live-in girlfriend and that Herrera was known to drive that car, wasn't it? That was part of the evidence?

Mr. D'ALEMBERTE. He sometimes drove that car. That is correct, sir.

Senator HATCH. Right, and evidence against Herrera at trial also included various blood and hair tests?

Mr. D'ALEMBERTE. It did.

Senator HATCH. OK. Now, the only thing I am saying is that even though some of these things—you have raised some questions. Let me just finish this because it is important.

Senator METZENBAUM. Sure.

Senator HATCH. I think that everyone can see what Justice O'Connor meant when she described the evidence against Herrera as overwhelming. But let me add further to the record that, by my count, Herrera has had some 15 separate judicial proceedings in the nearly 12 years since he murdered Police Officers' Carrisalez and Rucker and none of his claims has been found to have any merit.

Yet, by filing his claims on or near the eve of the scheduled execution dates, he had repeatedly managed to postpone his execution. Now, many feel that this is what is wrong with the criminal justice system, and that is an abuse of the current criminal justice system and something that we should be acting against and not facilitating. That is the problem.

I think, again, back to Federal District Judge Hinojosa, the Justices on the Supreme Court had every bit as much power, right and knowledge and opportunity to discover that threshold situation as did Hinojosa.

Mr. D'ALEMBERTE. Senator Hatch, if I could just say that I think what you say about Leonel Herrera's case as we look at it today could at one point have been said as well about the case of Randall Dale Adams. The evidence was overwhelming, if you wanted to look at it in a certain perspective.

The evidence, I believe, about Walter McMillian was sufficient to support a verdict. We look at it in that context. We understand at some point, unless you examine this evidence of innocence, you are not going to be very confident that you are doing the right thing.

Senator METZENBAUM. I am going to have to cut you off, Senator Hatch.

Senator HATCH. Well, I just want to compliment Sandy. I understand how you feel and I compliment you for fighting hard for what you believe may be right.

Senator METZENBAUM. Thank you.

Senator HATCH. But I have to say I have to agree with Justice O'Connor.

Mr. D'ALEMBERTE. I believe Leonel Herrera is innocent, Senator.

Senator HATCH. I acknowledge that and I compliment you for feeling the way you do.

Senator METZENBAUM. There is a roll call on. We have got a second panel. I am trying to keep this thing moving. Senator Feinstein, please proceed. Senator Heflin will preside.

Senator FEINSTEIN. Thank you, Mr. Chairman. I would like to ask this question, if I might, of Mr. Stevenson and Mr. Adams: Could you describe for us the specific nature of the evidence that was brought forward that proved your innocence, and also the time delay involved?

Mr. STEVENSON. Yes. Mr. McMillian was convicted on the testimony of one alleged codefendant who said he was with him at the time of the crime. Mr. McMillian had half a dozen witnesses who contradicted this alleged codefendant and testified. Mr. McMillian could not have committed the crime, and they all verified his presence some 20 miles from the crime scene.

The alleged codefendant who testified against Mr. McMillian later came forward and admitted that his trial testimony was false. Now, the codefendant had told police officers that prior to his arrest a month before the trial, but those statements were——

Senator FEINSTEIN. Prior to whose arrest?

Mr. STEVENSON. After the codefendant was arrested on an unrelated murder——

Senator FEINSTEIN. The witness?

Mr. STEVENSON. The witness, yes. He told the police "you want me to frame an innocent man for murder and I don't want to do that." After several days of, we contend, coercive questioning, the codefendant agreed to testify falsely against Mr. McMillian. Now, those statements and interviews were recorded and withheld from the defense at the time of trial so they could not prove that the codefendant did not consistently say that Mr. McMillian was guilty.

He also told State doctors when he was sent to a mental health facility for a pre-trial evaluation a month before the trial, "I am about to frame an innocent man for murder." The reports which contained that statement were sent to the prosecutor and to the trial judge, but again withheld from Mr. McMillian's defense coun-

sel. We uncovered that evidence, in addition to presenting evidence that the witness who testified against him, this witness——

Senator FEINSTEIN. How did you uncover the evidence?

Mr. STEVENSON. The court granted our discovery requests although discovery was opposed and resisted by the State in this case. We got a release through the codefendant to go to the State hospital without a discovery order after we knew he had made these statements. We found the evidence that way. We filed discovery in another case and, through that discovery motion, uncovered these other records that pointed to other witness statements which showed that lots of folks had told the police that this codefendant was framing an innocent man for murder.

Subsequent to that, the other two witnesses also recanted their trial testimony and acknowledged that their testimony against Mr. McMillian had been false. We could prove that Mr. McMillian didn't even know this man at the time of the crime because he came up to him some 6 months later and didn't know who he was. There was a great deal of evidence that we uncovered.

Senator FEINSTEIN. So there were three witnesses, essentially, that had lied?

Mr. STEVENSON. That is correct, that is correct.

Senator FEINSTEIN. And the prosecution was aware of this?

The prosecutor told the jury at trial that the main witness had only made two statements and they could believe him because those two statements consistently pointed to Mr. McMillian's guilt. That was clearly not true. The prosecution did not tell the jury that these other witnesses had been paid reward money.

Could you hold one second? I want to hear this and I have got to find this ruddy beeper. Go ahead. Sorry.

Mr. STEVENSON. So the prosecutor basically did not tell the jury that there were all these other statements that have been made by the codefendant that contradicted what he was telling the jury at trial, which was that Mr. McMillian was guilty. They also knew that the police had arranged to show one of the witnesses—what the other two witnesses basically did was say that they saw Mr. McMillian's truck there. They didn't have any evidence of guilt for the murder.

What the police had done was basically arrange for one of the witnesses to be brought from jail to see his truck after this arrest, this pretextual arrest for this alleged sodomy charge which was later dismissed. He was brought from jail, shown the truck, and then gave a statement saying "I saw that truck on the day of the crime."

The mistake they made was that he described the truck as it was, which was a low-rider modified to sit low to the ground. We were able to prove that the truck was not modified until 6 months after the crime. Again, the prosecution was aware of the efforts to kind of facilitate the witness testimony that was given by these two witnesses, all three witnesses.

Senator FEINSTEIN. Thank you very much. Mr. Adams?

Mr. ADAMS. Yes, Senator Feinstein. Basically, what the State did, they used five people at trial to convict me. The State's star witness, if you want to call him that, was a person by the name of David Harris that was a person that I had met on a Saturday

after work. I was driving home from work. I ran out of gas, I walked to a gas station. He pulled into the gas station and helped me get my car started.

Because of his assistance—while doing this, he told me he was from the Houston area in Dallas looking for work. I took him back to the job site to get him a job. Of course, no one was there so he didn't see the boss. He didn't see any work crew or anything. I never saw him again, never heard from him again.

A month later—you must understand this was the longest unsolved police officer killing in Dallas history, probably Texas history. They came out to work, they showed me a picture, asked me if I had ever seen this guy, David Harris. I said yes, he helped me get my car started. That is how I got tied into this. This is how I got arrested.

The way the case broke, David Harris had returned after the killing within 24 hours, was bragging about the killing, doing this. When the case finally broke, after telling at least eight people when, where and how he had executed a man, he finally tells them, OK, I have been bragging, but I didn't do it, this guy that I picked up and helped get his car started—this is what he testified to.

Another witness that they used was Police Officer Turko. She made three original statements, one directly after the killing, I believe one the next day or so, and then her in-court testimony. Her original statement to the first officer at the scene and her in-court testimony varied very differently. We did not know and the State did not allow us to know that she had been hypnotized in between here so, you know—which we should have known.

There was a third statement that she made the day after the killing that the car windows of the car they had stopped, her and her partner, were so dirty she could not see inside, which disputed both of her other two testimonies that we heard. That is one of the statements that the district attorney hid as far as we know. We found it in his files.

There was three other surprise witnesses who came forth at the last day of trial. They all stated that they had passed the scene of the crime, they could positively identify me, and the woman, one woman of the three, stated in open court that she viewed a lineup and picked me out.

Senator FEINSTEIN. Excuse me just a minute.

Senator MOSELEY-BRAUN. Mr. Chairman, unfortunately we have a vote pending and I have to get over to the Capitol, and I really regret that because I wanted to have a chance to ask some questions and make a statement for the record. So I will have to leave, but I did want to congratulate Mr. Stevenson for his fine, heroic work and what you have done, and Ms. Jones and the witnesses for giving us this hearing.

I hope that we can avoid any confusion about what this bill does. It does not mandate that a prisoner be released upon an application of innocence, but rather that the court at least give it a hearing, and I think that is really important as this debate happens because looking at some of the testimony for the next panel which I won't be here for because we have got to go vote, unless it is going to be rescheduled, Mr. Chairman, and I don't know if it will——

Senator HATCH. It will continue until it is over, I think.

Senator MOSELEY-BRAUN. It will continue until it is over, yes. Well, again, the next panel—I read some of the testimony and I was really concerned, frankly, that there might be a misapprehension of what it is this legislation does or is intended to do.

So, again, I want to thank you very much for this opportunity to hear you.

Senator FEINSTEIN. I think you may have misunderstood the question. The question was the evidence that was forthcoming that proved your innocence—when did it come and what specific was it?

Mr. ADAMS. OK. Again, I did misunderstand your question. I apologize. The question—the evidence actually was perjured testimony, of course, on Emily Miller. It was—we did not know that until, I would say, 8 to 9 years. At trial she, of course, stated she picked me out of the lineup. Eight years later, she told the film producer when talking to him that she, in fact, had picked out a decoy and that the officer that took her into the lineup room told her, that is not who we want, we want this guy over here, and, of course, she walks into trial and positively identified me at the lineup. The prosecutor, of course, says he did not know she was committing perjury, but that is one of the items.

Senator FEINSTEIN. So when did they find out?

Mr. ADAMS. Eight to nine years after my trial.

Senator FEINSTEIN. And how did it happen?

Mr. ADAMS. Through the making of the film, the investigation of "The Thin Blue Line."

Senator FEINSTEIN. And what did happen there? I am just not familiar with the film.

Mr. ADAMS. During the investigation of "The Thin Blue Line"—it is, of course, a documentary on my case—he tracked down all the witnesses. He interviewed the State, he interviewed myself, and these people told—different things came out during the testimony to him and, of course, with that we went back into a evidentiary hearing in Federal court, and this is when we got into the record the statements that were false, the evidence that was hidden and not given to us, and so forth.

Senator FEINSTEIN. Thank you very much, Mr. Adams. Thank you, Mr. Stevenson.

Senator HEFLIN [presiding]. Let me ask a few questions. Senator Metzenbaum will get back and I will leave, so whenever he gets back I will be leaving in order to be able to meet the vote.

Mr. Stevenson, I congratulate you on your fine work. I happen to know Mr. Chestnut, who was the original attorney and who is an outstanding trial attorney in the State. Actually, in your situation Alabama has rule 32.2, which is different from most States rules of criminal procedure. Most States have a time period in which newly discovered evidence can be used in a postconviction remedy procedure.

Actually, the Alabama Supreme Court establishes, under a judicial reform procedure, rules of criminal procedure. It allows at any time after any conviction newly discovered evidence can be used, provided it is presented to the court within 6 months after it has been discovered. This was basically the rule, I think, that you bottomed your petition to get Mr. McMillian released. Is that correct?

Mr. STEVENSON. That is correct, Senator Heflin.

Senator HEFLIN. So, actually, this case was not in the Federal courts, but it was in the State courts in which you used the procedure of Alabama's rules. Subsequently the Alabama Court of Criminal Appeal was the one that granted relief. Now, Alabama has some other rules—some of it is controversial—as to whether, after a jury brings in a verdict, the trial judge has the right to raise the jury determination. In this instance the jury found life imprisonment as a punishment and the trial judge raised it to capital punishment. That issue has been a controversial issue and I don't think it has ever really gotten fully decided by the Supreme Court.

Mr. STEVENSON. I think that is correct, Senator.

Senator HEFLIN. And that is an issue that he is involved. So, actually, the procedure in Alabama, under its rules and its courts, in effect ended up doing justice.

Mr. STEVENSON. I think that can be said, and I mean I think you are right that Alabama does provide a procedural remedy, at least to a certain extent, for some of these claims. The problem is that in Alabama to file that rule 32 petition, to do the kind of investigative work when you can uncover that evidence of innocence, you must have counsel, and you must have counsel adequately compensated to do the kind of work necessary.

Although rule 32 exists, there is a statute which precludes counsel from getting more than $600 for any work it does in connection with that litigation. So there is that barrier to presenting that evidence and developing that evidence effectively. The second barrier which——

Senator HEFLIN. I think, though, they have raised that now.

Mr. STEVENSON. Not for postconviction counsel. It is still——

Senator HEFLIN. Well, I thought [continuing]. Although I am not sure. Given I am away from Alabama rulemaking.

Mr. STEVENSON. Sure. Well, the statute still reads that you can only get $600 for the——

Senator HEFLIN. Well, certainly, this needs to be remedied. There is no question about that.

Mr. STEVENSON. I totally agree, Senator, and I guess the second concern even with making those procedures meaningful is that some of the same kind of problems in terms of enthusiasm with the death penalty continue to exist. The court that granted us relief, the Court of Criminal Appeals, has been attacked by legislative efforts coming from the Attorney General's Office and other communities to remove it from review of these cases.

Every year for the last 4 years, they have passed legislation at least in committee to remove the Court of Criminal Appeals from even reviewing these cases, which would have made it impossible for us to even be in court long enough to avail ourselves of these kinds of procedural remedies. And, of course, without compensation to do this stuff in State court, we can only hope that in Federal court we will have a similar opportunity.

Senator HEFLIN. Well, there are various groups, your organization and the Southern Poverty Law Centers being one, and others that get involved in these death penalties cases. You all have really provided tremendous expertise and presented people who are experts in regard to capital cases. I think that those people, from the

viewpoint of seeing that justice is to be done, are to be commended for their work.

Now, I am delighted to see you, Sandy, and glad to have you here. Let me ask you this. In the *Herrera* case, was the issue pertaining to constitutional prohibition against cruel and unusual punishment raised? It seems to me that the whole decision could have been bottomed under that constitutional aspect. Was that raised in this case?

Mr. D'ALEMBERTE. It was at the core of our presentation to the court, Senator, and we were trying to make a submission to the court that was as narrow as possible and we submitted that it was cruel and unusual punishment to execute a person who had a bona fide claim of innocence, and that was essentially the thrust of our presentation. We did not even seek in our submission to have the court lay down a rule that a trial judge, a district judge had to hear such a case, just that a district judge ought to be allowed to have such a case.

Senator HEFLIN. I see Senator Metzenbaum is coming so I am going to have to run to vote, so I will go ahead with one more thought. You know, one thing that appears to me that we ought to consider is the withholding of exculpatory evidence. It may well be that this act has to be made a Federal criminal offense. Unfortunately, we have had prosecutors who desire to win at all costs. The desire to win is such that they withhold exculpatory evidence. Presently, I am looking at various remedies to try to prevent these types of things from happening in the future.

Senator METZENBAUM. We are waiting for some of the others to return who may want to have questions, but I might ask you, Ms. Jones, just a question. Some people might argue that Mr. McMillian's case and Mr. Adams' case demonstrate there is no real need for Federal review of alleged constitutional errors in State death penalty cases since Mr. McMillian and Mr. Adams were exonerated through State court process. Doesn't that suggest the States can handle these matters adequately?

Ms. JONES. No, Senator Metzenbaum, it does not. As I indicated earlier, and as related to your earlier question, it takes extraordinary effort, really, to get innocent death-sentence inmates—to put them in the position that Mr. McMillian and Mr. Adams are in today. Also, when you look at the system, the way the system works is, you know, the penalty is—you finally overwhelmingly, disproportionately, have given it to blacks, the people who do not have adequate access and funds to get counsel.

You look at our indigent defense systems across the State, and when you shut the door at the postconviction level it makes it very difficult for these people to get these claims vindicated. Also, you are working against the tide because there is overwhelming—even when a defendant is charged, there is an overwhelming presumption of guilt. You know, the public seems to think, well, the fact that you are charged means that you must have done something.

And so in order to vindicate these defendants who are innocent, we do have to put the resources into the system, but at the same time we are talking about a death penalty. As I go back to the point, when we are talking about a death penalty we cannot close the courthouse door, and you set out the standard in your bill, in

S. 221, which is where there is a substantial claim, a factual claim of innocence which is established which shows probable innocence, but then we cannot say in this society we are going to have this death penalty, that we are not going to let those claims be aired.

Senator METZENBAUM. Thank you very much, and that will conclude this panel. I want to express my appreciation to the lawyers and to the individuals themselves who have been involved in this matter. Your testimony has been extremely helpful and we are very grateful to you. Thank you.

Our next panel consists of Miriam Shehane, State President of Victims of Crime and Leniency, of Montgomery, AL; Kenneth Nunnelley, Deputy Attorney General of the State of Alabama; Paul Cassell, Associate Professor of Law at the University of Utah College of Law, Salt Lake City, UT; and Ward Campbell, Deputy Attorney General, State of California.

In order that I follow the same procedure that I did with the first panel, I am going to ask the witnesses to be sworn. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. SHEHANE. I do.

Mr. NUNNELLEY. I do.

Mr. CASSELL. I do.

Mr. CAMPBELL. I do.

Senator METZENBAUM. I think you know of our 5-minute rule. We try to keep to it. Ms. Shehane, we are happy to welcome you this morning.

PANEL CONSISTING OF MIRIAM SHEHANE, STATE PRESIDENT, VICTIMS OF CRIME AND LENIENCY, MONTGOMERY, AL; KENNETH S. NUNNELLEY, DEPUTY ATTORNEY GENERAL, CAPITAL LITIGATION DIVISION, STATE OF ALABAMA; PAUL G. CASSELL, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT; AND WARD A. CAMPBELL, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA

STATEMENT OF MIRIAM SHEHANE

Ms. SHEHANE. Thank you, Mr. Chairman.

Senator METZENBAUM. Do you want to bring the mike closer to you?

Ms. SHEHANE. Thank you, Mr. Chairman. To you and to any of the other committee members——

Senator METZENBAUM. Could you bring that mike closer? We are not getting you. Thank you.

Ms. SHEHANE. I appreciate the opportunity to speak to you today on a very critical issue from a victim's perspective. As you know, my name is Miriam Shehane and I represent an organization called VOCAL, but I am a crime victim. I also have a death sentence, and we are here to address what the scales of justice is all about—the crime, the punishment, the guilt and the innocence.

My daughter, Quenette, was brutally murdered in 1976, and as a parent of a child that has been murdered that life is more precious than your very own. You cannot understand, you cannot even comprehend what we are talking about here today.

Before I even try to address the bill before you, I beg of you to just bear with me a minute and let me summarize very shortly what happened to Quenette. December 20, 1976, she had just graduated from Birmingham Southern College. She was to start graduate school at Auburn University January 7, 1977. School had already closed, but she was working at a little department store for Christmas money, staying with a lady professor. She had plans with her boyfriend to cook steaks that night after she got off work about 5:30.

She did get off work, but when she got there she realized they didn't have any salad dressing for their tossed salad, so she hops in the car to run to a little store to buy some salad dressing. Quenette never returned. Instead, Quenette was abducted, she was robbed, and she was brutally raped over a period of long, long hours. Time will not permit me, and I don't want to burden you with all she went through over a period of almost a whole night, but let me tell you it has been 16 years and that memory is implanted in my heart forever.

The three that killed her were arrested and they went to trial, literally seven trials over a period of 6 years. We went from initially three death sentences to mere life and, because of commutation of a judge, life without parole, and we were left with one on death row, by the way, that was represented by a very competent attorney who was from the Southern Poverty Law Center.

I have very, very much concern over what we are doing here today. It took 13½ years to finally execute Wallace Norrell Thomas, and let me tell you I did not rejoice when Wallace Norrell Thomas was executed, but I did find some relief and I could finally, I could finally bury my dear Quenette if I didn't have to worry about two other men one day walking the street, and that is what I have to worry about.

We victims, we need some closure to our victimization. I have agony that I go through with every day, and you are asking for another loophole to extend that. I am very aware of what happened in Alabama and I am not proud of it. I am not even telling you that the man was not innocent, but the system worked. Alabama is one of two States that have a two-tier appeals process. This man was not near—I hate that he spent 6 years in prison, but he was not near in the electric chair. It was reversed on the very first level of appeals. I understand what he was going through, but let me tell you he had an appeal, he had an appeal.

I know—and I have been working in this victim's movement for about 14 years, but I know of a lot of people that have stood trial. There is no doubt about it, they were guilty, but they were acquitted. That victim had no appeal, no appeal whatsoever. Now, is that justice? If there is that minute chance, and there is a minute chance, very minute chance, but do we do away with what we have now for such a small segment when you are talking about thousands and thousands of innocent victims, thousands of innocent victims?

I believe on the scales of justice that the defendant has far more rights than I do as a victim. I believe it so strongly that I gave up a career in banking to start in the victim's movement because my pain was so great, and I saw the injustices, too. I saw the injus-

tices, too. I hope that Wallace Norrell Thomas, after 13½ years, felt some remorse. He never told me he did, but I believe with all my heart he was guilty, and I believe the other two were just as equally guilty and they deserve the death sentence, also.

But, gentlemen and ladies, I didn't have an appeal. I had to swallow that up and I am left here. I am telling you I am left here with a sentence hanging over my head. I will never get over it, Mr. Metzenbaum, never in my whole life. I implore you, please search your hearts and consider the impact it will have on—this bill will have on us. Another extension of the appeals process will mean a longer timeframe before we can bury our loved ones. Please hear my cry for healing.

I thank you again for letting me share my thoughts with you. In particular, please remember the thousands of innocent murders that have occurred when you are wrestling with the scales of justice. We are not asking for inequity. We are just asking justice for all, even the victim.

I thank you.

Senator METZENBAUM. Thank you very, very much, Ms. Shehane, for a very powerful statement. I think you summarized it very well when you said you were asking for justice for all. That certainly doesn't mean that those of us who are parents, as I am, couldn't totally empathize with your position as a mother of a daughter who was murdered.

Ms. SHEHANE. It doesn't come any easier after 16 years.

Senator METZENBAUM. There isn't much we can say. We don't want other parents' children, other individuals to be murdered, and we don't want those who are in prison and not guilty to be subjected to their loss of life. But we are very grateful to you for your comments and certainly will take them into consideration as this committee continues its deliberations.

[The prepared statement of Ms. Shehane follows:]

PREPARED STATEMENT OF MIRIAM SHEHANE

Thank you Mr. Chairman. To you and the other members of the Senate Judiciary Committee, I appreciate the opportunity you have given me to appear before you and share my thoughts with you from a victim's perspective.

My name is Miriam Shehane. I *am* a crime victim. The subject being addressed here today is a very critical one and speaks to what our criminal justice system is all about. How do we balance the scales of justice in the broad scheme of crime, punishment, guilt, innocence, fairness, and equity?

My daughter, Quenette, was brutally murdered in 1976. As the parent of a child who was so innocently executed, I can understand this committee's concern for the innocent. The value of a human life is sacred. Your concern for an innocent life is commendable and I wholeheartedly applaud you for it; however, one cannot truly understand all the ramifications of the issue at hand unless you have personally experienced the loss of an innocent life more precious than your own.

Before addressing the Bill before you, I beg your indulgence in allowing me to briefly summarize Quenette's death and the events that followed. On December 20, 1976, my 21 year old daughter had graduated from Birmingham-Southern College and was scheduled to enter graduate school January 4, 1977, at Auburn University. The school had already closed for the Christmas Holidays but she was staying with a lady professor a few extra days in order to work at a local department store for extra Christmas money. She had all of her possessions of her 4 years of college packed in her automobile. She had plans to cook steaks and have dinner with her boyfriend after she left work around 5:30 p.m. but discovered on arrival they needed salad dressing for the tossed salad. She hopped in her car to purchase the item, was abducted at the store, robbed, raped and killed. Time will not permit nor will I burden you with the gory details of how one of the defendants described her hours of

torture and final death but the memory is imprinted in my mind permanently. The three men who killed her were arrested and brought to trial—literally 7 trials over a period of 6 years. Initially, two received death sentences and one received life without parole due to the judge's commutation of the death sentence. After 6 years of trials, we ended with one defendant merely receiving a life sentence, one life without parole and one on death row. The frustrations the families go through when they think justice will soon prevail, only to receive jolt after jolt as they learn the case is going back for trial due to technicalities, is enough to cause fatal health problems. In reality, this happens quite frequently. The strategy seems to be aimed at wearing you down by endless reversals. Unfortunately, this causes the victim's family to plead with the district attorney to accept a lesser sentence because they are mentally and physically unable to cope with opening fresh wounds all over again by the detailed facts of their loved one's heinous murder.

I speak to you today of my murdered child, the aftermath of her death and the impact that all murders have on the lives of the victim's families. I would like to impress upon you, Senators, that in discussing death penalty issues, the consideration of the innocence of the victim is imperative. As pointed out in the legislation, due concern must be given as to the proof of guilt for the sentence of death to be imposed, but just as important, equal and appropriate weight must be given to those innocent victims of murder whose lives were taken so abruptlyand viciously without any provocation, and yet, without *any* right to appeal.

Providing another delay tactic in an already cumbersome appeals process is not the best way to preclude the possible execution of *one* innocent person. The need to deliver certain and timely punishment to *hundreds* of vicious killers of the innocent whose guilt is unquestioned must be addressed.

As you know, 36 States have determined that the death penalty is the most appropriate punishment for certain brutal and vicious murders. As the parent of a murder victim, I feel this punishment is not only fair, it is essential. What is not fair is when this punishment is prolonged by extensive appeals, stays, and postponements. We victims need a closure to our grief. I did not rejoice when Wallace Norrell Thomas was executed July 13, 1990 for murdering Quenette, but I certainly felt relief. I could now have a sense of completion and finally put my dear Quenette to rest if I didn't have to worry about two others being released at some point. I am, however, eternally grateful that Thomas' appeals ware finally exhausted and some sense of closure was felt.

As I understand the Bill you are now considering, any death row inmate can assert probable innocence in an application for relief to a Federal District Court and will receive an *immediate stay* pending further consideration of the application. This is to apply at any time regardless of any other provision of the law! This will translate into even more delays and abuse. No time limits are set in the courts at the present time and common sense tells us this measure will ultimately erase any credibility of the death penalty sanction.

Just recently, the highly publicized case of Mr. Walter McMillan's innocence was established in my home State of Alabama. I am truly sorry for this miscarriage of justice; however, Mr. McMillan was far from being executed. In fact, Alabama is one of two States that has a two-tier appeals process and Mr. McMillan's conviction was reversed at the first level of appeals. I cannot fathom anyone advocating the conviction of an innocent person, let alone executing one. By the same token, committee members, I am sure you would not consciously bring about *actual* injustice on a large scale to prevent a *potential* injustice on a smaller scale. This is exactly the effect this proposed Bill could have.

Claims have been made that a dozen or more innocent persons *may* have been executed in recent years. While I have the contention to agree with the experts who disagree with this assumption, I contend the system already gives far more safeguards to the accused than it does to homicide victims and their surviving families. The system should insure that they receive the justice they are due in a timely manner. I took over 13½ years for the system to finally execute Wallace Norrell Thomas for brutally murdering Quenette. From one who has personally experienced the traumatization the system already inflicts on the victim's family by unwarranted delays, it is with much concern that I find this committee entertaining the idea of extending another loophole to stall for time.

I can assure you that the system as it now operates gives far more consideration to death row inmates than it affords the victim and their families. What are the safeguards for the victim when a murderer is tried, acquitted by a jury, but can *never* be retried no matter how much evidence is produced in the future? Are the scales of justice earnestly balanced when a convicted murderer is not executed for 13½ years? Lest we forget, in addition to the extensive appeals of the courts, every State with a capital punishment statute has a procedure for executive clemency.

I implore you, Senators, search your hearts and consider the impact of this Bill. It is impossible for you to imagine the eternal pain that follows the death of a loved one that is caused by the hands of another human being, but please consider the further victimization you will be inflicting on thousands of hurting victims' families if this measure is passed. Another extension of the appeals process will mean a longer timeframe before we can bury our loved ones. Please hear our cry for healing.

Thank you, Senators, for allowing me to share my thoughts with you. We victims do not ask for inequity but pray to be given the same consideration given the defendant. An innocent person's life should be of utmost concern. In particular, please remember the thousands of innocent murder victims when weighing the scales of Justice. We advocate justice for all—Even the victim.

Thank you again.

Senator METZENBAUM. Mr. Kenneth Nunnelley, Deputy Attorney General for the State of Alabama, we are happy to have you with us, sir. I think other members of the panel know we do have a 5-minute rule. I didn't see fit to exercise it in the case of Ms. Shehane. In view of the hour, I would like to see fit to exercise it a little bit more earnestly with you gentlemen.

Please proceed.

STATEMENT OF KENNETH S. NUNNELLEY

Mr. NUNNELLEY. Thank you, Mr. Chairman, members of the committee. It is a privilege for me to appear today and present the views of the Alabama Attorney General's office concerning S. 221, and also to address the Walter McMillian case which has received so much attention recently. And, in fact, I woke up this morning in my hotel to see an article about Walter McMillian in USA Today. I had no idea that the publicity was as ongoing as it is.

The Alabama Attorney General's office is opposed to S. 221 for several reasons. I have illuminated and covered in far greater detail than I can this morning the basis of our opposition to S. 221. First of all, and I guess most importantly, S. 221 is a well-intentioned solution to a problem that just does not exist. The State courts are well able to deal with claims of newly discovered evidence when it goes to innocence in capital cases or when it goes to innocence in a noncapital case, for that matter.

In addition, executive clemency, which I heard denigrated this morning as being an invalid political solution, is very much alive and well as an option for capital defendants. You only have to look across the Potomac River to Virginia where Governor Wilder has recently commuted two death sentences, the Joseph Giarratano case being the most perhaps famous of those cases.

Another case that arose last January—rather, January 1992—was the Herbert Bassette case. In both of those cases, Governor Wilder granted executive clemency because he just wasn't sure the defendant was guilty and deserved to die. Former Senator Terry Sanford, back in the 1960's, granted executive clemency to a black defendant who had killed a cop simply because he wasn't sure. In North Carolina just recently, Anson Maynard received executive clemency, again because the governor just wasn't sure.

Executive clemency is, in fact, a legitimate option for capital defendants, if it ever gets to that point, but executive clemency is the final level that comes after the State trial which, as we all know, is the main event in a death penalty prosecution. It comes after the State direct appeal process which, as Ms. Shehane indicated, Alabama has a two-level direct appeal process, Ohio being the other

State in the United States that has a death sentence that employs a double-layered appeal process.

Executive clemency comes after the State postconviction proceeding is completed and it comes after the Federal habeas corpus proceeding is completed. By the time you get to executive clemency, the case has been considered by 15, 20, or more judges, and as the *Herrera* v. *Collins* opinion establishes, if there is no State remedy, the Federal courts are going to act. *Herrera*, when you read Justice O'Connor's concurrence, leaves utterly no doubt that the Federal courts will step in if there is a question of innocence and there is no State remedy.

Second, S. 221 will do away with the death penalty in Alabama. I am not an expert on the law of any other State, but I do know what the law is in Alabama, and if S. 221 is enacted, I very seriously doubt that the State of Alabama will carry out another execution as long as S. 221 remains in effect. There are a lot of reasons for that. All of them are interrelated and I don't have time to go into all of them before Senator Metzenbaum turns the red light on on me.

The most compelling reason that S. 221 should not be enacted is because of the automatic stay provision that exists in that bill. The automatic stay provision, in addition to literally putting the brakes on the process of carrying out a death sentence, encourages abuse by capital defendants.

Under S. 221, the Federal district court has no choice but to enter a stay of execution as soon as the application is filed, and it literally means that regardless of how strong the State's evidence against the defendant is, he is going to get a stay of execution. It means he can refile the same application the next time he gets close to an execution, and the Federal district court is once again going to have to grant him a stay. The potential for abuse that exists under S. 221 is just enormous. If S. 221 is enacted, there will be utterly no concept of finality of State court judgments any longer.

To very, very briefly address the Walter McMillian case, there has been a lot of comment about it, but the Walter McMillian case doesn't demonstrate a problem with the system. Instead, it demonstrates that the State courts are going to protect the rights of criminal defendants. The case proves—well, I see the red light is on. Senator, if I can have just a couple of minutes——

Senator METZENBAUM. Take another minute or so to wind up. I don't want to cut you off.

Mr. NUNNELLEY. Just to clarify and add to the facts and circumstances surrounding the Walter McMillian case, the attorney general's office of the State of Alabama and the Alabama Bureau of Investigation were involved in a joint investigation into the allegations of perjury that existed in the McMillian case, and that investigation, in fact, began prior to the airing of the now famous "60 Minutes" story.

At one point, there were seven Alabama Bureau of Investigation agents in Monroeville, AL. All of those agents came from parts of Alabama geographically removed from Monroeville. None of them knew any of the local law enforcement authorities in the Monroeville area. And seven agents may not sound like an awful

lot, but it is when you consider that the Alabama Bureau of Investigation has only 43 field agents to cover the entire State of Alabama.

One of the top officers in ABI made the comment to me just this week that we couldn't afford this case, but we couldn't afford not to do it and not to do the investigation that we have done, and what he meant by that was that ABI is operated under a pro-rated budget and they have literally broken their budget on the McMillian case. There is just no suggestion that the State didn't act in good faith.

Senator Metzenbaum, to conclude, 30 years ago Dr. Sam Shepard testified before the Senate Judiciary and Dr. Shepard said the wheels of justice grind slowly. The system worked for Dr. Sam Shepard and it worked for Mr. McMillian, but if S. 221 is passed, those wheels, while they may grind slowly, will stop.

Thank you.

[The prepared statement of Mr. Nunnelley follows:]

PREPARED STATEMENT OF KENNETH S. NUNNELLEY

I am pleased to appear today to present the views of the Alabama Attorney General's Office on S.221, a bill which creates a new vehicle to allow a prisoner under sentence of death to obtain Federal review of his sentence. We regard this legislation as a well-intentioned response to a problem which does not exist. Enactment of this legislation would be contrary to the principles of Federalism, would destroy the finality of State Court judgments, and would be an open invitation to widespread abuse of the Federal judiciary.

My remarks today will consist of a statement concerning the *Walter McMillian* case, a brief review of the *Herrera* v. *Collins* decision, and an analysis of the reasons why S.221 should not be enacted.

THE WALTER McMILLIAN CASE

As the Committee is aware, Walter McMillian was released from the Alabama prison system after evidence developed by the State established that McMillian had been wrongly convicted of capital murder and sentenced to death. However, as unfortunate as that situation is, it does not indicate that the criminal justice system somehow failed Mr. McMillian; instead, this case proves that the States are well-equipped to deal with newly discovered evidence claims in capital cases. In fact, McMillian's conviction and death sentence were reversed by the Alabama Court of Criminal Appeals, the First Appellate Court to hear his case. That fact alone demonstrates that the State Courts are well able to protect the rights of capital defendants.

The Court of Criminal Appeals reversed McMillian's conviction and sentence based upon a violation of *Brady* v. *Maryland,* not based upon perjured testimony. However, the evidence that was withheld in violation of *Brady* was not evidence that suggested that someone other than McMillian committed this murder, but was evidence that could have been used on cross-examination of Ralph Myers, who was McMillian's co-defendant.

While the Court of Criminal Appeals did not disturb the finding of the trial court on remand that Myers did not commit perjury at McMillian's trial, it is virtually certain that he did. Myers was a suspect in an unrelated capital murder in a neighboring county, and it is clear that Myers-false testimony against McMillian was the final act in a scheme developed by Myers to avoid the death penalty for his other murder.

What is also clear is the loathsome nature of the perjury committed by Myers, Hooks and Hightower. However, the testimony of these three witnesses, who were the key witnesses against McMillan, withstood extensive cross-examination by McMillian's trial lawyer, J. L. Chestnut. Mr. Chestnut, who is black, is one of the most respected criminal defense lawyers in Alabama. Moreover, Hooks' perjury was not revealed during extensive cross-examination by McMillian's present lawyer during the first hearing on remand Hooks, who is black, did not admit to his perjury until earlier this year. That admission was made during the course of a joint investigation by the Attorney General and the Alabama Bureau of Investigation which

was initiated following Myers' admission of perjury. Hightower's perjury was also discovered during that investigation.

There is little doubt that Hooks perjured himself in the hope of receiving some reward. He has admitted as much, and, during hi5 last interview with State investigators, asked if his admission of perjury meant he had to give the reward back. On the other hand, Hightower's perjury seems to have been an attempt to gain favor with local law enforcement authorities. However, the indisputable fact, and the one that is most pertinent here, is the fact that the State went to great lengths to investigate the allegation of perjury and, when that allegation proved to be true, immediately informed the Court of criminal Appeals and McMillian's attorney and dismissed the indictment against McMillian. There is not a shred of evidence to suggest that the State had anything at all to do with the perjury that occurred in this case. That disgusting series of events was the product of Myers, books and Hightower, no one else.

HERRERA V. COLLINS

Much has been made of a misinterpretation of the *Herrera* decision to the effect that that decision would allow theStates to execute a defendant for a crime that he did not commit. Justice O'Connor's concurring opinion makes clear that *Herrera* does not stand for that proposition. Justice O'Connor stated that "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution" and that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera* v. *Collins,* 113 S.Ct. 853, 870 (1993). As Justice O'Connor stated, the Court assumed for the sake of argument "that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that Federal habeas relief would be warranted if no State avenue were open to process the claim." *Id.,* at 874. That is the holding in *Herrera,* and any claim to the contrary is simply not correct.

Moreover, Herrera's claim of innocence was weak at best, seeking to blame his dead brother for the crimes Herrera was found guilty of committing. When the evidence against Herrera is considered against the proffered evidence of innocence, it is not surprising that none of the Federal judges to hear this claim, including the dissenters in the Supreme Court, have ever expressed any doubt as to Herrera's guilt.

While McMillian's conviction and sentence were reversed at the first stage of direct review and therefore never reached the State post-conviction or Federal habeas corpus stage, even if it had, there would not have been a *Herrera* issue. In fact, *Herrera* has virtually no application in Alabama because newly discovered evidence claims can be raised at any time in an Alabama State post-conviction proceeding so long as the claim is raised within six months of the discovery of the new evidence. Moreover, even if McMillian had not raised the claim upon which the Court of Criminal Appeals reversed his conviction and sentence until the Federal habeas stage, that claim would not have been procedurally barred and the Federal Courts would have reached the merits of the claim. *See, e.g., Sawyer* v. *Whitley,* 112 S.Ct. 2514 (1992). Finally, the facts present in the McMillian case would riot have failed to produce executive clemency, even if the claim had not been raised in any judicial proceeding.

SENATE BILL 221 SHOULD NOT BE ENACTED

While S. 221 is well-intentioned, it attempts to solve a problem which does not exist The States are well able to deal with claims of newly discovered evidence, as the McMillian case indicates Two other examples of death-sentenced inmates who received relief from the State Courts in cases involving claims of innocence are Randall Dale Adams and Clarence Brantley, both of whom were under death sentences in Texas.

In addition to these inmates, recent events establish that the governors of States having capital punishment take their clemency power seriously and will not allow an execution to be carried out if there are any remaining doubts. For example, Anson Maynard received executive clemency in North Carolina because the Governor "just was not sure." Governor Wilder of Virginia had recently granted clemency to Joseph M. Giarrantano and Herbert R. Bassette for similar reasons. In the Roger Coleman case, which also arose in Virginia, Governor Wilder went to great lengths to determine the true facts of that case, in spite of massive media coverage which proclaimed Coleman's innocence. In fact, Governor Wilder had a polygraph exam given before denying clemency. The media coverage has since been proven to be little more than hype, and a civil lawsuit is now pending on behalf of the individual whom Coleman's attorneys claimed was the real perpetrator. The Coleman case

stands as an example of how seriously the Governors of capital punishment States view their role.

In addition to being unnecessary, 5.221 would create a great potential for abusive tactics by capital defendants. Under 5.221, defendants would be encouraged to wait until shortly before a scheduled execution to file an application under the provisions of 5.221. That last-minute filing would produce an automatic stay of execution that would continue until the appeals process wad completed. significantly, unlike appeals in Federal habeas corpus proceedings, there is no requirement that the District or Circuit Court issue certificate of probable cause to appeal. Instead, the appeal is automatic. The automatic appeal provision, when coupled with the automatic stay provision, literally means that a death-sentenced defendant would be able to indefinitely postpone hid execution by successive last-minute filings that, under the terms of S.221, could be based upon the same operative facts. Nothing in the bill exists that would keep a defendant from repeatedly filing the same pleading, and, by waiting until shortly before a scheduled execution, the inmate would always get a stay and always avoid his sentence being carried out. The last-minute tactics employed on occasion by a death-sentenced inmates are well known, and have been the subject of criticism by numerous Federal Courts. However, S.221 would sanction those abusive tactics and would render it impossible for a State to ever carry out a death sentence.

Moreover, S.221 is intrusive in terms of federalism, and runs contrary to the principles of comity and equity that are the underpinnings of habeas corpus. S.221 leaves the States without the ability to handle their own cases, and is one more step toward making the Federal Courts super-appellate courts over the State Courts. However, there is nothing to suggest that the State Courts are incapable of protecting the constitutional rights of criminal defendants. In fact, some would argue that the State Courts are far more liberal and lenient on constitutional issues than are the Federal Courts. However, be that as it may, nothing even remotely suggests that the appellate courts of each of the States that have capital punishment, which include Alabama and Ohio, are incapable of doing the right thing and protecting the constitutional rights of the criminal defendants appearing before them.

A third problem that exists with S.221 is its reliance upon affidavits. The members of this Committee are well aware of the potential for abuse that exists any time affidavits are employed. Specifically, there is no meaningful opportunity for the party against whom an affidavit is offered to cross-examine and confront the evidence presented. That provision is an open invitation to abuse by death-sentenced inmates. Further, S.221 provides the inmate with a means to by-pass the State Courts and deprives the State of any chance at all to address the claim raised by the petitioner. That assumption, which seems to have as its underpinning the theory that the States are not going to protect the rights of criminal defendants, is simply incorrect. The McMillian case is just one example which proves the willingness of the State courts to address and correct errors in capital murder cases.

Finally, S.221 renders it very unlikely that an execution could ever be carried out because, under the terms of the bill, there is virtually no chance that a State could ever have an active death warrant at the same time that a stay was not in effect. Under Alabama law, the Supreme Court sets an execution date, and that date must be at least thirty days from the entry of the death warrant. Moreover, the death warrant only lasts for twenty-four hours. In Alabama, S.221, if enacted, would mean that no sentence of death could ever be carried out.

Additionally, S.221 does away with the law of procedural default, ignores settled principles of exhaustion, and creates a separate cause of action distinct from and in addition to Federal habeas corpus, The perceived problem that S.221 addresses is one that the States are well able to deal with, and should be allowed to decide. If there is no effective State remedy, *Herrera* establishes that the Federal courts will intervene at that point.

An example of the effect of S.221 can be found in the Cornelius Singleton case, which was the last execution carried in the State of Alabama. Shortly before the scheduled execution date, I received information that an individual had come forward with evidence which might be exculpatory to the defendant. At that point, I informed Singleton's attorneys of that fact, and made arrangements for an investigator and a lawyer from the Attorney General's Office to interview that person. As it turned out, the information that this individual had was not exculpatory, but rather amounted to a statement that had been overheard outside a drinking establishment at some time around the time of the murder. However, the individual was not sure of the context of what he had heard; only that the statement was made by an apparently intoxicated individual who was being ejected from a drinking establishment. The individual stated unequivocally to representatives of the Attorney General's office that it could well have been the defendant that he saw and heard.

Under S.221, such evidence could have been presented in the form of an affidavit and would have resulted in a stay of execution even though there was not a shred of evidence to suggest that anyone other than the defendant himself was the declarant. In denying relief on this issue, the Federal District Court held that "this unreliable, hearsay evidence, which is partially controverted by an affidavit submitted by respondents, falls far short of the required colorable showing of factual innocence [footnote omitted]". *Singleton* v. *Thigpen,* No. 87–0754–AH (N.D. Ala. Nov. 18, 1992).

However, had S.221 been the law in November, 1992, Singleton would have received an automatic stay which would have continued throughout the pendency of any appeal on his behalf. That stay would have been required in the face of the district court's findings that the evidence of innocence was unreliable, controverted, and filed at the last-minute for no purpose other than delay even though Singleton had had the evidence available to him for almost two weeks prior to the filing of his last-minute habeas petition.[1] The Singleton case stands as an example of the last-minute tactics often employed by death-sentenced inmates. S.221 would only encourage such tactics, and, in the *Singleton* case would have frustrated the execution of a valid State court sentence based upon unreliable evidence. That result is inconsistent with any system of ordered justice. *Herrera* has decided what S.221 addresses, and S.221 should not be enacted.

In conclusion, my remarks should not in any way be construed as advocating the execution of an innocent person. Nothing could be further from the truth. I have been involved in seven executions in the State of Alabama, and have been lead counsel in two of those proceedings. There is no more sobering task that a prosecutor can undertake, and I know that my counterparts in all of the capital punishment States feel the same burden that I do. No one involved in capital litigation has any interest in seeing the wrong person executed, and I am convinced that no prosecutor would allow that to happen.

Senate bill 221, enacted, will amount to an abolition of the death penalty in this Country. While capital defendants are entitled to a fair trial that is not constitutionally deficient, "the Constitution does not require one-sidedness in favor of the defendant." *Davis* v. *Kemp,* 829 F.2d 1522, 1528 (11th Cir. 1987), *cert denied,* 108 S.Ct 1099 (1988). As the Supreme Court has recognized, direct appeal is the primary avenue for review of a conviction or sentence and death penalty cases are no exception." *Barefoot* v. *Estelle,* 463 U.S. 880, 887 (1983). The *Barefoot* court went on to state that:

> Federal courts are not forums in which to relitigate State trials. Even less is Federal habeas a means by which a defendant is entitled to delay an execution indefinitely. *Id.*

Senate bill 221 creates a mechanism by which capital defendants will indeed be able to postpone execution of their sentence indefinitely. However, as former Chief Justice Burger noted, "at some point there must be finality." *Darden* v. *Wainwright,* 477 U.S. 168, 188 (1966) (concurring opinion by Burger, C.J.). S.221 will destroy any and all concepts of finality of State judgments.

Senator METZENBAUM. Thank you very much, Mr. Nunnelley. Mr. Paul Cassell, Professor of Law at the University of Utah.

STATEMENT OF PAUL G. CASSELL

Mr. CASSELL. Thank you very much, Mr. Chairman. I would like to——

Senator METZENBAUM. Bring the mike a little closer, please.

Mr. NUNNELLEY. Thanks very much, Mr. Chairman. I would like to thank you for inviting me here today to testify, and to Senator Hatch for his kind remarks earlier. I will do my best to meet the 5-minute limit. I know how anxious my students get when that red light goes on on the classroom clock, and I certainly won't indulge more than the time you have allotted.

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[1] Singleton's habeas petition was filed on November 12, 1992, and Singleton attempted to amend his petition to raise a "factual innocence" claim on November 16, 1992, The district court found that Singleton was informed of the existence of the evidence upon which his factual innocence claim was baked at some time between November 3 and November 9, 1992.

The committee, of course, has heard today very moving statements from Mr. McMillian and Mr. Adams. I think we just heard an equally moving statement from Ms. Shehane, and the question has, of course, then is one of balancing these competing concerns. What I would like to suggest today is a way to put these statements in context and a way to balance these concerns, and to do that I think the committee might consider a hypothetical proposal to reduce the speed limit on our Nation's highways to 5 miles per hour. After all, it might be argued we know with some certainty that perhaps an innocent person will be killed every week in a traffic accident and if we reduce the speeds, that risk would be avoided.

Yet, I take it we would all be against such a proposal, and the reason, of course, is that efficient use of our Nation's highways is very important to our country's welfare. By the same token, any fair-minded and balanced assessment of our country's capital sentencing system leads to the same type of conclusion that efficient use of capital punishment is a critical part of our country's welfare.

Now, this morning we heard testimony about the possibility that an innocent person might be executed, but unlike the undeniable deaths that occur on our Nation's highways, the best evidence is that no innocent person has been executed in this country for at least the last 50 years. And while the death penalty in recent history has a perfect record in punishing only guilty murderers, it is also equally clear that innocent lives will be put at risk from the failure to carry out capital sentences in a timely fashion where those sentences have been affirmed by the courts and reviewed by the governors for possible executive clemency. If passed, S. 221 would substantially increase the risk of this kind of error, this risk to innocent lives, by unduly interfering with the imposition of death sentences throughout the country.

Now, it is first important to understand that S. 221 does nothing to change the risk of convicting an innocent person. Instead, it simply creates procedures designed to reduce the risk of executing an innocent person. Thus, much of today's testimony may be beside the point when considering this bill.

The Senate Judiciary Committee has previously found the risk of executing an innocent person to be minimal, and I reached the same conclusion in a 1989 article published in the Stanford Law Review with then Assistant Attorney General Stephen Markman. We reviewed all claims of erroneous executions that had been offered by Professors Bedau and Radelet, and this morning, I believe, Mr. Chairman, you referred to their book, "In Spite of Innocence," in your opening statement.

I think it is important for the committee to be aware of some of the abuses that we located in that so-called study. Now, to give you an example, they claim—to take an example from Senator Hatch's home State and my home State of Utah, they claim that Joseph Hillstrom was innocent of murdering a shopkeeper, but was nonetheless executed by Utah in 1915. Well, I have today with me once of the courses they cite. It is entitled "Joe Hill, A Biographical Novel," and if you read the Forward of that book, the Forward says very clearly this is fiction, with fiction's prerogatives and none of history's limiting obligations.

Now, they go on to say—and I hope I don't give away the ending of the novel for the Senators that haven't had a chance to read it, but they go on to say that—the book goes on to have its protagonist, in fact, be a guilty murderer. Now, this isn't surprising because the Pulitzer Prize-winning author of this book, Wallace Stegner, had written a nonfiction article in which he said that Joe Hill was, in fact, a guilty murderer.

Now, this is not the only example. I have some other books with me. There is one entitled "Meet the Murderer," a rather unlikely title for a book that would be describing innocent people and, in fact, when one looks there, sure enough, they cite this book to prove that Mr. Appelgate is innocent. When you read the book it says, frankly, I do not doubt the culpability of Mr. Appelgate. And I could go through some other examples; we go through those in our articles.

But the important point is it is very easy for opponents of the death penalty to claim that an innocent person has been executed and when, in fact, you look at the court records and actual documents, as I have done, you find that these claims are not substantiated, at least back through the last 50 years.

Time Magazine did a similar thing last year where they put on their cover Roger Keith Coleman, claiming that he was innocent and, in fact, it was quite clear that a Federal district court judge reviewed all the evidence, including the newly discovered evidence that Time Magazine referred to, and found that he was guilty.

So on the one hand, no innocent person has ever been executed, at least in recently history. On the other hand, failing to carry out capital sentences in a timely fashion undeniably poses a risk to innocent persons. The death penalty, of course, when carried out, can incapacitate murderers, prevent them from killing again. It also has a very powerful deterrent effect. In my article and in my testimony today, I cite studies suggesting that perhaps as many as 125,000 innocent lives have been saved through the use of capital punishment in this century.

The relative risk—the balance that has to be struck in this area is obvious. While no innocent person has been executed in recent memory, each year more than 20,000 of the nation's citizens will be the victims of murder. The death penalty is the most visible deterrent to such crimes. Small reductions in the deterrent value of capital punishment will clearly affect many innocent lives. Senate bill 221 would place these lives in jeopardy by making it extraordinarily difficult to execute even the most dangerous murderers about whom doubt is not in question.

I see my time is up and I thank you very much for the invitation to testify today.

[The prepared statement of Mr. Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today to discuss the issue of the possibility of mistake in capital cases.

Mistakes in capital cases fall into two categories. On the one hand, it is possible that an innocent person might be executed. It is the specter of this kind of error that opponents of the death penalty apparently seek to raise before this Committee. Concern about the risk of an erroneous execution has also apparently prompted the introduction of S. 221, which would radically alter the existing procedures for prisoners under sentence of death to raise claims of innocence.

But it is also possible to make quite a different kind of mistake in capital cases. A guilty capital murderer might be spared the ultimate penalty only to kill other innocent persons. A fair assessment of the issue of mistake in capital cases leads inexorably to the conclusion that the risk to innocent life from failing to carry out capital sentences imposed under contemporary safeguards far outweighs the speculative and remote risk that an execution might be in error.

If passed, S. 221 would substantially increase the risk of this kind of error—an error I call "mistaken commutations"—by unduly interfering with the imposition of death sentences throughout the country. Indeed, it is conceivable that S. 221 would make it impossible for the States and the Federal government to carry out any executions at all. As written, S. 221 would apparently allow a condemned prisoner to file repeated, frivolous applications raising claims of innocence, each of which would entitle the prisoner to an automatic stay of execution.

In my testimony today I will discuss four issues. I will first review the minuscule risk that an innocent person might be executed. Second, I will address the far more deadly problems that result when the death penalty is warranted but cannot be imposed due to failure to enact constitutionally-sound procedures. Third, I will review the current law regarding raising claims of innocence. Finally, I will identify various deficiencies in S. 221. My testimony will be limited to these issues regarding mistakes in capital cases.

My background in this area is as follows. I am currently an Associate Professor of Law at the University of Utah College of Law. From 1988 to 1991, I served as an Assistant United States Attorney in the Eastern District of Virginia, where I was responsible for prosecuting Federal criminal cases. From 1986 to 1988, I served as an Associate Deputy Attorney General at the United States Department of Justice, handling various matters relating to capital punishment. In particular, in 1987, along with then-Assistant Attorney General William F. Weld, I prepared a *Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission,* a comprehensive review of death penalty topics, including the issue of the possibility of mistaken executions. In 1988, along with then-Assistant Attorney General Stephen J. Markman, I published in the *Stanford Law Review* a detailed rebuttal to an article by Professor Bedau and Radelet concerning allegedly erroneous executions. I have also served as a law clerk to then-Judge Antonin Scalia and Chief Justice Warren E. Burger, writing memoranda on numerous criminal cases, including death penalty appeals.

I. NO MISTAKEN EXECUTIONS HAVE OCCURRED IN RECENT HISTORY

Given the fallibility of human judgments, the possibility exists that the use of capital punishment may result in the execution of an innocent person. The Committee has previously found this risk to be "minimal," a view shared by numerous scholars.[1] As Justice Powell has noted commenting on the numerous State capital cases that have come before the Supreme Court, the "unprecedented safeguards" already inherent in capital sentencing statutes "ensure a degree of care in the imposition of the sentence of death that can only be described as unique."[2]

While the widely-held view has been that State death penalties are imposed with extraordinary care and accuracy, that position has recently been challenged. In 1987, two avowed opponents of capital punishment, Professors Hugo Adam Bedau and Michael L. Radelet, published the results of what they claimed to be "sustained and systematic" research over many years purporting to show that the use of capital punishment entails an intolerable risk of mistaken executions of defendants who are factually innocent of the crimes for which they were convicted.[3] According to the authors, 350 persons have been wrongly convicted of capital or "potentially capital" crimes in the United States during this century; and twenty-three innocent persons have actually been executed. Professor Radelet repeated these claims in testimony

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[1] *See* SENATE COMM. ON THE JUDICIARY, ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT, S. Rep. No. 251, 98th Cong. 1st Sess. 14 (1983); W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 178 (1979); van den Haag, *The Death Penalty Once More,* 18 U.C. DAVIS L. REV. 957 (1985).

[2] *McCleskey* v. *Kemp,* 481 U.S. 279, 313 n.37 (1987).

[3] *See* Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21(1987). A popular version of the article was recently published as M. RADELET, H. BEDAU & C. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992). Bedau had previously taken the position that it is "false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed, when the record fails to disclose that such cases occur." Bedau, The Death Penalty in America, FED. PROBATION, June 1971, at 32.

before this Committee in 1989.[4] Because Professor Radelet has presented this argument to the Committee and because the Bedau-Radelet article has been widely cited by death penalty abolitionists, it is important to consider it in some detail.

In 1988 after extensive research, then-Assistant Attorney General Stephen J. Markman and I published in the *Stanford Law Review* a detailed rebuttal to the assertions of Bedau and Radelet.[5] We agreed with Bedau and Radelet that the execution of one innocent person would be a tragedy. But we concluded that "not only is the Bedau-Radelet study severely flawed in critical respects, it wholly fails to demonstrate an unacceptable risk of executing the innocent. To the contrary, it confirms—as convincingly as may be possible—the view that the risk is too small to be a significant factor in the debate over the death penalty."

The Bedau-Radelet article suffers from a number of flaws. To begin with, it uses a peculiar definition of "potentially capital" cases. The definition includes some allegedly erroneous rape executions, even though rape is no longer a capital offense under contemporary Supreme Court decisions. At the same time, the article excludes treason, a quintessential capital offense, apparently so that Bedau and Radelet would not suffer criticism for declaring the innocence of Julius and Ethel Rosenberg, as they did in a draft of their article.[6]

The authors also have included a great number of cases from the early part of this century, long before the adoption of the extensive contemporary system of safeguards in the death penalty's administration, which greatly skews their analysis. Bedau and Radelet are able to identify only a very few "miscarriages of justice" in the decade since the Supreme Court upheld the constitutionality of the death penalty. Out of approximately 50,000 murder convictions during the period from 1977 to 1986, the authors point to only five cases where, they claim, a death penalty was wrongly imposed, and in none of these cases was the sentence actually carried out.[7] Even if one accepts their claim that all of these convictions were mistaken, the authors' accounts of these cases demonstrate that current post-conviction procedures work well in discovering and correcting errors. After all, in each of these cases the mistake was discovered.

Moreover, Bedau and Radelet cite but a single allegedly erroneous execution during the past twenty-five years—that of James Adams. A dispassionate review of the facts of that case demonstrates, however, that Adams was unquestionably guilty, as I will discuss in a minute. Thus, Bedau and Radelet have made no persuasive showing that anyone has been wrongfully executed since new capital punishment procedures were instituted in the wake of the Supreme Court's decision in *Furman* v. *Georgia*. (All of the capital sentencing schemes throughout the country have extensive post-*Furman* procedural safeguards in them.) In short, what the authors have done is comparable to studying traffic deaths before the adoption of traffic signals.

The overwhelming problem with the Bedau-Radelet study is the largely objective nature of its methodology and therefore of its conclusions. The authors' standard of innocence is simply their belief that a majority of "neutral observers," given the evidence at the authors' disposal, would judge the defendant in question to be innocent. An examination of the James Adams case, the only alleged post-*Furman* case of an execution of an innocent person, demonstrates that far from acting as neutral observers, Bedau and Radelet have leaped to embrace as "innocent" even the guiltiest of defendants.

James Adams was convicted of killing then robbing a Florida rancher in 1974. Adams was executed in 1984. Bedau and Radelet claim that Adams was "innocent," but do not mention the following salient facts:

- Adams was arrested shortly after the murder with money stained with blood matching the victim's;
- Adams claimed that the money was stained because of a cut on his finger, but his blood did not match the blood on the money;
- Clothes belonging to Adams were found in the locked trunk of his car stained with blood matching the victim's;
- Eyeglasses belonging to the victim were also found in the locked trunk of Adams' car;

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[4] DEATH PENALTY: HEARINGS ON S. 32 BEFORE THE SENATE COMM. ON THE JUDICIARY, 101st Cong., 1st Sess. 172–200 (1989) (statement of Michael Radelet, Prof. of Sociology, Univ. of Florida).

[5] Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN L. REV. 121 (1988).

[6] These problems in the article are discussed in Markman & Cassell, *supra* note 5, at 123–25.

[7] Bedau & Radelet, supra note 3, at 178–79, discussed in Markman & Cassell, *supra* note 5, at 150–52.

- Adams told the police when arrested that the clothing and eyeglasses found in his trunk were his, but at trial changed his story and denied owning any of the items.
- A witness, John Tompkins, saw Adams driving his car to and from the victim's house at the time of the murder;
- Another witness saw Adams' car parked at the victim's house at the time of the murder;
- A few hours after the murder, Adams took his brown car to an auto shop and asked that it be painted a different color.
- Adams' principal alibi witness contradicted him on the critical issue of his whereabouts at the time of the crime.

While ignoring all of this evidence, Bedau and Radelet offer the following to "prove" Adams' innocence:

- A witness who identified Adams' car leaving the scene of the crime was allegedly mad at Adams—but Bedau and Radelet do not mention that three other witnesses also saw Adams at or near the scene of the crime;
- A voice that sounded like a woman's was heard at the time of the murder—but the trial transcript reveals that this was the strangled voice of the victim pleading for mercy;
- A hair sample was found that did not match Adams' hair—but Bedau and Radelet state falsely that it was found "clutched in the victim's hand" when in fact it was a remnant of a sweeping of the ambulance and could have come from any of a number of sources.

James Adams was a murderer and was justly convicted.[8] As a result, even after "sustained and systematic" research, there is absolutely no credible evidence proving that an innocent person has been executed since *Furman* v. *Georgia*.

Bedau and Radelet's other alleged instances of "innocent" persons executed in earlier parts of this century are equally dubious. In our 1988 article, we reviewed all eleven cases of alleged executions of innocent persons in which appellate opinions set forth facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of Bedau and Radelet's claims, including all of the cases since 1940. That review demonstrated beyond any reasonable doubt that all eleven of those defendants were guilty of capital murder. A full review of all of those cases would take more time than the Committee has today. I simply refer the Committee to the relevant portion of our article for further details,[9] and ask that the article be made part of the record of this hearing.

It is important for the Committee to be aware, however, of the scholarly abuses that we found in the Bedau-Radelet article. To prove the "innocence" of one defendant, Everett Appelgate who was executed for murdering his wife with rat poison in 1932, Bedau and Radelet cited two sources; those sources in fact actually believed that Appelgate was guilty.[10] In another case, that of defendant Sie Dawson, the authors stated, falsely, that there were no eyewitnesses to the crime. In fact, there was an eyewitness—the victim's four-year-old son, Donnie, who had been beaten and left to die at the scene of the crime. When found a day later, Donnie told his father, the police chief, and a family friend that Sie Dawson had committed the murder. Seventeen years later, when interviewed by the *St. Petersburg Times* about the details of the crime, he explained how Sie Dawson had brutally killed his mother with a hammer.[11] As another example, Bedau and Radelet cite a book to prove generally

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[8] A full review of the Adams case, including citations to the original trial transcript and other court documents is found in Markman & Cassell, *supra* note 5, at 128–33, 148–50. The only citation found in the Bedau-Radelet article is to Adams' Petition for Executive Clemency. The Florida Clemency Board reviewed the petition and found it to be without merit.

[9] *See* Markman & Cassell, *supra* note 5, at 133–45.

[10] *Compare* Bedau & Radelet, *supra* note 3, at 92 n. 362, *with* D. KILGALLEN, MURDER ONE 190–91, 230 (1967) (Appelgate "very nearly got away" with the murder); L. LAWES, MEET THE MURDERER 334–35 (1940) ("Frankly, I do not doubt the culpability" of Appelgate). Bedau and Radelet also state, incorrectly, that the governor of New York denied a clemency petition despite having "doubts about Appelgate's guilt." Bedau & Radelet, *supra*, at 92. But in fact one of the authors' sources wrote that the governor did not "question [Appelgate's] guilt. He took keen interest in the proceedings and made every possible effort to see that justice was meted out." L. LAWES, *supra*, at 334–35.

[11] *Compare* Bedau & Radelet, *supra* note 3, at 109, *with Dawson* v. *State*, 139 So. 2d 408, 412 (Fla. 1962); St. Petersburg Times, Sept. 24, 1977, at 12A col. 1; Markman & Cassell, *supra* note 4, at 136 N.75. Interestingly, Bedau himself indicated in 1982 that the Dawson case "remain[ed] in the limbo of uncertainty": because "[t]he original news story [regarding Dawson's supposed innocence] merely reported allegations and was inconclusive; no subsequent inquiry known to me has established whether Dawson was really innocent." Bedau, *Miscarriages of Jus-*

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the innocence of Charles Louis Tucker, executed in Massachusetts in 1906 for stabbing a young girl to death during a robbery; the book actually says that the Governor's rejection of Tucker's clemency petition was "conscientious and admirable."[12]

Finally, my favorite example of Bedau and Radelet's research comes from my home State of Utah and involves one of their sources cited "generally" to prove that Joseph Hillstrom was innocent. That source was a book published by Wallace Stegner entitled *Joe Hill: A Biographical Novel.* The foreword explained that the book "is fiction, with fiction's prerogatives and none of history's limiting obligations. * * * Joe Hill as he appears here—let me repeat it—is an act of the imagination." While citing a work of fiction is bad enough, even more startling is the fact that the novel strongly suggests that its protagonist, Joe Hill, is in fact a guilty murderer! This is not surprising, since Wallace Stegner published two magazine articles in which he gave his view that the real-life Joseph Hillstrom was a killer.[13]

The Bedau and Radelet study collected all claims of the execution of an innocent person through the summer of 1991.[14] One case since then deserves brief comment.[15] On May 18, 1992, *Time* magazine ran a cover story about Roger Keith Coleman entitled "This Man Might be Innocent; This Man is Due to Die."[16] The article suggested that Coleman was innocent of the brutal rape and murder of his sister-in-law. Coleman, however, was plainly guilty. Indeed, *Time* concealed from its readers the most compelling evidence of Coleman's guilt—DNA evidence developed by Coleman's own hand-picked DNA expert.

In 1982, when Coleman was tried, DNA testing was not sufficiently developed to be used in his case. In 1990, the State trial judge granted Coleman's request to have the State's physical evidence tested by Dr. Edward Black of California, whom Coleman's lawyers described as a "highly regarded expert" with "particular expertise" in DNA testing and "the interpretation of semen evidence in sexual assault cases."[17] According to Dr. Blake—who, remember, was selected and paid by Coleman's lawyers—Coleman is a member of a class of only 2 percent of the entire general population who could have been the source of the sperm found in the victim's vagina. And when this evidence is combined with the independent fact that both Coleman and rapist/killer have type B blood, the percentage is reduced from 2 percent to 0.2 percent.

This newly-discovered evidence of Coleman's guilt comes on top of the trial evidence that two foreign pubic hairs found on the victim matched Coleman's and that blood of the same type as the victim's was found on Coleman's pants. A full recounting of the overwhelming evidence Coleman's guilt presented at trial is found in Virginia Supreme Court's opinion affirming the death sentence.[18]

Coleman's attorney's claimed to have found newly-discovered evidence of his innocence. But all of the evidence was presented to a Federal District Court judge who, after careful examination, concluded that Coleman could not produce even a "colorable claim of innocence."[19] Governor Wilder, who has commuted death sentences when questions of guilt have arisen, also carefully reviewed Coleman's claims

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tice and the Death Penalty, in THE DEATH PENALTY IN AMERICA 236–37 (H. Bedau ed. 1982) (citing to the same sources late cited in the *Stanford Law Review* as "proving" Dawson's innocence).

[12] *Compare* Bedau & Radelet, *supra* note 1, at 164 n.869, *with* E. PEARSON, MASTERPIECES OF MURDER 171 (1963); Markman & Cassell, *supra* note 4, at 143 n.116.

[13] *Compare* Bedau & Radelet, *supra* note 3, at 126 n. 588, *with* W. STEGNER, JOE HILL: A BIOGRAPHICAL NOVEL 13–14 (1969); Stegner, *Joe Hill: The Wobblies Troubadour,* NEW REPUBLIC, Jan. 5, 1948, at 20; Stegner, *Correspondence: Joe Hill,* NEW REPUBLIC, Feb. 9, 1948, at 39. *See also* Markman & Cassell, *supra* note 5, at 138–39; *State* v. *Hillstrom,* 46 Utah 341, 371, 150 P. 935, 947 (1915) (Frick, J., concurring) ("it is not easy to perceive how rational men could have arrived at any other conclusion" than that Hillstrom was guilty of murdering the storekeeper during the robbery).

[14] After the publication of their *Stanford Law Review* article in 1987, the authors collected cases through the summer of 1991 for their book IN SPITE OF INNOCENCE, *supra* note 3.

[15] I will not discuss the facts surrounding the recent Supreme Court decision in the *Herrera* case since it is clear that Herrera was guilty and no judge or justice has ever suggested otherwise. *See Herrera* v. *Collins,* 113 S. Ct. 853, 870 (1993) (O'Connor, J., concurring) (reviewing the evidence and concluding Herrera "is not innocent, in any sense of the word").

[16] TIME, May 18, 1992, p. 40.

[17] The facts recounted in this paragraph come from Richard A. Conway, now an Asst. Commonwealth Attorney in Prince William County, Virginia, who worked on Coleman's case as an Assistant Attorney General. *See* NAT'L LAW JOURNAL, May 25, 1992, at 12.

[18] *Coleman* v. *Commonwealth of Virginia,* 307 S.E.2d 864 (Va. 1983).

[19] The district court's opinion is quoted by the U.S. Supreme Court in *Coleman* v. *Thompson,* 112 S.Ct. 1845 (1992). The Supreme Court agreed and denied Coleman's request for a stay of execution. *Id.*

and denied his request for executive clemency.[20] Roger Coleman was a guilty murderer who deserved to be executed.

Based on a review of the cases offered in the Bedau-Radelet study and the more recent case of Roger Coleman, there is absolutely no credible evidence proving that an innocent person has been executed in at least the last fifty years.[21]

The questionable examples in the Bedau-Radelet and the *Time* magazine articles make an important point about the debate over mistaken executions. It is easy for opponents of the death penalty to allege, despite a unanimous jury verdict, appellate court review, and denial of executive clemency, that an "innocent" person has been executed. Such an assertion costs nothing and will help abolitionists advance their cause. As this review demonstrates, such claims should be reviewed with a healthy dose of skepticism.

The paucity of examples of innocent defendants who have been executed provides compelling evidence that the risk of mistaken execution is virtually non-existent. If opponents of the death penalty are able to produce no better examples of mistaken executions than those put forward by Bedau and Radelet, then the overwhelming majority of Americans who support capital punishment can rest assured that the criminal justice system is doing an admirable, if not indeed perfect, job of preventing the execution of innocent defendants.

II. MISTAKEN COMMUTATIONS OF DEATH SENTENCES

While modern-day examples of executed innocent defendants remain as rare as unicorns, it is much easier to find evidence that failure to execute justly convicted capital murderers would produce fatal mistakes, mistakes that I will designate as "mistaken commutations." Capital punishment saves innocent lives in three ways: through its incapacitative effect, is deterrent effect, and its role in establishing a system of just punishment. Failure to carry out properly imposed death sentences, after reasonable judicial and executive review, would thus be a mistake, a mistake with consequences no less lethal than a mistaken execution.

Let me emphasize that I am not urging that every first degree murderer be executed lest he kill again. Our present system of capital punishment limits the ultimate penalty to certain specifically-defined crimes and even then, permit the penalty of death only when the jury finds that the aggravating circumstances in the case outweigh all mitigating circumstances. The system further provides judicial review of capital cases. Finally, before capital sentences are carried out, the governor or other executive official will review the sentence to insure that it is a just one, a determination that undoubtedly considers the evidence of the condemned defendant's guilt. Once all of those decisionmakers have agreed that a death sentence is appropriate, innocent lives would be lost from failure to impose the sentence.

A. Incapacitation

Capital sentences, when carried out, save innocent lives by permanently incapacitating murderers. Some persons who commit capital homicide will slay other innocent persons if given the opportunity to 'do so. The death penalty is the most effective means of preventing such killers from repeating their crimes. The next most serious penalty, life imprisonment without possibility of parole, prevents murderers from committing some crimes but does not prevent them from murdering in prison.

At least five Federal prison officers have been killed since December 1982, and the inmates in at least three of the incidents were already serving life sentences for murder.[22] For example, in the Federal Government's maximum security institution in Marion, Illinois, two experienced correctional officers were murdered in separate incidents on October 22, 1983. Officer Clutts died in an unprovoked, vicious assault when stabbed approximately 40 times with a homemade knife by inmate Thomas Silverstein. At the time, Silverstein was being supervised by three correctional officers. Silverstein had already murdered three inmates while in Federal custody, for which he received three life sentences.

GENERAL ON CAPITAL PUNISHMENT AND THE SENTENCING COMM'N 28 (Feb. 13, 1987).

Officer Hoffman was murdered by prisoner Clay Fountain. Fountain managed to slip off his handcuffs and stab one of the three officers escorting him back to his cell. The other two officers rushed in. One of these officers was injured and the other, Officer Hoffman, was killed attempting to protect his fallen comrade. Follow-

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[20] *See Coleman Executed As Final Appeals Fail,* WASHINGTON POST, May 21, 1992, at A1.

[21] *See* Markman & Cassell, *supra* note 5, at 128–50. We were able to find court records sufficiently detailed to allow us to examine all of Bedau and Radelet's claims of innocent men who had been executed back through 1940.

[22] W. WELD & P. CASSELL, REPORT TO THE DEPUTY ATTORNEY

ing this unprovoked, brutal stabbing, inmate Fountain waved his arms in a victory expression as he walked down the cell ranges in front of other inmates. This inmate was serving a life sentence for the murder of a staff sergeant while in the United States Marines. He had repeatedly engaged in extremely violent acts, including the murders of inmates in 1979, 1981, and 1982. He was serving three life sentences at the time he murdered Officer Fountain.

Some killers are also paroled, only to kill again. For instance, Eddie Simon Wein was sentenced to death in Los Angeles Superior Court in 1957. Instead of being executed, he was released from prison in 1975 to live in West Los Angeles. Within months, he began to attack and kill women in the area. Fortunately for other potential victims, his apprehension was swift. He was convicted in 1976 of first degree murder on one woman, attempted murder of another, and numerous sexual offenses.[23] The woman who was killed by Wein and the women who were scarred by him for life would not have been victims if Wein had been executed as originally decreed. Here the death penalty would have saved an innocent life.

Statistics prove that his is not just an isolated example. Out of a sample of 164 paroled Georgia murderers, eight committed subsequent murders within seven years of release. A study of twenty Oregon murderers released on parole in 1979 found that one (i.e., five percent) had committed a subsequent homicide within five years of release. Another study found that of 11,404 persons originally convicted of "willful homicide" and released during 1965 and 1974, 34 were returned to prison for commission of a subsequent criminal homicide during the first year alone.[24] Of course, these figures reflect recidivism by murderers in general, not the presumptively more dangerous population of capital murderers.

While it is impossible to determine precisely how many innocent lives the execution of convicted murderers has saved, the available data suggest that the number is not insignificant. Of the roughly 52,000 State prison inmates serving time for murder in 1984, an estimated 810 had previously been convicted of murder and had killed 821 persons following those convictions. Execution each of these inmates following their initial murder conviction would have saved 821 innocent lives. Of course, since only a fraction of convicted murderers receive the death penalty, the number of innocent lives would be substantially smaller. Our data published in 1988 suggest a conservative estimate of at least 24 innocent lives saved just in the last few decades from the incapacitative effect of capital sentences, more than the total number of "innocent" defendants that Bedau and Radelet claim have been executed in this century.[25]

B. Deterrence

While the innocent lives saved through the incapacitative effect of capital punishment are important, the penalty also saves far more innocent lives through its general deterrent effect. Support for the deterrent effect of the death penalty comes from four sources: logic, anecdotal evidence, deterrence studies, and the structure of our criminal penalties.

Logic supports the conclusion that the death penalty is the most effective deterrent for some kinds of murders—those that require reflection and forethought by persons of reasonable intelligence and unimpaired mental facilities. Many capital offenses are quintessential contemplative offenses. Murder for hire, treason and terrorist bombings all require extensive planning. It stands to reason that capital punishment deters such persons more than the next most serious penalty, life imprisonment without parole.

Anecdotal evidence in support of the deterrent value of capital sentences comes from examples of persons who have been deterred from murdering, or risking a murder, because of the death penalty. For instance, Justice McComb of the California Supreme Court collected from the files of the Los Angeles Police Department fourteen examples within a four-year period of defendants who, in explaining their

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[23] W. BERNS, *supra* note 1, at 103.

[24] *See* Heilbrun, Heilbrun & Heilbrun, *Impulsive and Premeditated Homicide: AN Analysis of Subsequent Prole Risk of the Murderer,* 69 J. CRIM. L. & CRIMINOLOGY 108, 110–13 (1978); J. Wallerstedt, *Bureau of Justice Statistics Special Report: Return to Prison* 4 (1984); H. BEDAU, THE DEATH PENALTY IN AMERICA 175 (3d ed. 1982). Bedau and Radelet are apparently willing to tolerate these subsequent homicides, referring to the "low incidence of recidivism." Bedau & Radelet, *supra* note 3, at 81.

[25] Sources for this calculation are provided in Markman & Cassell, *supra* note 5, at 153. The estimate is likely to be extremely conservative since we have assumed that those executed are no more dangerous than the population of convicted murderers generally. In fact, however, the death penalty is reserved from the most brutal murderers or serial killers (*e.g.,* Ted Bundy) who might fairly be expected to pose a substantially greater risk of subsequent homicide. *See also* Section IV, *infra* (discussing dangerousness of those on death row).

refusal to take a life or carry a weapon, pointed to the presence of the death penalty. For instance, Louis Turck was arrested for robbery. He had used guns in prior robberies in other States but simulated a gun in the robbery in Los Angeles. He told investigating officers that, although he had been in California for only one month, he was wary of the State's death penalty. He used a simulated gun because: "I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber." Similarly, Jack Colevris committed an armed robbery at a supermarket about a week after escaping from San Quentin. He was soon stopped by a motorcycle officer. As an escaped convict with two prior armed robbery convictions, Colevris knew he faced another long prison term. But he did not use the loaded revolver on the seat next to him because, he said, he preferred a possible life sentence to a death sentence.[26]

Other evidence reveals that some criminals committed or attempted to commit homicides specifically because of the absence of a death penalty. For instance, according to the Attorney General of Kansas, one of the contributing factors leading to the reenactment in the 1930's of the death penalty in Kansas for first-degree murder was numerous deliberate murders committed in Kansas by criminals who had previously committed murders in States surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured.[27]

More recently, in March, 1973, four men entered a warehouse complex in Landover, Maryland, and took numerous hostages. Five of the hostages were shot, but they all miraculously survived. Eleven others were pistol-whipped. One of the victims, who had been shot in the throat, later testified that one of the robbers "told us he had a hand grenade and was going to blow us all up. He said it didn't matter to him who died, since the worst that would happen to him was that he would be taken care of the rest of his life" in prison. While no hand grenade was found, the fact that the robbers shot five people clearly indicates that they were quite willing to kill in the recognized absence of death penalty.[28] Numerous other examples could be cited,[29] but the fundamental point is that innocent lives are at risk from the absence of a death penalty.

Statistical studies support the proposition that capital sentences, like other criminal sanctions, have a deterrent effect. To be sure, some statistical surveys, often conducted by opponents of the death penalty, have found no such effect. A detailed review undertaken in 1987 by then-Assistant Attorney General William F. Weld and me found that few, if any, of these studies relied on rigorous methodologies or adequately controlled from many variables that affect the homicide rate in the jurisdictions under consideration.[30] Moreover, it appears to be common ground in the scholarly literature on deterrence that a statistically valid study should account not only for the response of criminals to penalties imposed by an outside authority (the so-called "demand for crime") but also for an outside authority's response to changes in crime (the so-called "supply of crime"). The "supply-demand" econometric studies that have been done to date accord with our intuition and support the conclusion that the death penalty deters homicide.

One of the most recent substantial econometric studies was performed by Professor Stephen K. Layson of the University of North Carolina at Greensboro, who analyzed data for the United States from 1936 to 1977. Layson concluded that increases in the probability of execution reduced the homicide rate. Specifically, Layson found that, on average, each execution deterred approximately eighteen murders. Layson's study of the United States data is consistent with his earlier study concerning the deterrent effect of capital punishment in Canada and with important empirical work in this area by Isaac Ehrlich and other scholars. These econometric studies are buttressed by a growing body of scholarly literature demonstrating that punishment has a deterrent effect on crime in a wide variety of settings, including "cohort" studies using data on particular individuals rather than aggregate crime rates.[31]

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[26] *People* v. *Love*, 56 Cal. 2d 720, 366 P. 2d 33, 16 Cal. Rptr. 777 (1961) (McComb, J., dissenting).

[27] Report of the Royal Commission on Capital Punishment 375 (1953).

[28] *Four Guilty in Holdup Shootings*, WASHINGTON POST, Dec. 8, 1973, at B1.

[29] Examples are collected in W. WELD & P. CASSELL, REPORT TO THE DEPUTY ATTORNEY GENERAL ON CAPITAL PUNISHMENT AND THE SENTENCING COMMISSION (Feb. 13, 1987) (Appendix C). A particularly helpful collection of examples is also found in F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL (1978).

[30] W. WELD & P. CASSELL, *supra* note 29, at 15–19.

[31] For Layson's United States studies, see Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68 (1984); Layson, *United States*

Continued

Indeed, the premise that more severe penalties deter crimes is fundamental to our criminal justice system. This Committee, for example, has often responded to the problem of crime by proposing new legislation that would increase the severity of criminal sanctions for certain criminal activities. Penalties for drug trafficking and firearms offenses immediately come to mind here. If those enhanced penalties were appropriate because they would help deter those offenses, death penalties for homicides are likewise appropriate because they will deter some would-be killers.

If Layson's empirical work (which is strongly supported by our intuition, anecdotal evidence, deterrence theory, and the structure of our criminal penalties) is correct, the death penalty has deterred roughly 125,000 murders in this country in this century.[32] Put another way, based on Layson's study, more than one thousand innocent lives have been saved each year because of capital punishment. This figure dwarfs the twenty-three innocent persons Bedau and Radelet claim have been executed in the same time period. More important, it demonstrates rather starkly that under any realistic risk assessment, the chance of a mistaken execution is tiny compared to the risk from the "commutation" of all death sentences.[33]

C. Just punishment

Through the imposition of just punishment, civilized society expresses its outrage and sense of revulsion toward those who, by contravening its laws, have not only inflicted injury upon discrete individuals, but also weakened the bonds that hold communities together. Certain crimes constitute such outrageous violation of human and moral values that they demand retribution. It was to control the natural human impulse to seek revenge and, more broadly, to give expression to deeply held views that some conduct deserves punishment, that criminal laws, administered by the State, were established. The rule of law does not eliminate feelings of outrage but does provide controlled channels for expressing such feelings. People can rely on society to sanction criminal conduct and to carry out deserved punishment. The law's acceptability and effectiveness as a substitute for self-help depends, however, on the degree to which society's members perceive the law as actually providing just punishment for particularly serious criminal offenses.

As this Committee has previously recognized, "[m]urder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought to also differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate."[34]

Times-Series Homicide Regressions with Adaptive Expectations, 62 BULL. N.Y. ACAD. MED. 589 (1986). For Layson's Canadian study, see Layson, *Homicide and Deterrence: Another View of the Canadian Time-Series Evidence,* 16 CAN. J. ECON. 52 (1983). Ehrlich's most recent study is Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence,* 85 J. POL. ECON. 741(1977), which responds to criticism of his earlier study, Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death,* 65 AM. ECON. REV. 397 (1975). Other important studies include Wolpin, *Capital Punishment and Homicide in England: A Summary of Results,* 68 AM. ECON. REV. 422 (1978); Phillips & Ray, *Evidence and Identification and Causality Dispute about the Death Penalty,* in APPLIED TIME SERIES ANALYSIS 313 (1982). Both Wolpin, as well as Phillips and Ray, controlled for the deterrent effect of imprisonment length and observed a unique deterrent effect attributable to death sentences.

Outside the death penalty context, a deterrent effect has been found in Bartel, *Women and Crime: An Economic Analysis,* 17 ECON. INQUIRY 29 (1979); Block Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement,* 89 J. POL ECON. 429 (1981); Corman, *Criminal Deterrence in New York: The Relationship Between Court Activities and Crime,* 19 ECON. INQUIRY 476 (1981); Viscusi, *The Risks and Rewards of Criminal Activity: A Comprehensive Test of Criminal Deterrence,* 4 J. LABOR ECON. 317 (1986); Witte, *Estimating the Economic Model of Crime with Individual Data,* 94 Q.J. ECON. 57 (1980).

[32] Between 1900 and 1985, 7092 persons were lawfully executed. Multiplying Layson's estimate of the execution/homicide tradeoff (18) by 7092 produces a total of roughly 125,000 innocent lives saved from the death penalty. This calculation assumes that Layson's tradeoff, which is based on data from 1933 to 1977, would apply at the same level for the entire period from 1900 to 1985.

[33] For instance, even if one were to contend that there was only a small (say 25 percent) chance that Layson's figures were correct, then one would have to weigh 31,250 lives (25 percent x 125,000) in any risk assessment equation. Of course, to complete the equation, one must consider the possibility of a counter-intuitive "brutalization" effect (i.e., an increase in the homicide rate) attributable to society's use of the death penalty. The anecdotal and statistical support for such an argument is extremely thin. See W. WELD & P. CASSELL, *supra* note 29, at 15–16. Moreover, Layson's equations demonstrate that any "brutalization" effect is outweighed by capital punishment's deterrent effect.

[34] SENATE COMM. ON THE JUDICIARY, ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT, S. Rep. No. 251, 98th Cong., 1st Sess. 13 (1983).

Determining what sanction is proportionate and, therefore, what constitutes just punishment for committing certain offenses is admittedly a subjective judgment. Nevertheless, when there is widespread public agreement that the death penalty is a just punishment for certain kinds of murder—as there is in this country today—and when a jury acting under standards meeting constitutional requirements determines that a particular person has killed another under circumstances for which the legislature has found that death is the appropriate penalty, the resulting judgment is no less "just" because its validity cannot be scientifically proven.

The death penalty's retributive function thus vindicates the fundamental moral principle that a criminal should receive his or her just deserts. Through the provision of just punishment, capital punishment affirms the sanctity of human life and thereby protects it. Walter Berns has traced this process, and his analysis is worth quoting:

> The purpose of the criminal law is not merely to control behavior—a tyrant can do that—but also to promote respect for that which should be respected, especially the lives, the moral integrity, and even the property of others. In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement and, thereby, hope to promote this respect. To be successful, what it says—and it makes this moral statement when it punishes—must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can made to be awful or awe inspiring is to entitle it to inflict the penalty of death.[35]

III. CURRENT SAFEGUARDS AGAINST AN ERRONEOUS EXECUTION

The preceding sections have demonstrated two points: First, that no innocent person has been executed in recent history; and, second, the failure to impose death penalties can result—and has resulted—in the death of innocent persons. This section briefly reviews the current accommodation that has been reached between the need to review claims of innocence while at the same time allowing the effective imposition of death penalties.

The current capital sentencing scheme guards against the execution of innocent persons in at least seven ways.

First, the system imposes a vast array of due process protections to assure that no innocent person is convicted of a crime. The integrity of the criminal trial process is protected by rules governing the admissibility of evidence, the requirement that a defendant receive the effective assistance of counsel, the placement of the burden of proof on the prosecutor, the requirement of proof beyond a reasonable doubt, and the guarantee of a verdict by a unanimous jury on the issue of guilt or innocence. Because of these safeguards, it is "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free."[36]

Second, with respect to the role of Federal courts in the process, Federal courts can review the sufficiency of the evidence supporting a guilty verdict to ensure that the evidence was sufficient to persuade a rational trier of fact beyond a reasonable doubt of every element of the charged offense.[37] Federal courts can review the sufficiency of the evidence on habeas corpus and can reverse a State conviction where the evidence was so lacking that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[38]

Third, the Federal courts will allow any prisoner who can demonstrate his "actual innocence" to seek relief under Federal habeas for a procedural error at his trial, even if the prisoner has forfeited his right to seek relief on habeas corpus due to a procedural default in the State courts or an abuse of the writ.[39]

Fourth, prosecutorial misconduct will result in reversal of a conviction. Both Federal and State prosecutors are constitutionally required to disclose exculpatory evidence to a defendants[40] and impeaching information regarding government witnesses.[41] Failure to disclose such information that is material to a defendant's case requires a new trial. Moreover, a prosecutor may not knowingly present false testi-

[35] Berns, *Defending the Death Penalty*, 26 CRIME & DELINQ. 503, 509 (1980).
[36] *Ford* v. *Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring).
[37] *Jackson* v. *Virginia*, 443 U.S. 307 (1979).
[38] 443 U.S. at 318–19.
[39] *Sawyer* v. *Whitley*, 112 S. Ct. 2514 (1992).
[40] *Brady* v. *Maryland*, 373 U.S. 83 (1963).
[41] *Giglio* v. *United States*, 405 U.S. 150, 154–55 (1972).

mony and, indeed, has a duty to correct testimony that she knows is false.[42] Thus, if government misconduct results in the conviction of an innocent person, a remedy already exists.

Fifth, in the event that evidence comes to light after a trial that casts doubt on the accuracy of the trial verdict, a defendant may file a motion for a new trial. For example, in the Federal system Rule 33 of the Federal Rules of Criminal Procedure allows a defendant to file a motion for a new trial based on newly discovered evidence within two years of trial. All fifty States and the District of Columbia authorize motions for new trials based on newly discovered evidence, with time limits ranging from ten days after judgment to no time limits at all.[43]

In the event that exculpatory evidence is discovered after the time limits have expired, the sixth—and perhaps most important—safeguard against the execution of an innocent person is the possibility of clemency. As the fifth circuit has recognized, "Executive clemency is the last link in the chain."[44] In the Federal system, the Pardon Clause, Art. II, section 2, cl. 1, authorizes the President to pardon a prisoner or to commute a capital sentence to any term of years, for any reason.[45] Clemency has long been available in the States as well.[46] All States that currently authorize the death penalty provide for the possibility of clemency, either by statute or by constitutional provision.[47]

It is clear that executive clemency has been frequently exercised in capital cases. The Bedau and Radelet article, although flawed in the respects noted earlier, indicates that in 129 "potentially capital" cases a defendant was pardoned or received other executive clemency on grounds the authors identify as related to innocence.[48] To cite some recent examples of executive clemency, in 1992, Governor Wilder of Virginia commuted Herbert R. Bassette, Jr.'s death sentence because "I cannot in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested in me as governor to intervene."[49] A year earlier, Governor Wilder commuted the death sentence of Joseph M. Giarratano, Jr., apparently because of doubts about guilt.[50] Of course, these pardons do not mean that Bassette and Giarratano were in fact innocent of the crimes with which they were charged. To the contrary, very strong cases could be made that they were guilty.[51] But the critical point is that executive clemency is available to death row prisoners who can demonstrate substantial claims of innocence.

It is sometimes argued that "politics" (however defined) sometimes prevents justified pardons. But whatever merit the argument might have in other contexts, when a clemency petition of an arguably innocent death row prisoner is involved it has none at all. Governor Wilder undoubtedly described the view of all governors when he explained, "You don't even think about politics when weighing death penalty cases."[52] Moreover, "politics" has no sway when claims of innocence are involved. Not even a caricatured death penalty advocate would argue for the execution of innocent persons. Executive clemency based on sound claims of innocence is, if anything, good politics. As Governor Wilder explained in commuting Bassette's death sentence, he acted to "express the conscience of the commonwealth."[53] Executive clemency is clearly a strong protection against the execution of an innocent person.

On top of all of these safeguards, the United States Supreme Court has recently recognized the possibility of even another, seventh safeguard against erroneous executions: review of claims of innocence on Federal habeas. The traditional approach to claims of innocence raised on Federal habeas was to consider only *legal* issues, not *factual* issues pertaining to guilt or innocence. As Justice Holmes explained, "[W]hat we have to deal with [on habeas review] is not the petitioners' innocence

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[42] *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1529–30 (11th Cir. 1988).

[43] *See Herrera* v. *Collins*, 113 S. Ct. 853, 865–66 & nn. 8–11 (1993).

[44] *Shaver* v. *Ellis*, 255 F.2d 509, 511 (5th Cir. 1958).

[45] *See Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. 307 (1856).

[46] *See* C. JENSON, THE PARDONING POWER IN THE AMERICAN STATES (1922).

[47] *See Herrera* v. *Collins*, 113 S.Ct. 853, 867 n.14 (1993).

[48] Bedau & Radelet, *supra* note 3, at 49. Bedau and Radelet appear to have overestimated the number of times the pardons involved a truly "innocent" person. *See* Markman & Cassell, *supra* note 5, at 126 n.28.

[49] *Va. Death Sentence Commuted: Wilder Cites Doubts About Inmate's Guilt*, WASHINGTON POST, Jan. 24, 1992, at D1.

[50] *Wilder Grants Reversal of Death Sentence: Murderer Could Get Parole in 13 Years*, WASHINGTON POST, Feb. 20, 1991, at A1.

[51] *See, e.g., Terry Rules Out New Trial for Pardoned Killer: Attorney General Certain of Giarratano's Guilt*, WASHINGTON POST, Feb. 21, 1991, at B3.

[52] *Va. Death Sentence Commuted: Wilder Cites Doubts About Inmates Guilt*, WASHINGTON POST, Jan. 24, 1992, at D1.

[53] *Id.*

or guilt but solely the question of whether their constitutional rights have been preserved."[54] Chief Justice Warren announced the governing standard in 1963:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the State trier of facts, the Federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; *the existence merely of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief on Federal habeas corpus.*[55]

In recent years, the Federal courts generally interpreted Chief Justice Warren's statement as precluding habeas review of claims of innocence, at least where the claim was based on newly discovered evidence.[56]

In January, the Supreme Court cast doubt on the vitality of this limitation and suggested that claims of innocence could be reviewed on Federal habeas in extraordinary circumstances. In *Herrera* v. *Collins*,[57] the court reviewed a claim raised by petitioner Herrera that he was actually innocent of the capital murder In various opinions, the court denied his claim in a six-to-three decision. Of importance for present purposes, however, is that six Justices suggested that a sufficiently persuasive claim of actual innocence would entitle a petitioner to Federal habeas relief.

The opinion for the court, written by Chief Justice Rehnquist, did not deny Herrera's contention that executing an innocent man would be subject to Federal habeas review. Instead, the court chose to "assume, for the sake of argument in deciding this cases, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."[58] The three dissenters (Justices Blackmun, Stevens, and Souter) went further, and would allow a prisoner to raise a claim on habeas if he could establish that he "probably is innocent."[59] Justice White concurring agreed that "I assume that a persuasive showing of 'actual innocence' made after trial * * * would render unconstitutional the execution of petitioner in this case."[60] Justice O'Connor concurred, joined by Justice Kennedy, to note that she "cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[61] Justice O'Connor went on to explain that the evidence "overwhelmingly" demonstrated that Herrera was guilty and that, therefore, she did not need to reach the issue of what circumstances would allow a petitioner to press a claim of innocence.[62] In short, six justices seem to indicate that, despite the earlier history that habeas review was limited to claims of legal error, an innocent defendant could raise a claim of innocence in appropriate circumstances. Other commentators have read *Herrera* in exactly this fashion.[63]

Apparently the only question remaining after *Herrera* is how strong a showing of innocence a petitioner would need to make to obtain relief. The pivotal concurring opinion of Justices O'Connor and Kennedy, whose votes were necessary for Chief Justice Rehnquist's opinion to command a majority of the court, argued that Federal proceedings and relief must be reserved for "extraordinarily high and truly persuasive demonstrations of actual innocence."[64] The precise contours of that language remain unexplored because, as the concurring opinion observed, "If the Constitu-

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[54] *Moore* v. *Dempsey*, 261 U.S. 86, 87–88 (1923); *accord Ex parte Terry*, 128 U.S. 289, 305 (1888) ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding.").

[55] *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963) (emphasis added).

[56] *See, e.g., Boyd* v. *Puckett*, 905 F.2d 895 (5th Cir.), *cert. denied*, Ill S. Ct. 526 (1990); *Byrd* v. *Armontrout*, 880 F.2d 1, 8 (8th Cir. 1989), cert. denied, 494 U.S. 1019 (1990); *Stockton* v. *Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071(1989); *Swindle* v. *Davis*, 846 F.2d 706 (11th Cir. 1988) (*per curiam*); *Walker* v. *Lockhart*, 7653 F.2d 942, 960 (8th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1020 (1986); *Burks* v. *Egeler*, 512 F.2d 221, 230 (6th Cir.), cert. denied, 423 U.S. 937 (1975); *but see, e.g., Sanders* v. *Sullivan*, 863 F.2d 218, 224–26 (2d Cir. 1988); *Lewis* v. *Erickson*, 946 F.2d 1361(8th Cir. 1991); *Harris* v. *Vasquez*, 943 F.2d 930, 957 (9th Cir. 1990).

[57] 113 S.Ct. 853 (1993).

[58] 113 S.Ct. at 869.

[59] 113 S.Ct. at 882 (Blackmun, J., dissenting).

[60] 113 S.Ct. at 875 (White, J., concurring).

[61] 113 S.Ct. at 870 (O'Connor, J., concurring).

[62] 113 S.Ct. at 871 (O'Connor, J., concurring).

[63] *See, e.g.*, Stewart, *Supreme Court Report*, A.B.A. J., Apr. 1993, at 46–48 ("With the three dissenters and the three concurring justices agreeing with Herrera's Eighth Amendment theory, the court's action would seem to give habeas petitioners facing execution the opportunity to prove their innocence.").

[64] 113 S.Ct. at 874 (O'Connor, J., concurring) (internal quotations omitted).

tion's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all."[65]

In sum, the current capital sentencing scheme has an extraordinary array of safeguards to prevent the execution of an innocent person.

IV. SENATE BILL 221 IS UNTIMELY, UNNECESSARY, AND UNWISE

If I understand Senate Bill 221 correctly, it would dramatically change existing procedures for raising claims of innocence in capital cases. S. 221 would require a district court "to promptly stay" any pending execution whenever it received an "application" raising a claim that a prisoner under sentence of death is "probably innocent of the offense for which the death sentence was imposed."[66] The stay would remain in effect until the district court's decision was affirmed by the court of appeals.[67] The district court would grant "any appropriate writ or relief" if the applicant established "probable innocence" and that the evidence supporting the claim of innocence "could not have been discovered through the exercise of due diligence in time to be presented at trial."[68] S. 221 would supersede all other provisions of law.[69]

SENATE BILL 221 IS UNTIMELY, UNNECESSARY, AND UNWISE

Senate bill 221 is untimely because it now easier than in any time in history for a death row prisoner to raise a claim of factual innocence in Federal court. The prevailing law in this country had long been that a prisoner could not raise a claim of innocence on Federal habeas.[70] Given the Supreme Court's recent recognition in *Herrera* of the possibility of bringing such claims on Federal habeas, S. 221 seems ironically inopportune. The Federal courts will now begin to define the breadth of the "actual innocence" claim created by *Herrera*. The Federal courts have extensive experience in the litigation of habeas claims in general and capital claims in particular. The country's Federal judges should be given the opportunity to develop the procedures and dimensions of actual innocence claims. If Congress is not satisfied with the result, there will be time enough to act later.

Senate bill 221 is unnecessary. No doubt this Committee will hear testimony regarding cases in which an innocent person was allegedly convicted of a capital crime. S. 221, however, does nothing to change the risk of *convicting* an innocent person. Instead, it simply creates procedures designed to reduce the risk of *executing* an innocent person. As noted earlier,[71] the present procedures work extraordinarily well in insuring the only guilty murderers are executed. No innocent person has been executed in this country for at least the last fifty years. Nor would S. 221 accelerate existing procedures for reviewing claims of innocence, since the Federal court must suspend review of a claim of innocence where the applicant has other "available and effective remedies in either State or Federal court."[72] S. 221 is thus completely superfluous.

To this point, it might be asked what is the harm in having excess protection against executing the innocent. This brings me to my final and most important point:

Senate bill 221 is unwise. The bill focuses single-mindedly on the risk of executing an innocent person and is blind to the larger dangers posed from failing to carry out executions in a timely fashion. In the language I used earlier, S. 221 would dramatically increase the risk of "mistaken commutations" in its quest to avoid a peril that has never come to pass in recent memory. Like the commander at Pearl Harbor who grouped his planes to avoid the risk of sabotage while ignoring the larger risk of airborne attack, S. 221 focuses on the risk of executing an innocent person while remaining oblivious to damage it would do to our country's capital sentencing system. The relative risks in this area are obvious: while no innocent person has been executed in at least the last fifty years, each year more than twenty thousand of the nation's citizens will be the victims of murder.[73] The death penalty is the most

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[65] 113 S.Ct. at 874 (O'Connor, J., concurring).
[66] Senate bill 221, secs. (c)(1), (2).
[67] Senate bill 221, sec. (c)(2).
[68] Senate bill 221, secs. (c)(1), (c)(3)(A).
[69] Senate bill 221, sec. (c)(1) ("At any time, and *notwithstanding any other provision of law*, a district court shall * * *.").
[70] *See* Section III, *supra*.
[71] *See* Section I, *supra*.
[72] Senate bill 221, sec. (c)(4).
[73] *See* U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 16 (1991) (21,505 murder victims in 1990).

visible deterrent to such crimes. Small reductions in the deterrent value of capital punishment will clearly affect many innocent lives.

Senate bill 221 could substantially reduce the deterrent effect of capital punishment by making it extraordinarily difficult to execute even murderers about whom guilt is not in doubt. The automatic stay provisions of the bill are triggered whenever a prisoner files an application claiming innocence—even where the district court finds the application to be frivolous, repetitive, abusive, or utterly without merit.[74] To comply with the minimal requirements of the bill, the application need only be supported by "sworn affidavits" raising newly discovered evidence suggesting innocence. But such "evidence" is routine part of capital cases nowadays. As Justice O'Connor explained in rejecting the sworn affidavits submitted in *Herrera*, "Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism."[75]

To give an example of how S. 221 would affect capital cases, consider how Ted Bundy could have used its provisions. The day before his scheduled execution, Bundy could have simply asked the prisoner in the next cell to sign an affidavit claiming to be responsible for Bundy's murders (or even simply having overheard someone stating he was responsible for Bundy's murders). In exchange, Bundy could have signed an affidavit for the neighboring prisoner. Bundy would then use the affidavit to file an application claiming innocence in the appropriate Federal district court. Under S. 221, the district court would be required to "promptly stay the applicant's [*ie.,* Bundy's] execution pending consideration of the application." Even though the district court would summarily deny the application as frivolous and without credible support, the stay would remain in effect "until the court's action is affirmed on direct review," a process that typically would take at least a year. Once the court of appeals affirmed the district court's denial, the stay would be lifted; but Bundy would be free to create a new affidavit and file a new application, again staying his execution.

This example demonstrates the serious effect S. 221 would have on already-extended capital proceedings. Since S. 221 does not permit the summary dismissal of manufactured claims of innocence, a condemned prisoner could easily delay his execution several times, if not indefinitely. And there is no likelihood that the risk of being held in contempt of court or prosecuted for perjury could possibly deter condemned inmates from filing frivolous or fraudulent claims of innocence. Other provisions of law that limit abusive applications are apparently superseded by the terms of S. 221.[76] And S. 221 requires that a district judge find only slightly more than a 50/50 chance that a prisoner is innocent before releasing him. Justice O'Connor has warned against such a low standard, explaining that "[u]nless Federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstrations of actual innocence' that cannot be presented to State authorities, the Federal courts will be deluged with frivolous claims of actual innocence."[77]

As written, S. 221 would also specifically encourage delayed presentation of claims of innocence. The bill requires that a prisoner establish only that the alleged new evidence "could not have been discovered through the exercise of due diligence in time to be presented *at trial.*"[78] If a prisoner discovers evidence after trial, nothing in S. 221 requires him to present it in a timely manner. The affidavits filed in *Herrera* provide an example of how S. 221 would foster abuse. As Justice O'Connor explained, the affidavits were "suspect, produced as they were at the eleventh hour with no reasonable explanation for the nearly decade-long delay."[79] Yet under S. 221, Herrera's affidavits would have been timely filed simply because the evidence arose after trial. S. 221 would thus create incentives for sandbagging.

Repetitive challenges to a prisoner's capital sentence have now become the norm in capital cases,[80] and such claims often are filed shortly before a prisoner scheduled

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[74] Senate bill 221, sec. (c)(2). ("a district court shall promptly stay the applicant's execution pending consideration of the application and, upon an unfavorable disposition, until the court's action is affirmed on direct review.").

[75] *Herrera* v. *Collins,* 113 S.Ct. 853, 872 (O'Connor, J., concurring).

[76] S.B. 221, sec. (c)(1) ("At any time, and *notwithstanding any other provision of law,* a district court shall * * *.").

[77] *Herrera* v. *Collins,* 113 S.Ct. 853, 874 (1993) (O'Connor, J., concurring).

[78] 221, sec. (c)(3)(A) (emphasis added).

[79] 113 S. Ct. at 872 (O'Connor, J., concurring).

[80] *See, e.g., Darden* v. *Wainwright,* 473 U.S. 928, 929 (1985) (Burger, C.J., dissenting from grant of certiorari) ("In the 12 years since petitioner was convicted of murder and sentenced

Continued

to be executed.[81] Sometimes it even appears that last-minute filings are part of a deliberate tactic to delay executions.[82] The average time between imposition of a death sentence and execution is now almost eight years and more than two thousand prisoners are on death row awaiting execution.[83] S. 221 would clearly add substantial delay to a system that already moves at a snail's pace.

Beyond the problems of repetitive and delayed claims, S. 221 would create a new and serious intrusion of Federal power into areas of traditional State responsibility. As the Supreme Court recently explained, "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."[84] Senate bill 221 would allow a single Federal judge to overturn a death sentence and release a convicted murderer despite a unanimous jury verdict of guilty, affirmance of the verdict by the State courts, and denial of clemency by the governor of the State. If the final and dispositive determination of the issue of an individual's guilt of a State offense is to be made by a single Federal judge years or even decades later, there would seem to be little point in conducting the State trial in the first place. S. 221 would relegate the entirety of the State criminal process, representing a substantial investment of resources, to the level of a mere preliminary proceeding.

Of course, there is no guarantee that the Federal judge who second-guesses a jury's unanimous finding of guilt will make the correct decision. Indeed, there are substantial reasons to believe that such a belated guilt-innocence determination that is made on collateral review is, if anything, less likely to be accurate. As the Supreme Court has recognized, "the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication."[85] Moreover, such after-the-fact hearings will inevitably focus on "newly discovered" evidence that was not presented at trial. Such evidence is almost invariably unreliable. If a defendant is truly innocent, he will be fully aware of the circumstances surrounding his innocence and can present them at trial. Circumstances that are presented only later are questionable. As the Supreme Court has concluded, "It is * * * reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed."[86] S. 221 would also apparently open the door to unreliable hearsay and other dubious evidence. For example, if S. 221 passes it can be expected that death row prisoners will routinely concoct affidavits from other persons claiming responsibility (or having heard someone claiming responsibility) for the prisoners' crimes. The Federal Rules of Evidence are so skeptical of claims of criminal responsibility offered to exonerate a criminal defendant that they are inadmissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement."[87] But S. 221 would apparently require Federal judges to receive such evidence without suspicion. Finally, under S. 221 district courts will face the difficult task of weighing the "hot" newly-discovered evidence supposedly demonstrating innocence against the "cold" trial evidence proving guilt.

All of this suggests that S. 221 would produce cases in which a single Federal district judge would erroneously conclude that a guilty capital prisoner was "probably" innocent. The safeguards against this kind of mistake are minimal. Although the State could appeal the finding, the district judge's decision would be essentially final because it would be a "factual" finding subject to only to a very deferential "clearly erroneous" review on appeal.[88] The district court would then have to release the prisoner and order a new trial because that is the only "appropriate relief"[89] for an innocent person. It might well be impossible for the State to reassemble its

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to death, the issues now raised in the petition for certiorari have been considered by this court four times * * * and have been passed upon no fewer than 95 times by Federal and State Court judges.").

[81] *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2520 (1992) ("In the every day context of capital penalty proceedings, a Federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution * * *.").

[82] *See, e.g., Davis* v. *Wainwright*, 107 S.Ct. 17, 18 (1986) (Powell, J., concurring) ("counsel owe this court a duty to explain why no action was taken until the day before the execution date, making it difficult both for the courts below and for this court to make the carefully considered judgments so essential in capital cases.").

[83] U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1990, at 1 (1991).

[84] *Schad* v. *Arizona*, 111 S.Ct. 2491, 2500 (1991).

[85] *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991) (internal quotations and citations omitted).

[86] *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988).

[87] Federal Rule of Evidence 804(b)(3).

[88] *See Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985).

[89] Senate bill 221, sec. (c)(1).

case a decade after the first trial and the in-fact guilty prisoner would be set free to prey again on society.

The risk of such "mistaken commutations" is far more substantial than the risk that an innocent person will somehow slip through the enormous body of safeguards in the present system against an erroneous execution. The murderers on death row are, obviously enough, an extraordinarily dangerous population. In some States, it is indeed necessary for the jury to find a risk of future dangerousness before imposing a capital sentence.[90] Statistics confirm what common senses suggests about the threat to public safety posed by those on death row. More than ten percent of those under sentence of death have received two death sentences and more than four percent have received three or more.[91] Apart from their capital convictions, more than 69 percent of death row inmates had prior felony convictions.[92] Of the 2,356 death row prisoners in 1990, 417 were on parole at the time of their capital offense; 161 were on probation; 139 had charges pending, 64 were prison inmates, and 36 had escaped from prison.[93] The erroneous release of even one of these prisoners would pose a great risk to the law abiding public.

The mistaken release of guilty murderers under S. 221 should be of far greater concern to this Committee than the speculative and heretofore nonexistent risk of the mistaken execution of an innocent person.

CONCLUSION

An examination of S. 221 leaves the (hopefully mistaken) impression that it was drafted not solely to prevent the execution of an innocent person but to stop the execution of all prisoners under sentence of death, no matter how guilty. To be sure, reasonable people can disagree about the propriety and efficacy of the death penalty iii this country. But as a policy matter, that debate has been resolved in favor of capital punishment. The Congress, at least 36 States, the Supreme Court, and the overwhelming majority of the American public all support the constitutionality and desirability of the death penalty. If S. 221 is an effort to reopen the death penalty debate, one hopes that the subject will be approached in a more direct fashion.

* * * * *

Senator METZENBAUM. Thank you very much, Professor Cassell.

Our last witness today is Mr. Ward Campbell, deputy attorney general of the State of California. We are happy to have you with us, sir.

STATEMENT OF WARD A. CAMPBELL

Mr. CAMPBELL. Thank you, Mr. Chairman and Senator Hatch. I would also like to say hello to our home State Senator, Senator Feinstein. We are very proud she is on this committee, and the comments I heard this morning, I think, will only increase that pride.

Very quickly, as you know, Attorney General Lungren was hoping to be here for this session and could not make it. He has sent a rather long, intense study of S. 221 and the *Herrera* case to the committee and I assume that is part of the record for these hearings. Am I correct, Mr. Chairman?

Senator METZENBAUM. It isn't now, but it will be.

Mr. CAMPBELL. I would like to make it part of the record.

Senator METZENBAUM. It will be.

Mr. CAMPBELL. In addition, I also sent a shorter, briefer statement. I assume that is part of the record as well.

Senator METZENBAUM. Whose statement is that?

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[90] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981 & Supp. 1988).

[91] U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1990 at 10 (1991).

[92] *Id.* at 9.

[93] *Id.*

Mr. CAMPBELL. It is an eight-page statement by Ward A. Campbell, which I think was sent to the committee 2 days ago.

Senator METZENBAUM. That is you.

Mr. CAMPBELL. That is me. That is correct.

Senator METZENBAUM. That is fine, sir. We are happy to make it part of the record.

Mr. CAMPBELL. Finally, I am sorry to take up this other matter. Attorney General Lungren also asked to have inserted in the record a law review article he has written on the Robert Alton Harris case, which I have a copy of with me today, and would it be possible to submit that for the record later?

Senator METZENBAUM. We will include it in the record. I am not certain we will reprint it in its entirety.

Mr. CAMPBELL. Reference will be fine. Thank you very much, Your Honor—Mr. Chairman.

I want to say, as a practitioner in this area, the question of innocence for a defendant is something that we deal with all the time. As a prosecutor, I have almost the unique obligation and duty to disclose exculpatory evidence any time it comes into my possession, and I have done so.

We take very seriously the question of making sure that all the evidence pertaining to guilt or innocence as properly presented at the time of the trial, which is the main event to determine guilt or innocence in any case, and the appropriate forum for that determination, since the States have the power over their criminal justice systems and are the main forums for the adjudication of factual issues.

I am also well acquainted as a practitioner with the various mechanisms I have in the State of California that allow defendants to later present evidence that might indicate that they were innocent or wrongly convicted at the time of trial. They can do that by State habeas corpus. I have many matters in which that issue is raised in State habeas corpus. It is not required that they show that there was any type of governmental wrongdoing. They merely have to make a showing that false testimony was presented at their trial or false evidence.

I am also well familiar, as any Californian is, with the history of the clemency power in California, which has been exercised quite extensively by the governors of California, including Governor Ronald Reagan, who commuted at least one death sentence during the time he was governor.

I have also been a practitioner for a long time in this area of Federal habeas corpus reform and have monitored the various bills that have come before the Senate and the House. There is a lot of subtlety and nuance in the habeas corpus area, I think, around the concepts of exhaustion and procedural default.

I have to say that I find no subtlety or nuance in S. 221. It is basically a blanket invitation to any death row inmate to wait until the last minute to file a petition claiming some sort of evidence of innocence in order to get an automatic stay of that execution, and it is a stay that we would be helpless to prevent and I want to illustrate that by talking a little bit about a case that I know is well known to this committee that we dealt with last year, the execution

of Robert Alton Harris, who was executed after 14 years of litigation in State and Federal courts.

Mr. Harris, in fact, did file a habeas corpus petition toward the end of those proceedings in which he made a claim that was probably relevant to the guilt or innocence determination, a claim that his brother, who was his accomplice, had actually fired the first shot as part of the succession of shots in which two teenage boys were murdered by the Harris brothers.

The problem with this statement which came from Mr. Harris' brother rather belatedly—actually, Mr. Harris' brother claimed he never could remember who did it, but he now thought, well, maybe I did fire the shot first—is that it was totally inconsistent with Mr. Harris' seven prior confessions, the physical evidence, and even the brother's testimony at the time of trial.

The State and Federal courts were able to deal with that issue very expeditiously and it was not a petition—despite the fact that it related to innocence, they were able to deal with it very quickly and the execution was able to proceed after other litigation that went on in other unrelated matters. If Senate bill 221 had been in effect on April 20, 1992, the day before Mr. Harris was scheduled to be executed, he could have filed this petition in Federal court, with declarations. Under its terms, the Federal district court judge, even though he believed that there was not merit to the claim, would have been required to automatically stay the execution, to return it to State court and continue staying the execution if there were any State court remedies available, and then to also stay the execution during the time there was any appeal.

Appeals in the Ninth Circuit in death penalty cases can last for a matter of years, and based on the provisions of S. 221, the system would be paralyzed and we would be helpless to do anything about that, even though the entire claim was transparently bogus. Mr. Harris would not have to explain his delay in waiting until the very last minute to bring forth this claim after 14 years of litigation, and he would not have to explain why he had not raised it earlier in the previous habeas proceedings.

I think it should be pointed out that Mr. Harris—the danger with this type of claim or this type of statute is that it encourages defendants to wait until the last minute to bring claims and it discourages them from raising them early in the State court proceedings because, as a tactical matter, it is better to wait because you get the benefit of the automatic stay and time is always to the benefit of the defendant.

I would point out that Mr. Harris raised another claim in which he did have an evidentiary hearing concerning one of his confessions, and the witness in that claim—and I see my light is on—who testified at the hearing was just recently convicted of five counts of perjury in that evidentiary hearing. So you see the real possibility that we have with this type of statute of bogus and manufactured evidence of innocence being raised at the last minute solely as a ploy to stop the execution.

Thank you.

[Mr. Campbell submitted the following:]

PREPARED STATEMENT OF WARD A. CAMPBELL

Mr. Chairman, ranking minority member Hatch members of the committee, my name is Ward A. Campbell deputy attorney genes for the State of California, and it is my honor to be here today on behalf of Daniel E. Lungren, attorney general of the State of California.

As you know, Attorney General Lungren would have liked to have been here personally to testify, but was unable to attend in light of a prior scheduling conflict requiring his presence in California. Mr. chairman, I request permission that his written testimony be entered into the record along with a UCLA law review article he has co-authored concerning public policy lessons from the recent execution of Robert Alton Harris. I will discuss the *Harris* case more in a moment.

As for myself, today mares the beginning of my fourteenth year as a deputy attorney general for the State of California. I have been involved in death penalty litigation throughout my entire career with that office at both the State appellate and Federal review level. Currently, I am representing the State of California in six separate death penalty cases pending in State testimony of Ward A. Campbell and Federal courts, from 1987–1991, I was the capital case coordinator for our Sacramento office, with supervisory responsibility over all capital cases originating in that office. In 1990, I represented California in intervening in the Canadian Supreme Court in the extradition case relating to suspected mass murderer Charles Ng, an international case which raised many questions about our administration of the death penalty in this country. Since 1989, I have been a member of several committees of the U.S. Court of Appeals for the Ninth Circuit, which have examined rules and procedures for death penalty cases in that circuit. I was one of the legal representatives of the governor's office in connection with Robert Alton Harris' clemency request and am generally familiar with the extraordinary litigation involved in the Harris case.

Finally, and most significantly for this committee, I have spent the last three years working on issues relating to Federal habeas review, first, with California attorney general John Van De Kamp, and more recently, as one of the veteran prosecutors on the Federal habeas corpus reform task force established by Attorney General Lungren, as you know, Attorney General Lungren and his office are committed to providing this committee with complete analysis and information on all legislation pertaining to reform of our Federal habeas corpus system.

It is in that spirit that I address you here today. As Attorney General Lungren's testimony points out, there is no doubt that S. 221 would have a profound impact on Federal review testimony of Ward A. Campbell of our State's death penalty cases, effectively abolishing the administration of the death penalty.

Let me say at the outset, that as a prosecutor, the execution of an actually innocent person is intolerable. It is for this reason that our criminal justice system has established necessary protections for death penalty cases. As a prosecutor, I have both an ethical and constitutional obligation to disclose any exculpatory evidence in my possession *at any time,* even long after the trial. as a prosecutor, I have taken that obligation seriously and have repeatedly disclosed such information even when I did not believe that it would change the outcome of the trial.

I note that the *Herrera* decision itself—which apparently prompted S. 221—does not close the door irrevocably on the presentation of such claims in Federal court. However, T3Herrra points out that the proper forum for presenting evidence of innocence is at the State courts at the time of trial, not years later after conviction when witnesses are dead and the evidence of guilt is stale. After all, the trial in our criminal justice system should be the "main event." [1]

My own experience is that the Powell committee report on Federal habeas corpus in capital cases is right: "often factual guilt is not seriously in dispute."[2] Nevertheless, despite the unprecedented procedural protections offered death penalty defendants by our Federal and State laws, convicted defendants do come forward belatedly with so-called new evidence of innocence. in California, there are four avenues for presenting such evidence: (1) a motion for new trial; (2) a State petition for writ of habeas corpus; (3) a State petition for writ of coram vobis; or (4) a request for executive clemency.

Our office has cases in which prosecution witnesses have come forward and recanted their prior trial testimony. As justice Brennan himself recognized, such

[1] *Wainwright* v. *Sykes.* 433 U.S. 72, 90 (1977).

[2] *Judicial Conference of the United States, Ad Hoc Committee on Federal habeas corpus in capital cases.* at 17 (Aug. 23, 1989).

recantations are suspicious and should be viewed with distrust.[3] Based upon my experience, defendants do come forward long after their trial with new medical or psychiatric evidence or some other exculpatory evidence, which is ultimately rejected by the State courts after much litigation.

However, as a prosecutor I also have a duty to see that the criminal justice system is administered fairly and effectively. All prosecutors have an obligation to ensure that once guilt is fairly determined, that the constitutional punishment mandated by the people's democratically elected representatives or in the case of California, by the people themselves, is carried out promptly.

Sad to say, in my opinion, S. 221 will advance neither the claims of the truly innocent nor do anything to advance the goals of our criminal justice system to swiftly and effectively mete out justice. Senate bill 221 will frustrate the administration of a penalty that has been declared constitutional by our courts and is heartily endorsed by our fellow citizens. In fact, S. 221 will effectively abrogate the death penalty in this country.

Attorney General Lungren's written testimony sets out in detail tee many flaws in S. 221. as a practitioner, I will only emphasize one—what I refer to as the "automatic last minute stay of execution rule" in the bill.

To illustrate, I will use our recent experience with the Robert Alton Harris case as an example. If S. 221 had been in effect on April 21, 1992 when Mr. Harris was finally executed after almost 14 years of intense Federal and State litigation—it would have prevented Mr. Harris' execution *indefinitely.*

For your information Mr. Harris did file such a habeas corpus petition in his case claiming that his brother actually fired the first shot in the double murders of two teenage boys for which Mr. Harris had been convicted and sentenced to death. This was a transparently bogus ploy on the part of Mr. Harris since it was inconsistent with his own previous confessions and testimony as well as his brother's testimony and the physical evidence. The claim was tenuously connected to an argument that prosecutors had suppressed this evidence. Nevertheless, the State Supreme Court and the Federal district court did consider and reject the petition. Because of the belated nature of this claim, it could be dealt with quickly. When the ninth circuit stayed the sentence, we were able to convince the United States Supreme Court to vacate the stay. Of course, the execution still did not immediately proceed because of the many other belated last minute claims raised by Harris.

On a related note, Mr. Harris successfully delayed his execution when his attorneys filed a motion for remand with the ninth circuit in light of allegations that one of Harris's Statements had been deliberately elicited by a police agent in violation of his right to counsel. After remand and a full evidentiary hearing, the claim was denied. as a postscript, a Federal jury recently convicted one of Mr. Harris' witnesses for five counts of perjury during that evidentiary hearing.

If S. 221 had been in effect, the *Harris* case would have gone quite differently and we would have been helpless to do much about it. Mr. Harris's attorneys would have had every incentive to wait until 11:59 p.m. on April 20, 1992 to file this petition even if they had been in possession of the information for a long time. Despite this untimeliness, a Federal judge *automatically* would have been required to stay the execution until papers are filed, argument is heard, a decision is rendered and the appellate process had been completed. None of the well-established habeas rules against successive petitions and abuse of the writ would have applied to deny the petition and vacate the stays. The Federal courts, as well as the people of California, would have been held prisoner to another last minute manipulation, under the bill. The point is that S. 221 will effectively nullify the death penalty in this country. It not only allows, it awards, last minute applications for some sort of unspecified relief based on a claim of innocence. Since there are no procedural obstacles to this petition, defendants and their counsel can sit on this evidence and wait literally until the final moments to file their petitions, secure in the knowledge that the system will be paralyzed by the automatic stay. Thus S. 221 discourages capital defendants from bringing their claims of innocence forward early in State court and encourages the manufacture of unmeritorious claims of innocence. As an unintended byproduct, it will bury truly legitimate claims of innocence in an avalanche of merit less claims. True claims of actual innocence will be demeaned and possibly ignored because of understandable skepticism about these claims in general. Most importantly, legitimate claims of factual innocence can and should be heard under available avenues in State court.

Both the *Harris* and *Herrera* cases demonstrate the potential for defendants to manipulate the criminal justice system through belated claims. However, there is

[3] *Dobbert* v. *Wainwright,* 468 U.S. 1231 1233–34 (1984) (Brennan, J., dissenting from the denial of certiorari).

a significant distinction between the two cases. In *Harris,* the last minute claims asserted constitutional violations, whereas under the *Herrera* case, a belated claim of innocence was asserted in the absence of and constitutional violation. in fact the record shows that Mr. Herrera received a fair trial. s. 221 would permit similar claims of innocence, without any asserted constitutional violation, to be presented in Federal court.

Neither the *Harris* case nor the *Herrera* case, of course, establish that all claims of innocence are bogus or false. however, our State systems are not oblivious to that possibility. as the *Herrera* decision points out, all States, including California, provide avenues of relief for defendants who have evidence of true innocence. furthermore, all States have available the final recourse of executive clemency.

In closing, attorney general Lungren has articulated the test that all habeas reform legislation must be judged by its potential to curtail delay and avoid repetitious legislation. s. 221 fails that test completely since it actually adds delay and redundancy. furthermore, it offers no guarantees that legitimate evidence of innocence will actually be produced or considered.

PREPARED STATEMENT OF DANIEL E. LUNGREN

I. INTRODUCTION

Mr. Chairman, ranking minority member Hatch, Senator Feinstein, members of the committee, I want to express my appreciation for the opportunity to testify concerning the recent U.S. Supreme Court *Herrera* decision; S. 221, introduced by Senator Metzenbaum in response to this decision; and the determination of innocence under our criminal justice system.

It is my pleasure to return to the Congress, where I had the privilege of serving on the House Judiciary Committee for ten years and working with many of you. I also join many Californians who are pleased to see that the Senior Senator from California is a member of this distinguished committee.

Nearly two years ago I had the privilege of appearing before this committee to testify on the need for Federal habeas corpus Reform. Since that time I have had further opportunity to reflect on this issue and related questions raised by today's hearing, particularly in light of the 1992 execution of Robert Alton Harris—the first execution in California in twenty-five years.

My office handled all appeals and State and Federal habeas proceedings in the Harris case following the trial. As one Ninth Circuit Judge familiar with the case observed, the Robert Alton Harris case is "a textbook example" of the abuse of the habeas corpus process.[1] relying on current habeas corpus rules, Harris was able to file six Federal habeas petitions and raise numerous collateral issues over a thirteen year period. A chronology of the 141 significant events in the Harris proceedings shows that 69 percent occurred in Federal court, while 31 percent took place at the State level.[2]

I was present at San Quentin prison during the evening of April 20, and early hours of April 21, 1992 and observed the legal drama unfold as four last-minute stays were entered by members of the Ninth Circuit Court of Appeals and were ultimately vacated by the U.S. Supreme Court prior to the execution. Based upon that experience? I have concluded, among other things, that congress should adopt legislation to limit last-minute, one- judge stays on successive habeas petitions.[3]

One thing is clear: unless and until congress acts to reform the habeas corpus process, the eleventh hour constitutional showdowns and repetitive rounds of litigation experienced in the Harris case will likely recur. Until that time, one of the tragic consequences will be the further undermining of public confidence in our criminal justice system. Inexplicably, the surviving family and friends of victims will be needlessly forced to endure rounds of unnecessary litigation before closure and finality can be obtained. Finality in the enforcement of State law will also be undermined.

It has been nearly four years since the Powell Committee, chaired by former U.S. Supreme Court Justice Lewis F. Powell, Jr., concluded that the present system countenances unnecessary delay and repetitious litigation which is not essential to

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[1] *Harris* v. *Vasquez,* 949 F.2d 1497, 1546 (9th Cir. 1991) (Alarcon, J., dissenting from the granting of a motion for a stay of the mandate pending application for a writ of certiorari), *cert. denied,* 112 S.Ct. 1275 (1992).

[2] *See* D. Lungren & M. Krotoski, Public Policy Lessons From The Robert Al ton Harris Case, 40 UCLA L. Rev. 295, 315–26 (1992) (Appendix) [Hereinafter Public Policy Lessons From The Harris Case].

[3] *See* Public Policy Lessons From The Harris Case, *supra* note 2, at 301–08.

fairness.[4] I believe the success of any reform bill must be measured by how it addresses the central problems of unnecessary delay and repetitious litigation permitted under the status quo.

In other words, does the reform proposal reinforce the so-called "one bite at the apple" rule, or does it encourage more delay and more piecemeal challenges in Federal court? most would agree, absent exceptional circumstances, a State prisoner should present all of his claims in one petition, not two, three, or more petitions.

A majority of the State chief legal or law enforcement officers concluded last year that many of the proposals considered during the last congress were worse than current law. These views were expressed in three letters to Senate Judiciary Committee Chairman Biden, House Judiciary Committee Chairman Brooks, and President Bush. I will join my State colleagues in monitoring the progress of any habeas reform bill to see if it truly addresses the problems under current law and constitutes meaningful reform. Of course, my office stands prepared to work with you toward this important public policy objective.

* * * * *

At the outset, let me stress that everyone agrees with the fundamental proposition that an *actually innocent* person should *never* be executed and every criminal defendant should be assured of essential due process protections. But that is not the question before the committee today. Instead, the central question is whether current law furnishes an adequate means of presenting newly discovered evidence of actual innocence, and whether Federal legislation establishing a new vehicle to consider new assertions of probable innocence is warranted.

Similarly, we must be clear on what specific problem congress may be attempting to address through S. 221. [a copy of S. 221 is reproduced in the appendix.] Does anyone really suggest that Herrera is not guilty? As Justice O'connor observed in the *Herrera* v. *Collins* decision, "not even the dissent expresses a belief that petitioner might possibly be actually innocent. Nor could it".[5] As I will further discuss, *Herrera* is not the case to which congress should be precipitously rushing to establish new procedural obstacles to carry out the death penalty.

I also cannot overemphasize the fact that S. 221 should not be viewed in isolation from the Federal habeas corpus process—the process by which most State capital convictions and sentences are reviewed in Federal court. It is clear that S. 221 is written in light of the Habeas corpus statute.[6] Proposed section 1651(c)(1) indicates that the measure would operate "notwithstanding any other provision of law," an obvious reference to the Federal habeas corpus law. Moreover, proposed section 1651(c)(4) would allow applicants under the bill to exhaust available remedies, another apparent reference to the habeas corpus process.[7]

Unequivocally, S. 221 would have a drastic impact on State appeals and habeas corpus matters handled by my department. Let me be clear: S. 221, if enacted, would effectively abolish the administration of the death penalty in this country. The due process clause of the fourteenth amendment already guarantees every defendant the right to determination of guilt or innocence in a fair trial. Nevertheless, in response to mischaracterizations of the *Herrera* decision, and in the guise of defending "innocent" persons, S. 221 proposes to establish a new vehicle for relitigating the guilt of condemned prisoners in Federal court. Its enactment would engender judicial paralysis similar to the "on-again, off-again" justice which Californians and the nation witnessed in the Harris case last year.

Under the bill, an eleventh hour claim of "probable innocence" would ensure entry of an automatic stay of execution, regardless of how weak the assertions may be, how many rounds of litigation have already transpired, or whether a similar claim of newly discovered evidence had already been rejected in State court. A Federal judge—often years after the original trial—would then review the sworn affidavits or documented evidence and decide whether the petitioner is "probably innocent." if the judge concluded the petitioner was not "probably innocent," the petitioner could appeal this ruling, leading to a new round of litigation while the automatic stay remained in effect. If the trial judge or appellate panel decided the petitioner was "probably innocent," then some "appropriate writ or relief" would issue. It is not clear whether the State would be able to reprosecute the case, in the event it

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[4] *See* Judicial Conference of the United States, Report and Proposal of the Ad Hoc Committee on Federal habeas corpus in capital cases, 2–3 (Aug. 23, 1989) [Hereinafter Powell Committee Report].

[5] 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring).

[6] *See* 28 U.S.C. section 2254.

[7] *See* 28 U.S.C. sections 2254(b), (c); *see also Rose* v. *Lundy*, 455 U.S. 509 (1982).

decided to do so. Further, there is no limit to the number of "probably innocent" claims that a petitioner may file under the bill. All the petitioner needs to show is that the new evidence "could not have been discovered through the exercise of due diligence in time to be presented *at trial*." Consequently, single or multiple "probable innocence" claims could be filed five, ten or more years after the trial. Moreover, S. 221 encourages and rewards last-minute applications since there is no requirement that the newly discovered evidence be presented at the earliest opportunity that it may have become available.

For these reasons, and others which I will elaborate upon, I believe S. 221 fails my proposed test for reform; it would encourage more delay and litigation than permitted under the status quo. Most important of all, this Federal legislation is unnecessary because the States—including California—already have adequate avenues available for the presentation of newly discovered evidence of innocence.

Quite frankly, the Federal Government should focus more on repairing the current habeas corpus process rather than devising new methods by which Federal courts will be empowered to block the enforcement of presumptively final and correct State court capital judgments. Because Federal habeas review of State court decisions is a statutory—not a constitutional—right,[8] only Congress can repair this system. Until it does so, presumptively valid and final State court convictions will continue to be subjected to repetitive and piecemeal attack in the Federal courts. The message to victims and society is that more unnecessary delay and repetitious litigation will be expected during the foreseeable future.

II. THE HERRERA DECISION

What was and was *not* decided because the *Herrera* opinion has provoked an extensive and important debate on the death penalty and innocence, a discussion is in order of what this case did and did *not* decide.

Some have recently suggested that in *Herrera* the U.S. Supreme court held that it was not unconstitutional to execute an innocent person. In fact, a review of the opinion shows that this was neither the question presented by the case nor the actual holding of the court. Any doubt on this point should be resolved by Justice O'connor's concurring opinion: "Nowhere does the court state that the constitution permits the execution of an actually innocent person."[9]

As Justice O'Connor put it, "the issue [presented] is not whether a State can execute the innocent. It is * * * whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial."[10] citing well-settled case law of the Warren court, the court resolved that question against Mr. Herrera; in so ruling, the court noted how belated, how unpersuasive—indeed, how altogether suspect—was his new "evidence" of "innocence." whether, and under what circumstances, some other defendant's differing and less incredible claim might be heard, are questions the court reserved appropriately for the future.

Those criticizing the *Herrera* opinion overlook and fail to respond to several key aspects of the case.

First, as the majority opinion and concurring opinion of Justice O'Connor note, Herrera was not an innocent man but a man who had been found guilty beyond a reasonable doubt by twelve jurors following a trial. The Texas Court of Criminal Appeals affirmed the conviction and sentence. The initial presumption of innocence, afforded to all defendants, therefore no longer applies.

Importantly, Herrera received a fair trial. The fundamental question presented by the *Herrera* case, is how our criminal justice system should consider claims of innocence from individuals who do not challenge the constitutionality of any of the procedures in their State trial and who are no longer entitled to a presumption of innocence.

Second, the evidence of guilt in the *Herrera* case overwhelming. Anyone doubting the substantial evidence in the case should review Justice O'Connor's concurring opinion, which sets forth the well-established facts of the case, including a signed letter by Herrera which acknowledged his responsibility for the murders.[11] As Justice O'connor added, "not one judge [involved with the case] * * * has expressed

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[8] *See, e.g.,* Public Policy Lessons From The Harris Case, *supra* note 2, at 300 & n.15; Powell Committee Report, *supra* note 4, at 4 n.2.

[9] 113 S.Ct. at 874 (O'Connor, J., concurring).

[10] 113 S.Ct. at 870 (O'Connor, J., concurring).

[11] *See* Herrera, 113 S.Ct. at 871–73 (O'Connor, J., concurring); *see also id.* at 857 n.1.

doubt about [Herrera's] guilt," including the dissent in the *Herrera* decision.[12] Clearly, *Herrera* is not the type of case which should warrant reconsideration of the jury's guilt determination.

Third, the U.S. Supreme Court in *Herrera* did not say that newly discovered evidence of innocence could *never* be considered in our criminal justice system. The court merely held that the evidence, as presented, was inappropriate for habeas review in Federal court, which is the post-conviction process where State prisoners may challenge their custody by contending that their constitutional rights have been violated.[13] This conclusion comports with long-standing authority, including an opinion authored by Chief Justice Earl Warren thirty years ago, where it was noted: "the existence merely of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief on Federal habeas corpus." [14]

More fundamental to the question of innocence is that, independent of the Federal habeas corpus process, there are available avenues to present new claims of innocence in our criminal justice system. Most States have statutes which permit defendants to present new evidence within a limited time period following the trial.[15] However, some States, like Arizona, have no limit on the time period for the filing of a post-conviction motion based on newly discovered evidence, providing an even greater opportunity for new claims of innocence to be presented.[16] California, like many other States, requires that the motion for a new trial be made before entry of judgment. California also provides, moreover, that where a motion for a new trial is made on the grounds of newly discovered evidence, the court may grant such continuances as may be necessary to develop fully the new facts.[17]

In addition, California law permits a defendant at any time to raise a claim of newly discovered evidence in a State petition for writ of habeas corpus. The writ must be granted if the defendant can demonstrate that his new evidence "casts fundamental doubt on the accuracy and reliability of the proceedings." [18] In the context of a capital case, this requires that he show either evidence which "undermine[s] the entire prosecution case and point(s) unerringly to innocence or reduced culpability" at the guilt phase, or that "the evidence, if true, so clearly changes the balance of aggravation against mitigation [at the penalty phase] that its omission more likely than not altered the outcome." [19]

Additionally, an individual may seek relief by applying for executive clemency, which is not constrained by evidentiary rules and procedures. All capital States have executive clemency procedures.[20]

In conclusion, some future case may require resolution of whether the eighth amendment or due process clause of the fourteenth amendment requires that a Federal court on habeas review consider newly discovered evidence of innocence. Perhaps this may be the example noted by Justice Kennedy during the *Herrera* oral argument where a videotape is presented which conclusively shows the person is innocent.[21] While Herrera himself certainly did not make an adequate showing of innocence in light of the evidence submitted at trial and the newly discovered evidence presented, significantly, this important question remains open to further consideration in a more appropriate case.

I also agree with one of my predecessors, Earl Warren, a former California Attorney General who, as Chief Justice of the U.S. Supreme Court, concluded that newly discovered evidence pertaining to guilt or innocence is not cognizable on Federal habeas review, in the absence of a constitutional claim bearing on the petitioner's custody. That authority, which remains the law of the land after *Herrera,* best characterizes the proper role for Federal review of State court convictions and sentences. For these reasons, Federal legislation is not needed.

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[12] *Herrera,* 113 S.Ct. at 874 (O'Connor, J., concurring); *see also id.* at 871, 873 (O'Connor, J., concurring).

[13] *See* 28 U.S.C. section 2254.

[14] *Townsend* v. *Sain,* 372 U.S. 293, 317 (1963) (cited in *Herrera,* 113 S.Ct. at 860).

[15] *Herrera,* 113 S.Ct. at 865–66.

[16] *See* Arizona Rule of Criminal Procedure 32.1; *see also Herrera,* 113 S.Ct. at 866 n.11 (citing 9 States with no time limit for filing new trial motions).

[17] *See* Cal. Penal Code section 1181(8).

[18] *People* v. *Gonzalez,* 51 Cal.3d 1179, 1246 (1990), *cert. denied,* 112 S.Ct. 117 (1991).

[19] *Gonzalez,* 51 Cal.3d at 1246 (citation and internal quotation omitted).

[20] *Herrera,* 113 S.Ct. at 867 & n.14.

[21] *See Herrera* v. *Collins,* Oral Argument, No. 91–7328, at 37 (Oct. 7, 1992).

III. COMMENTS ON S. 221

Senate bill 221, introduced by Senator Metzenbaum, is an obvious attempt to circumvent the recent *Herrera* decision.[22] A host of constitutional and criminal justice problems are raised as this bill strikes at the proper role of the jury, and State and Federal courts in our criminal justice system.

UNDERLYING DISTRUST OF STATE CRIMINAL JUSTICE SYSTEM

Initially, I would like to comment on the troubling underlying premises of S. 221.

The unavoidable assumption of this bill is that State criminal justice systems are incapable of considering a credible showing of post-conviction evidence of innocence. If the new demonstrable evidence is so clear, how can it be assumed that the State courts or executive officials would fail to render justice? if the hypothetical videotape of Justice Kennedy was offered as conclusive evidence, for example, I have complete confidence that any State court or governor would grant appropriate relief. Indeed, in such a case, I, acting in my capacity as attorney general, would take direct action on the innocent defendant's behalf if that course were necessary to ensure that no execution would go forward. I should add that I have every confidence my counterparts around the country would do likewise. There would be nothing heroic about our reacting this way. Rather, such would be our plain and simple duty as our States' chief law enforcement officers. I wholly reject the implied indictment of our State criminal justice systems raised by S. 221.

It seems to me the burden of proof is on those who would question the integrity and ability of State officials to consider these issues of innocence. That bare allegation has not been substantiated. Thus, S. 221 appears to be a solution in search of a problem that does not exist.[23]

A related premise of the bill is that *only* the Federal Judiciary is capable of making fair assessments on innocence and furnishing appropriate relief. Quite frankly, Federal judges are as equally human and fallible as other government officials. in fact, since many Federal judges would be asked to render a "probably innocent" finding years after the original trial, the accuracy of such determinations made later in time may be legitimately questioned. To state the issue another way, can we fairly suggest that Justice O'Connor became a "better" judge when she left the Arizona Court of Appeals for the U.S. Supreme Court, or that California Chief Justice Malcolm Lucas became "less qualified" when he took off his Federal robes to leave the Federal bench?

Most importantly, both premises are entirely unfounded because States, like California, have adequate means for considering post-conviction claims of newly discovered evidence. Senate bill 221 is not only unnecessary, but also intrudes on the ability of States to enforce State law and consider claims of newly discovered evidence.

CONSTITUTIONAL ISSUES

Let me turn to some of the central constitutional issues presented by S. 221.

The U.S. Supreme Court has made clear that "Federal courts hold no supervisory authority over State judicial proceedings and may intervene only to correct wrongs of *Constitutional Dimension.*"[24] Senate bill 221 applies to those applications where no constitutional claims are presented, in contrast to the Federal habeas corpus statute which expressly permits Federal review "only on the ground that [the petitioner] is in custody in violation of the constitution or laws or treaties of the United States."[25] Senate bill 221 would require a U.S. district court to "issue *any appropriate writ* or *relief*" for any person who has received a death sentence "who establishes that he is probably innocent of the offense for which the death sentence was imposed." serious constitutional questions are therefore raised over what "appropriate writ or relief" the Federal court may fashion under S. 221 without interfering

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[22] *See* 139 Cong. Rec. 5775–76 (daily ed. Jan. 27, 1993) (remarks of Sen. Metzenbaum upon introduction of S. 221).

[23] Some have purported to prove that innocent people have been executed, Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 Stan. L. Rev. 21 (1987), but the validity of those assertions and the scholarship upon which they are based have been questioned. *See* S. Markman & P. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study,* 41 Stan. L. Rev. 121 (1988). The majority in *Herrera* noted this conflict. *See Herrera,* 113 S.Ct. at 868 n.15.

[24] *Smith* v. *Phillips,* 455 U.S. 209, 221 (1982) (emphasis added); *see also Chandler* v. *Florida,* 449 U.S. 560, 570 (1981); *Cupp* v. *Naughten,* 414 U.S. 14, 146 (1973).

[25] 28 U.S.C. section 2254(a).

with State court proceedings. Under settled authority, the Federal court could not vacate a State conviction unless there was a constitutional violation.

At the same time, S. 221 directly injects questions of evidentiary sufficiency into Federal proceedings, and thus creates needless confusion concerning whether any relief conferred therein might foreclose the States, from conducting retrials. This is not a remote possibility, since every Supreme Court Justice. In *Herrera* agreed that any claim of newly discovered evidence should be considered in light of the evidence presented at trial.[26] As Justice Blackmun put it in his dissent, "the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be."[27]

Nothing about the Federal Judiciary makes it peculiarly well-suited to resolve evidentiary issues initially raised in State court, and any remedy that purports to bar retrial may well be beyond the authority of the Federal court. Moreover, although I am confident that no Federal court could properly bar retrial merely by sustaining a "probable innocence" claim on the basis of evidence which was, by definition, not a part of the State trial record, I am equally confident that capital inmates will invariably argue otherwise—a prospect that only promises more protracted litigation and, thus, more delay. In contrast, there is typically no double jeopardy question raised by Federal court review of habeas petitions, since Federal habeas review involves a question of constitutional or Federal law, not factual determinations of innocence.

RETROACTIVE APPLICATION

Apart from these constitutional questions, perhaps the most immediate and dramatic impact of S. 221 is that it would apply retroactively, as any Federal or State prisoner under sentence of death could submit a "probably innocent" application "at any time, and notwithstanding any other provision of law." Since there would be nothing to lose and everything to gain, such an application would be expected to be filed by virtually every Federal or State capital prisoner in the country. In California there are currently 354 individuals currently under sentence of death. Senate bill 221 would enable most, if not all, of these prisoners to file new probably innocent" claims. Indeed, the bill all but assures such claims.

Is it really the intent of congress to permit relitigation of guilt in virtually every capital case? If the Powell Committee is correct that "often factual guilt is not seriously in dispute" in capital cases,[28] why would congress want to make it so easy for the door to be opened to the Federal Judiciary to consider such claims, particularly where the States, including California, already have adequate means to consider these claims of new evidence?

Moreover, applications under S. 221 would be permitted even where similar applications of newly discovered evidence have already been rejected by State courts, and even where prisoners do not dispute that they received a fair trial. Also, there is no limit to the number of "probably innocent" claims that can be brought. All that is required is that the post-trial evidence "could not have been discovered through the exercise of due diligence in time to be presented at trial."

Consequently, S. 221, if enacted, would likely encourage current death row prisoners to endlessly delay execution of their presumptively final judgments with little more than a handful of declarations, despite the "fair degree of skepticism" which attaches to such belated showings.[29]

IMPACT ON JURY SYSTEM

Senate bill 221 would have a disruptive impact on our jury system, the centerpiece of our criminal justice process. If S. 221 were enacted, any unanimous State jury verdict would become tentative, subject to the filing of a subsequent petition of newly discovered evidence and ruling of a Federal judge. The bill would permit a single Federal judge to second guess and cast doubt on the original jury verdict, even where there is no dispute chat the defendant received a fair trial. This second-guessing would be virtually assured in every case, as a convicted individual under sentence of death would have nothing to lose by pressing a claim of new evidence.

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[26] *See Herrera,* 113 S.Ct. at 870 (majority opinion); *id.* at 872- 73 (O'Connor, J., concurring); *id.* at 875 (Scalia, J., concurring and "join[ing) the entirety of the court's opinion"); *id.* at 875 (White, J., concurring in the judgment); *id.* at 883 (Blackmun, J., dissenting).

[27] *Herrera,* 113 S.Ct. at 883 (Blackmun, J., dissenting).

[28] *Powell Committee Report, supra* note 4, at 17.

[29] *Herrera,* 113 S.Ct. at 872 (O'Connor, J., concurring).

Such a showing might not be difficult to make under the bill. A jury must determine whether an accused is guilty beyond a reasonable doubt[30]—a substantial and necessary threshold. Under the bill, the Federal judge, following a conviction which has already been affirmed on appeal, need only determine whether "sworn affidavits or documentary evidence * * * if proven, would establish that the applicant is probably innocent."

As I have already noted,[31] the Federal judge would in effect be asked to sit in the room of the original jury (without actually participating in the deliberations) and consider—post-conviction—the new evidence in light of what was originally presented at trial. As the majority characterized it, the Federal court would be called upon "to weigh the probative value of 'hot' and 'cold' evidence on petitioner's guilt or innocence."[32]

This consideration of factual issues would constitute an unprecedented role for a Federal judge in reviewing a State court conviction. In contrast, it is well-settled that Federal habeas review was not established to provide a chance to relitigate State trials, including whether the prisoner was factually guilty. The novel path charted by S. 221 should not be entered without careful consideration to the effect it would have on the jury system. Federal courts should not invade the factual domain of guilt or innocence, which is best left to juries in State trials.

DISRESPECT TO THE STATES AND THE ENFORCEMENT OF STATE LAWS

The State trial really should be the "main event" in our criminal justice system.[33] Under our Federal System, State courts have the primary role for enforcing criminal laws. Absent a constitutional deprivation, the Federal court should not interfere with State proceedings. Since the enforcement of State laws is in issue, the States have an independent sovereign interest and ability to determine whether new protections are necessary to allow the presentation of newly discovered claims of innocence. Most importantly, many States, including California, already have such mechanisms in place.

At least with respect to habeas petitions, the congress has already recognized that a statutory presumption of correctness applies to State court findings of fact.[34] Under S. 221, no deference is due the factual determination of guilt.

INTEREST IN FINALITY

As the U.S. Supreme Court has stated, "neither innocence nor just punishment can be vindicated until the final judgment is known."[35] Under current law, many have already lost confidence in the ability of our criminal justice system to attain finality.

Senate bill 221 would further frustrate the State's interest in enforcing its criminal laws by adding a new avenue for Federal court review. It does so in several significant ways. First, a district court would be required to enter an automatic stay of execution "on receipt" of a "probably innocent" application. The stay would remain in effect until the conclusion of any appellate review of the district court's determination. Second, a "probably innocent" application could be brought "at any time." Third, there is no limit to the number of applications which may be filed under S. 221. for these reasons, S. 221 would effectively eliminate any real hope for obtaining finality in State or Federal capital cases.

LACK OF PROTECTION AGAINST MANUFACTURED EVIDENCE

While S. 221 would certainly encourage "probably innocent"applications in virtually every capital case, it contains no protections against perjured evidence or uncorroborated, recanted testimony, or manufactured claims of innocence. This is more than a theoretical concern.

In the Harris case, we saw first hand how questionable allegations of newly discovered evidence can lead to further rounds of unnecessary litigation. while the ninth circuit was considering Harris's petition for rehearing in his third Federal habeas proceeding, he filed a motion to remand to the Federal trial court for an evi-

[30] *See, e.g., In re Winship,* 397 U.S. 358 (1970); *see also Jackson* v. *Virginia,* 443 U.S. 307, 315 (1979).

[31] *See* notes 26–27, *supra,* and accompanying text.

[32] *Herrera,* 113 S.Ct. at 862.

[33] *Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977); *see also Herrera,* 113 S.Ct. at 869 (noting "in State criminal proceedings the trial is the *paramount event* for determining the guilt or innocence of the defendant") (emphasis added).

[34] *See* 28 U.S.C. section 2254(d); *see also Sumner* v. *Mata,* 449 U.S. 539, 550 (1981).

[35] *McCleskey* v. *Zant,* 499 U.S. ——, 111 S.Ct. 1454, 113 L.Ed.2d 517,542 (1991).

dentiary hearing based upon a newly filed declaration by inmate Joey Abshire who contended that he was a State agent at the time he talked with Harris in his prison cell. the Ninth Circuit granted the motion for an evidentiary hearing.[36] After an evidentiary hearing, the claim was ultimately rejected by the district judge, who found Abshire's testimony "unbelievable and untruthful and not entitled to any weight" and "was flatly contradicted by numerous witnesses."[37] The Ninth Circuit affirmed.[38] Just last month, a Federal jury returned guilty verdicts on five counts of perjury for Mr. Abshire concerning his statements during the evidentiary hearing. Apparently it took the jury all of twenty minutes to return the guilty verdicts on all counts.

The Abshire declaration and subsequent evidentiary hearingwere nothing more than fishing expeditions which caused unnecessary litigation and further delay in the Harris case. Moreover, the Abshire story is not an isolated exception. There are other similar examples in other death penalty cases around the country.

As Justice O'Connor observed in *Herrera:* "affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skeptism."[39] Senate bill 221, if enacted, would encourage similar last-minute declarations leading to new evidentiary hearings.

THRESHOLD SHOWING: THE CRITICAL ISSUE

If post-conviction claims of innocence are to be considered in Federal court in the future, as suggested by S. 221, the critical question is what threshold showing should be required before newly discovered evidence of innocence is considered in post-conviction review. In other words, when should prisoners such as Herrera—who received a fair trial—be permitted to reopen their case and challenge their conviction and sentence? Herrera submitted affidavits asserting that his now dead brother committed the charged murder.

The *Herrera* opinion touched upon this issue without resolving it. The court assumed, *Arguendo,* that a claim of innocence, unaccompanied by any alleged constitutional violations in the State proceedings, could be considered on Federal habeas review. Without deciding what threshold would be required for such claims, the court determined that "[t]he showing made by petitioner in this case falls *far short* of any such threshold."[40]

I submit that, at the very least, it would be *premature* for the congress to resolve or consider this issue. Specifically, the Supreme Court expressly left open the possibility of confronting this issue by assuming Arguendo that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant Federal habeas relief if there were no State avenue open to process such a claim."[41] Since Federal courts, under Article III, can only decide those cases and controversies actually submitted before them, a future case may present "a truly persuasive demonstration of actual innocence," requiring reconciliation of this issue on constitutional grounds.

As to the specific contours of the threshold, the majority opinion correctly recognized for several reasons that any such threshold "would necessarily be *extraordinarily high.*"[42] This includes, of course, consideration of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States."[43]

In addition, the State should obtain the full benefit of the presumptively valid conviction and sentence, since it already met its burden to establish guilt beyond a reasonable doubt and there is no contention that the trial was unfair. The U.S. Supreme Court has already noted that upon the conclusion of the direct appeal process, a presumption of validity and finality attaches to the State court conviction.[44] The same presumption should apply in any proceedings brought under S. 221. after all, the initial presumption of innocence no longer applies.

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[36] *See Harris,* 949 F.2d at 1510.
[37] *See Harris,* 949 F.2d at 1526.
[38] *See Harris,* 949 F.2d at 1526–28.
[39] *Herrera,* 113 S.Ct. at 872.
[40] *Herrera,* 113 S.Ct. at 869 (emphasis added).
[41] *Herrera,* 113 S.Ct. at 869.
[42] *Herrera,* 113 S.Ct. at 869 (emphasis added).
[43] *Herrera,* 113 S.Ct. at 869.
[44] *See, e.g., Barefoot* v. *Estelle,* 463 U.S. 880, 887 (1983).

Because S. 221 appears to adopt the threshold proposed by justice blackmun in his dissent,[45] it is apparent that S. 221 rejects the notion that the threshold should "necessarily be extraordinarily high." Consequently, S. 221 would expectedly contribute to a judicial paralysis in death penalty cases.

There are a few additional concerns that I wish to add to the problems which I have already identified regarding the low threshold in S. 221.

First, it is not clear what constitutes "probable innocence" under the bill. must the showing under S. 221 tend to establish that the applicant is "actually innocent" of the offense (i.e., did not commit the killing)? or may an applicant, who actually committed the murder, merely cast probable doubt on whether an element of the offense (e.g., the requisite mental state) was established? if mental state questions may be raised, then the bill may promote hearings involving a "battle of experts."

Second, the question on the proper threshold showing of the petitioner must take into account the position of the State in defending its original, constitutionally valid conviction. Because the presumption of innocence no longer attaches to the petitioner, and a presumption of a valid and constitutional conviction and sentence should be preserved, I submit that any threshold showing should be considered in light of the additional burden which would be imposed on the State under the bill.

Consider that the State has already had to marshal considerable resources to obtain the original conviction and sentence and defend them on State appeal and on direct review before the U.S. Supreme Court. Further, the State has likely had to defend the original conviction and sentence through at least one round of collateral attack in both the State and the Federal courts. Some cases, such as the Harris case, may require several rounds and many years of collateral litigation. After all these resources have been spent, S. 221 would tell the States that they must summon their resources to defend yet again the original conviction, often years after the original trial, considered the "main event" in our criminal justice system. Following all of this litigation, a State may be confronted with the question of whether to reprosecute if a Federal court makes a finding of "probable innocence" under the bill.

Moreover, the outcome and accuracy of any subsequent State trial may hinge on the reliability and availability of any remaining evidence, perhaps years after the original trial. *Any delay* places the State at a greater and greater disadvantage as stale or unavailable evidence calls into question the ability of any factfinder to resolve questions of innocence accurately and reliably. Retrial may be impracticable as witnesses may be dead, memories may have faded, and original prosecutors and judges may be in another world or another position. As the *Herrera* court noted, "it is far from clear that a second trial 10 years after the first trial would produce a more reliable result."[46] For these reasons, S. 221 not only imposes significant new burdens on the State but also places the State at a tremendous disadvantage by encouraging and rewarding delay.

IV. ROLE OF INNOCENCE ON HABEAS CORPUS MATTERS

The question must be asked, "in light of *Herrera*, what role should innocence play in the Federal court review of State court convictions in capital cases?"

I have previously written elsewhere that State prisoners should be able to raise any cognizable claim during the first round of Federal habeas review and that any subsequent habeas petition should be considered where a colorable showing of innocence is established in addition to a claim involving constitutional rights.[47] This conclusion is also consistent with recent recommendations of the Powell committee concerning proper limitations on successive habeas petitions.[48]

This would ensure that any capital prisoner who has new evidence of innocence would be able to present a Federal court with this issue along with a contention of a Federal right violation. Where no constitutional claim is present, the prisoner could utilize State court procedures for new claims of innocence, including the clemency process. States such as California already permit claims of newly discovered evidence to be presented in State court or during clemency proceedings. I believe these steps provide necessary safeguards for the death penalty.

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[45] *See Herrera,* 113 S.Ct. at 882–83 (Blackmun, dissenting).

[46] *Herrera,* 113 S.Ct. at 863.

[47] *See Public Policy Lessons From The Harris Case, supra* note 2, at 311–14.

[48] *See Powell Committee Report, supra* note 4, at 14–5 (proposed section 2257(c)(3)), 17–18; *see also* H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 160 (1970).

V. CONCLUSION

We can all agree that an actually innocent person should never be executed. yet in the name of protecting the innocent, S. 221 would, instead, effectively preclude the administration of the death penalty by the State or Federal Governments.

In response to the question I raised in the beginning of my testimony, I urge. The committee to conclude that Federal legislation along the lines of S. 221 is not warranted in light of the *Herrera* decision and would pose many unnecessary constitutional and criminal justice problems. More importantly, not only are sufficient mechanisms in place for presenting claims of new innocence in States like California, but the States are in the best position to revise their procedures to consider post-conviction claims of innocence.

STATE OF CALIFORNIA,
DEPARTMENT OF JUSTICE,
Sacramento, CA, April 3, 1993.

Hon. HOWARD M. METZENBAUM,
Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: Once again, let me express my appreciation for the honor of testifying before the Judiciary Committee concerning S. 221. Both you and your staff were very gracious and helpful.

As you recall, I asked that Attorney General Daniel Lungren's article, *Public Policy Lessons from the Robert Alton Harris Case,* be placed in the record of the hearing. In doing so, I neglected to leave a copy of the article with your staff. A copy of the article is enclosed. I apologize for any inconvenience.

Please do not hesitate to contact our office for any further assistance on these important issues.

Sincerely,

DANIEL E. LUNGREN,
Attorney General.
WARD A. CAMPBELL,
Deputy Attorney General.

Enclosure.

FORUM

PUBLIC POLICY LESSONS FROM THE ROBERT ALTON HARRIS CASE

Daniel E. Lungren*
and
Mark L. Krotoski**

"Oh, I get it. It's like a chess game." Those were the words uttered to me on the evening of April 20, 1992, by the mother of one of the two boys brutally murdered by Robert Alton Harris nearly fourteen years before. I had just informed her that a federal appellate judge had issued yet another stay in the matter—only minutes before the execution was to begin. Although I assured her that my office was fully prepared to meet this and any other legal challenges we might face, her words felt like a despairing blast of winter chill.

I finally responded: "Well, it should be about justice, it shouldn't be a game at all."

-Attorney General Daniel E. Lungren, recounting events during the evening preceding the execution of Robert Alton Harris.

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* Attorney General of the State of California; University of Notre Dame, B.A., 1968; Georgetown University Law Center, J.D., 1971; member, U.S. House of Representatives Committee on the Judiciary, 1978-1988.

** Special Assistant Attorney General, California Department of Justice; University of California, Los Angeles, B.A., 1980; Georgetown University Law Center, J.D., 1986.

The California Attorney General's Office handles all appeals and state and federal habeas proceedings and has been responsible for all judicial proceedings in the Harris case following the trial.

We wish to express our appreciation for the suggestions and review of this Article by Deputy Attorney General Dane R. Gillette, statewide capital case coordinator for the California Department of Justice, and Deputy Attorney General Louis R. Hanoian, who was the lead attorney on the Harris case. Both attorneys were integral members of the team of state attorneys handling the case during the final weeks leading to the execution.

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Certainly, our criminal justice system rests fundamentally on a pursuit of justice which commands the respect of the people it serves. When its machinations become indefensibly inexplicable to those people, the credibility which is prerequisite to that respect is deeply, if not fatally, undermined.

Perhaps more than any other case, the recent execution of Robert Alton Harris, the first in California in twenty-five years, raises some of the most basic issues concerning the administration of our criminal justice system. These include: (1) the need to reform the federal habeas corpus process; (2) the ability of individual judges who have not directly heard the case to issue last-minute stays; (3) the role of deterrence in the death penalty; and (4) the role of innocence in the habeas corpus process. This Article addresses each of these issues.

I. ABUSE OF THE FEDERAL HABEAS CORPUS PROCESS: THE NEED FOR CONGRESSIONAL REFORM

At the outset, two incontestable premises must be noted. First, the habeas corpus process is an important statutory protection in our criminal justice system.[1] Second, this process is greatly abused under current law, making a mockery of our criminal justice system.

In August, 1989, a special committee of respected federal judges, chaired by former U.S. Supreme Court Justice Lewis F. Powell, Jr., formally concluded that the current habeas corpus process promotes unnecessary delay and repetitious litigation and that this delay and interminable litigation is not essential to providing

1. Following the primary state court proceedings, a convicted state prisoner may pursue two avenues of federal court review of the state court conviction and sentence, under the direct review and collateral review processes. First, the direct review process includes the state trial and appeal and a petition to the United States Supreme Court for certiorari review of the conviction and sentence. The conviction becomes final and direct review ends once the state appeal is exhausted and the time for a certiorari petition has passed or the petition for certiorari has been denied. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); *see also* 28 U.S.C. § 1257 (1988). Upon the conclusion of direct review, "a presumption of finality and legality attaches to the conviction and sentence." Barefoot v. Estelle, 463 U.S. 880, 887 (1983); *see also* Strickland v. Washington, 466 U.S. 668, 697 (1984) (noting "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment").

Second, normally, after exhausting state remedies, a state prisoner may seek federal collateral review of his conviction and sentence by filing a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254(a) (1988), "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The federal review of state prisoner convictions and sentences is a statutory, not constitutional, right. *See infra* note 15.

fairness to capital defendants.[2] In November, 1991, Judge Arthur L. Alarcon of the U.S. Court of Appeals for the Ninth Circuit wrote that the Robert Alton Harris case is "a textbook example" of the abuse of the habeas corpus process.[3]

One recurring issue with respect to federal habeas reform is the role that innocence should play in federal habeas review. Significantly, innocence was not in issue in the Harris case.[4] In fact, Harris confessed at least seven times to murdering the two teenage boys.[5] Nonetheless, the chronology of the Harris case reveals that

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2. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT AND PROPOSAL OF THE AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, at 2–3 (Aug. 23, 1989), *reprinted in* HABEAS CORPUS REFORM, HEARINGS BEFORE THE COMM. ON THE JUDICIARY UNITED STATES SENATE, 101st Cong., 1st & 2nd Sess. 7-30, on S. 88, S. 1757, & S. 1760, at 8–13 (1990) [hereinafter POWELL COMMITTEE REPORT].

3. Harris v. Vasquez, 949 F.2d 1497, 1546 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1275 (1992) (Alarcon, J., dissenting from the granting of a motion for a stay of the mandate pending application for a writ of certiorari).

4. Robert Alton Harris admitted killing three people. In 1975, Harris pled guilty to voluntary manslaughter. Over a several hour period, Harris savagely beat his next-door neighbor to death in a manner which the California Supreme Court described as a "sadistic attack" where Harris "cut off [the victim's] hair and threw matches at him after squirting him with lighter fluid." People v. Harris, 623 P.2d 240, 245, *cert. denied*, 454 U.S. 882 (1981); *see also* Harris v. Vasquez, 913 F.2d 606, 619 n.12 (9th Cir. 1990) (discussing 1975 manslaughter conviction), *superseded by* 943 F.2d 930 (9th Cir.), *superseded by* 949 F.2d 1497 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1275 (1992). According to the Court, Harris "continued to lead a life of violence while in jail." *People v. Harris*, 623 P.2d at 245. Some have noted that in prison Harris constituted a threat to other prisoners.

On July 5, 1978, Harris had been out on parole from his earlier homicide conviction for exactly six months. As part of a plan to steal an automobile to use in an armed bank robbery, Harris and his brother Daniel kidnaped two high school sophomore students. The two best friends, John Mayeski, 15, and Michael Baker, 16, were eating hamburgers in a parking lot in a green Ford LTD and had planned to spend the day fishing after eating lunch. After forcing the boys to drive to an isolated area where Harris and his brother had previously been target practicing in preparation for the robbery, Harris told the boys they would not be harmed. Then to avoid being identified, Harris brutally shot both teenagers several times. He chased one of the boys down, shooting him four times as the teenager crouched and screamed. After leaving the murder scene, Harris ate the half-finished hamburgers and made fun of his brother for not having the stomach to join him. About an hour and a half later, Harris was arrested for the bank robbery by a SWAT team which included patrol officer Steve Baker, who did not know at the time that Harris had earlier killed his son. In an attempt to demonstrate remorse as a mitigating factor in the penalty phase of the trial, Harris confessed to the jury that he had lied during the guilt phase of the trial, that he had, indeed, killed the boys. *See generally Harris*, 623 P.2d at 244–45; Harris v. Vasquez, 949 F.2d 1497, 1501–02 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1275 (1992).

5. The trial transcript (RT) reveals at least seven confessions by Harris, including his confessions to Detective Dreis (RT 3099–3102), Dr. Griswold (RT 4646–4647), Officer Newman (RT 2798–2806), Investigator Boulden (RT 3197–3212), his sister Glenda (RT 3523–3524), Sergeant Charles Shramek of the San Diego County Marshal's Office, jail inmate Joey Abshire (RT 3166–3169, 3176–3182), jail inmate Keith

of the 141 significant events which transpired in our criminal justice system, 44 (or 31%) took place at the state level and 97 (or 69%) occurred in federal court.[6]

In light of the legal maneuverings in this case—spanning more than thirteen years after the jury verdict—it is no wonder that public confidence in our criminal justice system has been undermined. Harris was sentenced to death on March 6, 1979. On February 11, 1981, the California Supreme Court affirmed the conviction. Harris's death sentence became final and the *direct* review process concluded on October 5, 1981, when the U.S. Supreme Court declined to hear the case.[7]

Numerous *collateral* challenges were pursued by Harris. As the chronology of the case shows,[8] Harris's attorneys filed ten state habeas corpus petitions and six federal habeas corpus petitions. During the Harris case, the U.S. Supreme Court considered five certiorari petitions, and on one occasion granted plenary review. The California Supreme Court reviewed six state habeas petitions. Five separate execution dates were set in state court, the last one a full thirteen years after Harris's death sentence was originally rendered. California Governor Pete Wilson also provided clemency review.

Under the federal habeas corpus process, multiple and sometimes divergent interests must be balanced. The victims of crime and society at large have an interest in resolving and redressing factual determinations of guilt. A convicted defendant has an interest in ensuring that his confinement is not a product of any constitutional violations. The states have an interest in enforcing substantive criminal laws and in protecting the integrity of their judicial processes. The federal government has an interest in the uniform application of federal rights.

Gustafson (RT 4126–4128, 4171–4175), and his in-court confession during the penalty phase of trial at which he admitted lying to the jury in the guilt phase of trial (RT 4386–4387, 4406). Sergeant Shramek recounted Harris's statement, "I couldn't have no punks running around that could do that [identify him], so I wasted them" and established premeditation and deliberation beyond any doubt. (RT 3180–3181) In addition, the testimony of his brother Daniel (RT 2514–2591, 2598–2649), the physical evidence (RT 2751–2753, 2765–2766, 2899, 2910–2911, 2918–2924, 2933–2939, 3125–3132, 3645–3659, 3674–3704), and his admissions to Officer Pearce and Technician Stewart (who was taking swabs of Harris's hands for gunpowder residue) that he was out shooting on the day of the murders (RT 2952–2954, 3058–3061), made it plain Harris could not possibly make a colorable showing of innocence. *See also Harris v. Vasquez*, 913 F.2d at 620 n.14 (noting Harris "confessed at least four times").

6. *See* Appendix.

7. *See supra* note 1 (discussing direct review stage).

8. *See* Appendix.

As the Harris case illustrates, these interests are currently unbalanced, imposing substantial and unjustifiable social costs on our criminal justice system.[9] For example, the criminal justice interest in finality is frustrated by a system which allows rounds of relitigation and piecemeal challenges.[10] In the Harris case, the people of California and the families and friends of the victims were required to wait 4,794 days (or some 156 months) for finality after the jury verdict had been rendered in 1979.

Under our system of federalism, the states have the chief obligation to enforce criminal laws.[11] However, with the current opportunity for independent or de novo relitigation in federal court on habeas review, the state trial courts no longer provide what should be the "main event" in our criminal justice system.[12] In this manner, federal habeas review intrudes upon "the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[13] Further, under this dual judicial process entailing state and federal review, the central issues of guilt or innocence and the facts of the crime often become secondary or tangential. Relitigation on collateral issues also taxes precious and limited judicial and prosecutorial resources.[14]

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9. The U.S. Supreme Court has repeatedly noted the costs of federal habeas review. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1468–69 (1991) (discussing "the significant costs of federal habeas corpus review"); Engle v. Isaac, 456 U.S. 107, 126–29 (1982) (noting federal habeas review "entails significant costs"). In fact, the U.S. Supreme Court has recently stated that "most of the price paid for federal review of state prisoner claims is paid by the State." Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991).

10. Numerous U.S. Supreme Court cases have noted the interest in finality. *See McCleskey*, 111 S. Ct. at 1468; Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion); *Engle*, 456 U.S. at 127; Schneckloth v. Bustamonte, 412 U.S. 218, 256–66 (1973) (Powell, J., concurring); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970).

11. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2607–08 (1991); *Engle*, 456 U.S. at 128; Palmore v. United States, 411 U.S. 389, 402 (1973); *see also McCleskey*, 111 S. Ct. at 1469 ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.").

12. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

13. Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (quoting *Schneckloth*, 412 U.S. at 254).

14. The U.S. Supreme Court has considered the impact of the federal habeas process on limited criminal justice resources. *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992); Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991); *McCleskey*, 111 S. Ct. at 1469; *Stone*, 428 U.S. at 491 n.31; *see also* Friendly, *supra* note 10, at 148–49.

It is important to note that the review of state court decisions in federal court is a statutory right, not a constitutional one.[15] Consequently, Congress can repair the problems of delay and repetitious litigation permitted under the current habeas corpus process. As the Harris case demonstrates, reasonable limits must be placed on the habeas corpus process to curb "successive petitions," unnecessary delay, and repetitious litigation. Capital defendants should be entitled to present their claims in one federal habeas petition (the proverbial "one bite at the apple"); capital defendants should *not* be permitted multiple collateral challenges, often years after the final conviction. Until Congress adopts meaningful reforms, substantially along the lines recommended by the Powell Committee,[16] the experience of the Harris case will likely be repeated.

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15. For nearly a century, there was no federal collateral review of state court decisions, until Congress enacted the federal habeas corpus statute. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (1966)); *see also Stone*, 428 U.S. at 474–75 (discussing history and scope of this statutory writ). *See generally Schneckloth*, 412 U.S. at 252–66 (Powell, J., concurring) (noting limited historical function of the writ in the United States).

There are two other forms of habeas corpus which are not implicated in this Article. First, the Judiciary Act of 1789 provided for federal court review of habeas claims brought by federal prisoners. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2255 (1949)).

Second, article I, section 9, clause 2 of the U.S. Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." This constitutional right to habeas corpus concerns detention pursuant to executive, not judicial, authority. *See generally* Office of Legal Policy, *Federal Habeas Corpus Review of State Judgments*, 22 U. MICH. J.L. REF. 901, 918–28 (1989). The common law writ of habeas corpus, guiding construction of the constitutional provision, *see Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–96 (1807), "was available (1) to compel adherence to prescribed procedures in *advance of trial*; (2) to inquire into the cause of commitment *not pursuant to judicial process*; and (3) to inquire whether a committing court had proper jurisdiction." Swain v. Pressley, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (emphasis added); *see also Ex parte* Watkins, 28 U.S. (7 Pet.) 193, 203 (1830) (Marshall, C.J.) (noting limited scope of common law writ). Moreover, this constitutional provision applies only to federal government conduct. *See* Friendly, *supra* note 10, at 172.

16. *See* POWELL COMMITTEE REPORT, *supra* note 2.

During the 102d Congress, several votes on habeas corpus reform have taken place, including reform proposals which contain the Powell Committee proposal.

The Senate adopted the Powell Committee recommendation, along with other provisions, including noncapital habeas reforms, a full and fair standard of review of state court rulings, and time limits on federal court review of capital habeas petitions. *See* 137 CONG. REC. S8661 (daily ed. June 26, 1991) (vote 58 to 40); 137 CONG. REC. S8823–25 (daily ed. June 26, 1991) (amendment language); 137 CONG. REC. S8869 (daily ed. June 27, 1991) (Sen. Specter amendment for time limits); 137 CONG. REC. S9832 (daily ed. July 11, 1991) (final passage of crime bill, 71 to 26).

The House of Representatives has narrowly approved an alternative approach, which does not contain the central recommendations of the Powell Committee. *See* 137 CONG. REC. H11, 756–57 (daily ed. Nov. 26, 1991) (adoption of conference report on

II. Proposal to Limit Last-Minute One-Judge Stays on Successive Habeas Petitions

The Harris case highlighted the need to curb the last-minute stays by individual federal appellate court judges who do not serve on the original panel. Four last-minute stays were entered during the evening of April 20, 1992 and early hours of April 21, 1992.[17]

The spectacle of "on-again, off-again" justice resulting from these last-minute stays was apparently permitted by current statu-

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the crime bill, 205 to 203); 137 CONG. REC. H8173 (daily ed. Oct. 22, 1991) (adopted on omnibus crime bill, including House Judiciary Subcommittee habeas corpus reform proposals, approved 305 to 118).

On several votes the Powell Committee language, along with other habeas reforms (including noncapital habeas reforms, a full and fair standard of review of state court rulings, and time limits on federal court review of capital habeas petitions), was narrowly defeated. *See* 137 CONG. REC. H8005 (daily ed. Oct. 17, 1991) (Rep. Hyde amendment containing Senate-passed habeas reforms, defeated 208 to 218); 137 CONG. REC. H8172–73 (daily ed. Oct. 22, 1991) (Rep. Hyde motion to recommit the omnibus crime bill, offering Senate-passed habeas corpus provisions without the full and fair standard of review, defeated 201 to 221); 137 CONG. REC. H11,755–56 (daily ed. Nov. 27, 1991) (motion to recommit the conference report including habeas corpus reforms adopted by the Senate, defeated 174 to 237).

17. According to news accounts, Ninth Circuit Judge Betty B. Fletcher issued the first stay at 6:25 p.m. on April 20th.

Ten judges issued the second stay at 10:15 p.m. In addition to Judge John T. Noonan, Jr., the ten-judge order listed the following Ninth Circuit Judges: Procter R. Hug, Jr., Betty B. Fletcher, Harry Pregerson, Cecil F. Poole, Dorothy W. Nelson, William A. Norris, William C. Canby, Jr., Stephen Reinhardt, and Thomas G. Nelson.

At 12:08 a.m. on April 21st, Judge Norris reportedly issued the third stay.

Finally, at 3:51 a.m., while Harris was sealed inside the gas chamber, Judge Pregerson issued the fourth stay by telephone, followed by a written order. The last stay was issued on stationery from Judge Pregerson's chambers and signed by him. The first and third stays were issued by a senior deputy clerk on behalf of unnamed judges, later identified in news accounts as Judges Fletcher and Norris, respectively.

With the exception of Judge Noonan, none of the judges involved in the stays had participated on the original panel. Judges Fletcher, Pregerson, and Norris were involved in at least two of the four stays.

These appellate court stays do not include the stay disguised as a temporary restraining order issued by U.S. District Court Judge Marilyn Patel pursuant to a 28 U.S.C. § 1983 attack on the use of lethal gas on Saturday, April 18th. This was not the first time § 1983 has been used to seek a stay to which the condemned prisoner was otherwise not entitled. *See* O'Bryan v. McKaskle, 729 F.2d 991, 993 n.1 (5th Cir. 1984) (rejecting a § 1983 attack on lethal injection drugs used by the State of Texas and thus finding it unnecessary to reach the State's argument that the civil rights complaint was "a thinly-disguised habeas petition," the filing of which constituted "an abuse of the writ"). In the Harris case, the U.S. Supreme Court held in vacating the stay imposed in the § 1983 action, "[w]hether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. . . . This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." Gomez & Vasquez v. United States District Court, 112 S. Ct. 1652, 1653 (1992).

tory provisions and/or local court rules. No one—not even Robert Alton Harris—was well-served by such a system which countenances such a macabre situation.[18] Unless Congress addresses this problem, this particularly offensive aspect of the Harris case may reoccur. With this reform objective in mind, the following proposal is offered.

A. *Proposal*

This proposal contains two central recommendations. First, a threshold showing that the writ is not being abused must be established before a stay can issue. Second, individual judges who were not originally assigned to hear the case and therefore are not directly familiar with the proceedings should not be permitted to issue stays by themselves. Stays should only issue in cases following resolution of an initial habeas petition where a majority of the court concludes the request for the stay would not abuse the writ.

1. Threshold Showing

First, no federal court should be able to issue a stay on a *successive* petition unless the court first determined the petition did not constitute an abuse of the writ.[19] This proposal would therefore furnish the exclusive means of issuing a stay on any successive habeas petition in a capital case, *notwithstanding any other provision of law or rule of court or procedure*. As to any initial habeas peti-

18. As the U.S. Supreme Court noted in its last ruling on the Harris case, "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez & Vasquez*, 112 S. Ct. at 1653. Unfortunately, the last-minute stays encountered in the Harris case are not an isolated exception. *See, e.g.*, Delo v. Stokes, 495 U.S. 320 (1990) (per curiam). In one of the last cases of the 1991 term, the Supreme Court noted, "We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties against the sufficiency of this submission." Sawyer v. Whitley, 112 S. Ct. 2514, 2520 n.7 (1992).

19. The proposal would apply to any subsequent habeas petition following final determination of an original habeas petition (*e.g.*, second or third petition). No distinction is intended to apply to petitions which might be technically classified as an "abuse of the writ" (concerning claims not previously raised) or a "successive petition" (involving claims previously asserted). *See* Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (noting distinction). The same threshold showing would apply to either form of habeas petition following the initial petition. Therefore, after the first round of collateral review, all petitioners would have to satisfy the requirements of the proposal in order to obtain federal habeas review.

tion, state capital prisoners would be entitled to a stay pending conclusion of the first round of collateral review. This is consistent with the philosophy that every capital prisoner should be afforded one full opportunity to seek state and federal post-conviction relief.

This part of the proposal is similar to the Powell Committee recommendation which would preclude a stay on a successive petition unless a special showing was made.[20] The key is that some threshold showing of merit must first be established in order to obtain a stay pending consideration of the new petition.[21] Instead of creating a new statutory standard, the stay could be predicated under the existing abuse of writ doctrine.[22]

2. Determination Made By Original Court or Judges

The second part of this proposal addresses the situation encountered during the Harris case where individual appellate judges who did not originally hear the case were able to issue last-minute stays of execution. The problem of allowing individual judges who were not on the original three-judge panel to issue stays is that it encourages forum shopping and disparages the regular appellate process by which appellate panel decisions establish binding precedent unless overturned by a higher authority. Although there may be legitimate occasions where a three-judge panel decision should be

20. POWELL COMMITTEE REPORT, *supra* note 2, at 21, proposed § 2257(c) (after the first round of post-conviction relief, "no federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless" the requisite showing is established).

21. For example, under the Powell Committee recommendation, a stay could issue in a capital case only if:

> (1) the claim has never been raised in state or federal court previously;
> (2) there is a valid excuse for not discovering and raising the claim during the prisoner's initial opportunity for state and federal post-conviction review; *and*
> (3) the facts underlying the claim raise a serious doubt about the prisoner's guilt of the offense or offenses for which the death penalty was imposed.

POWELL COMMITTEE REPORT, *supra* note 2, at 17 (emphasis added).

22. After the government has met its initial burden of pleading an abuse of the writ, the petitioner:

> must show *cause* for failing to raise [the claim previously] and *prejudice* therefrom .... If [the] petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a *fundamental miscarriage* of justice would result from a failure to entertain the claim.

McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (emphasis added). This same standard has applied to successive petitions. *See* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); *see also supra* note 19 (noting proposal applies to all subsequent habeas petitions after final determination of the first one).

reversed, this should be accomplished by an en banc panel (generally the entire membership of the court) or at least a majority of all the active judges of the court or the U.S. Supreme Court. The effect of a stay by a single appellate judge in a capital case is to suspend the judgment of the three-judge panel.[23]

Under this proposal, the determination of whether the successive petition constituted an abuse of the writ would be limited to the federal district court or the appellate judges who first adjudicated the merits of the first habeas petition. (Only in the event of an unavailability of the original court or judges would any other judges be reassigned to consider the stay question.) At the federal court of appeals, a stay would not issue on a successive petition unless: (1) a majority of the original panel, or (2) a majority of all the active judges, determined there was no abuse of the writ.

This aspect of this proposal would require the original district court or appellate panel to make the stay determination. Consistent with judicial economy, this would ensure that the judge(s) most familiar with the case would make the ruling. This recommendation is analogous to many court rules which require related or prior cases to be assigned to the original judge or court which heard the case in the first instance. Forum shopping would also be precluded.[24]

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23. Ninth Circuit Rule 22-5 exacerbates such delays by permitting a seven-day stay upon the request of one judge to permit the court to decide on whether to rehear the case en banc. It appears that the Ninth Circuit may be the only federal appellate court to provide such wide authority to single appellate judges. *Cf.* Delo v. Stokes, 495 U.S. 320, 322 (1990) (Kennedy, J., concurring) (noting in a case where the Fifth Circuit took more than twenty-four hours to rule on the State's motion to vacate a stay, "[a]ll Courts of Appeals should consider implementing, and following, procedures, such as those employed [in Eleventh Circuit Rule 22-3] to make certain that three active judges are available to act upon emergency stays of this sort and to provide a timely ruling from the panel as a body, so that this Court may also rule upon the case where necessary and appropriate").

U.S. Supreme Court Justice Sandra Day O'Connor, who serves as the Circuit Justice for the Ninth Circuit, has criticized Ninth Circuit Rule 22-5. In a recent address to the Ninth Circuit Judicial Conference, Justice O'Connor observed, "Whatever ones' view of the morality or constitutionality of capital punishment, it is an unusual procedure that enables one judge to exercise this sort of control over the process," adding that other circuits where many capital cases are reviewed do not have such a rule. Justice O'Connor called on the Ninth Circuit to refine its procedures to provide for a fair and efficient means of reviewing stay applications which are also "fairer to the states and not . . . disrupting the states' enforcement of their criminal laws." Philip Carrizosa, *9th Circuit Handling of Death Cases Criticized*, S.F. DAILY J., Aug. 7, 1992, at 3.

24. For example, during the Robert Alton Harris case, the last published order of the Ninth Circuit referred to the "*ex parte* motion" submitted to Ninth Circuit Judge Harry Pregerson which resulted in the fourth and final stay. This *ex parte* request has also been confirmed in subsequent news accounts. *See, e.g.*, Harriet Chiang, *Judge Ex-*

At the federal appellate level, Congress has authorized en banc panels to override a determination of a three-judge appellate panel.[25] Analogously, this proposal would allow a panel decision declining to issue a stay to be overridden. For example, in the event a majority of the original appellate panel concluded a stay was unwarranted, this proposal provides that a majority of the active appellate judges could still determine that a stay was justified because the successive petition was not an abuse of the writ. This process respects the normal appellate process which is governed by majority decisions of three-judge panels, pending a reversal by an en banc appellate panel or the U.S. Supreme Court.

Importantly, this proposal takes into account the substantial interests underlying our criminal justice system. The United States Supreme Court and other respected commentators have repeatedly noted the importance of the criminal justice interests in finality, comity, and judicial economy in the administration of justice.[26] Certainly, these identified interests are undermined with each new round of collateral review. The United States Supreme Court has repeatedly expressed concern where an *entire* federal court delays or disregards finality and sovereign interests on federal habeas review. Concomitantly, these same concerns must apply where a *single* appellate court judge, who did not serve on the original panel, is able to issue a stay on a second or successive habeas petition. Under the proposal, a state prisoner is afforded every opportunity to present his or her claims during the original habeas petition, following the presumptively valid state court judgment.[27] New or subsequent claims may be presented on any second or subsequent petition *as long as* the threshold requirements are met.

B. *Congressional Authority*

For several reasons, history and precedent support the authority of Congress to enact this proposal. First, as a general matter,

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plains Stay of Execution, S.F. CHRON., May 18, 1992, at A13; *'Rush to execution' questioned by judge in Robert Harris case*, SAN JOSE MERCURY, May 4, 1992, at B3.

Because Harris's attorneys contacted the judge by telephone without notice to the Attorney General's Office, our office was never permitted an opportunity to argue against the motion. Had this opportunity been afforded, as required under regular practice, Judge Pregerson could have been advised that the last federal habeas petition, which served as the basis for the *ex parte* motion, was identical to the fifth habeas petition which had already been filed *and* withdrawn by Harris's attorneys.

25. *See* 28 U.S.C. § 46(c); FED. R. APP. P. 35 (1988).

26. *See, e.g., supra* notes 9–11, 14.

27. *See supra* note 1.

the Anti-Injunction Act precludes federal courts from granting any injunctions to stay proceedings in state courts unless "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[28] Under settled case law, the exceptions to this statute are narrowly construed.[29] Absent an express authorization by Congress, none of these exceptions would apply in a habeas proceeding. In fact, the proposal would constitute an express statutory pronouncement *limiting* the issuance of stays.

Second, federal habeas review is not a constitutional right but a statutory one.[30] Accordingly, Congress could adopt a statutory limitation on the availability of the writ. Congress has already adopted an express provision governing stays of state court proceedings by federal courts reviewing habeas petitions. Section 2251 of the habeas statute allows a federal judge to stay an execution when "a habeas corpus proceeding is pending" before the judge or court.[31] Section 2251 currently qualifies under the "expressly authorized" exception of the Anti-Injunction Act. The proposal dis-

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28. 28 U.S.C. § 2283 (1988).

29. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (noting statutory exceptions are narrowly construed) (citing Atlantic Coast Line Ry. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970)).

> The provision concerning protecting or effectuating the court's judgments or the relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel. . . .
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> . . . [A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.

Chick Kam Choo, 486 U.S. at 147–48.

Finally, as part of the narrow construction afforded each of the exceptions under the statute, the "in aid of jurisdiction" provision has been limited to cases removed to federal court, in rem actions where the federal court has acquired jurisdiction, or where the federal court has already issued an injunction in an action in which it holds jurisdiction. *See* Revision Note to 28 U.S.C. § 2283 (1988); Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922); Looney v. Eastern Tex. Ry., 247 U.S. 214, 221 (1918); *see also* Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524 (1986) (noting history of exception under 1948 amendment).

30. *See supra* note 15.

31. Section 2251 of Title 28 of the United States Code (1988), concerning stays of state court proceedings, provides:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person

cussed herein would modify this statutory exception only as to successive habeas petitions.

As Judge Friendly has written in a related habeas context, "What Congress has given, Congress can partially take away."[32] In fact, on several occasions Congress has retracted the availability of the statutory writ of habeas corpus. For example, the history of the certificate of probable cause requirement reveals a congressional intent to foreclose the presentation of frivolous habeas petitions in capital cases on appeal. The first federal habeas statute permitting federal review of petitions by state prisoners in 1867 required an automatic stay of execution in capital habeas cases pending an appeal.[33] To redress the problem of frivolous capital habeas petitions filed to obtain the benefit of the automatic stay, Congress imposed the certificate of probable cause requirement.[34] According to the accompanying House report, the objective of the legislation was "to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution. . . . The prosecution of an appeal under these circumstances results in a delay of anything like a year or two years."[35] A petitioner has no automatic right of appeal from a federal habeas proceeding. A federal appellate court may consider a habeas appeal only where a federal judge issues a certificate of probable cause.[36] Consequently, this statutory prereq-

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detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

32. Friendly, *supra* note 10, at 171.

33. *See* Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1983).

34. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 (codified at 28 U.S.C. § 2253 (1988)).

35. H.R. Rep. No. 23, 60th Cong., 1st Sess. 1 (1908).

36. *See* 28 U.S.C. § 2253 (1988). It provides:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

uisite for a habeas appeal serves as a screening device, conditioning any appeal on a "substantial showing of the denial of [a] federal right."[37]

The proposal of this Article to limit stays is analogous. Unless a threshold showing is established, no stay may issue in a *successive* habeas petition by a federal court. For the foregoing reasons, Congress should include this proposal as part of any effort to reform the federal habeas corpus process.

III. DETERRENCE AND THE DEATH PENALTY

One issue that arose immediately preceding the Harris execution is the deterrent role of the death penalty. Deterrence is one of the central underlying reasons for the death penalty. Commencing with the landmark decision of *Gregg v. Georgia*, the U.S. Supreme Court has noted that deterrence and retribution are the two principal social purposes of the death penalty.[38] Certainly, deterrence will not play a role in all murders, such as crimes of passion. However, the death penalty can and does deter some categories of murders, including those involving reflection or premeditation.

Admittedly, the deterrent effect of the death penalty is difficult, at best, to prove or disprove empirically for all cases.[39] The lack of conclusive empirical evidence, however, does not dictate that deterrence has no role in determining whether the death penalty is an

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37. *Barefoot*, 463 U.S. at 893 (brackets in original) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972)). In considering whether to issue the certificate in a *successive* habeas petition, the court should consider whether the writ is being abused. *Id.* at 895.

38. 428 U.S. 153, 183 (1976) (plurality opinion); *see also* Spaziano v. Florida, 468 U.S. 447, 461 (1984) (noting role of deterrence and retribution in capital and noncapital cases); Enmund v. Florida, 458 U.S. 782, 798–800 (1982) (deterrence function applies where murder is the product of premeditation). The Supreme Court also noted a third purpose as "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future." *Gregg*, 428 U.S. at 183 n.28 (joint opinion) (citations omitted). Others have discussed the retribution and incapacitation objectives under the death penalty. This Article focuses on the deterrence function since it was most acutely debated prior to and following the Harris execution.

39. The plurality opinion of the *Gregg* Court acknowledged this but went on to say:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. *But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.*

428 U.S. at 185–86 (emphasis added) (footnote omitted).

appropriate punishment for certain murders.[40] The plurality opinion in *Gregg* concluded that the complex issues surrounding the death penalty must and should be resolved by the Legislature.[41]

Against this background, the question has been asked what lessons the Harris case may teach regarding deterrence. Robert Alton Harris was one of the first individuals convicted under the 1977 death penalty statute.[42] Even though the death penalty in California has been on the statute books for the past fifteen years and this sentencing scheme satisfies established standards of the United States Constitution, the deterrent impact had been mitigated by the fact that no execution had occurred for a quarter of a century. There can be no deterrence in our criminal justice system when the punishment is neither swift nor certain.[43] In contrast, in 1961, when California implemented the death penalty on a more regular basis, California Supreme Court Justice McComb noted several examples where the deterrent function of the death penalty actually affected the nature of the crime committed.[44]

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40. In fact, some have suggested that there is empirical evidence of the deterrence effect. *See* Stephen J. Markman & Paul J. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 154–56 (1988) (discussing statistical studies on the deterrent effect).

41. 428 U.S. at 186–87.

42. *See* Harris v. Pulley, 692 F.2d 1189, 1193 & n.1 (9th Cir. 1982), *rev'd*, 465 U.S. 37 (1984). In November, 1978, the California voters adopted Proposition 7, which extended many of the death penalty provisions. *See* People v. Frierson, 599 P.2d 587, 591 (1979), *cert. denied*, 112 S. Ct. 944 (1992).

43. As then Justice Rehnquist made this point:

> When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system. To be sure, the importance of procedural protections to an accused should not be minimized, particularly in light of the irreversibility of the death sentence. But it seems to me that when the Court surrounds capital defendants with numerous procedural protections unheard of for other crimes and then pristinely denies a petition for certiorari in a case such as this, it in effect all but prevents the States from imposing a death sentence on a defendant who has been fairly tried by a jury of peers.

Coleman v. Balkcom, 451 U.S. 949, 959–60 (1981) (Rehnquist, J., dissenting from the denial of certiorari); *see also* Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect.").

44. *See* People v. Love, 366 P.2d 33, 40–42 (1961) (McComb, J., dissenting) (recounting specific instances where toy guns or simulated guns were used because the perpetrators believed they would likely receive the death penalty if real guns were used; providing examples where defendants thought twice about killing individuals during the commission of their offense and decided not to do so because of fear of the death penalty), *overruled by* People v. Morse, 388 P.2d 33 (1964).

While we may not be able to establish definitively in the near future the empirical effect of the death penalty on deterrence, this does not necessarily compel the conclusion that the death penalty has no deterrent value. If the death penalty deters at least one premeditated murder, who can question the value of the death penalty as a deterrent? Already the Harris case appears to be having an effect on pleas. For example, immediately following the Harris execution, at least two individuals charged with murder pled guilty in order to avoid the possibility of receiving a death penalty sentence.[45]

Californians have repeatedly affirmed their support for the death penalty for the most heinous murders. In 1990, the voters adopted Proposition 115 which contained a finding that "the death penalty is a deterrent to murder."[46] Public opinion polls before and after the Harris execution consistently show that three out of four persons support the death penalty in California.[47]

In conclusion, it is widely-recognized that deterrence is at least a part of the underlying rationale for the death penalty. The role of deterrence is a relevant factor in the debate for the death penalty, and should be left to the Legislature to assess.[48] To date, the California Legislature and people, along with thirty-five other states, have maintained their support for the death penalty for the most gruesome murders.

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45. *Man Cites Fear of Death Penalty, Changes Plea to Guilty in Killing*, L.A. TIMES, Apr. 24, 1992, at A3; *Looming Execution Motivates Plea Bargain*, BAKERSFIELD CALIFORNIAN, Apr. 21, 1992.

46. Proposition 115, § 1, subd. (a) (*quoted in* Tapia v. Superior Court, 807 P.2d 434, 440 n.7 (1991)).

47. *See* George Skelton, *The Times Poll; Death Penalty Support Still Strong In State*, L.A. TIMES, Apr. 29, 1992, at A1, A18 (noting survey indicated that "support for capital punishment among California's voters has been virtually unchanged for 11 years, with roughly three-fourths of the electorate favoring it through this period" and that support for capital punishment remained constant before and after the Harris execution).

48. *See* Gregg v. Georgia, 428 U.S. 153, 186–87 (1976) (plurality opinion) ("Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."); *see also* People v. Frierson, 599 P.2d 587, 605 (1979) (reaching the constitutionality of the death penalty statutes despite reversing the judgment, in part because the deterrent effect of capital punishment accepted by the Legislature could only be effectuated if the legality of the statutes was upheld) *cert. denied*, 112 S. Ct. 944 (1992).

IV. THE ROLE OF INNOCENCE IN FEDERAL HABEAS REVIEW

A legitimate policy question raised by the Harris case is what role innocence should play in federal habeas corpus proceedings. The answer to this question depends on the function of the federal habeas corpus process.

Federal habeas corpus review advances two primary objectives, the second of which pertains to innocence. First, as Justice Harlan noted, the habeas statute fulfills a "deterrence function," providing an "additional incentive" to state courts to ensure federal rights are applied consistent with established constitutional standards at the time of their application.[49] Second, "it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[50] Certainly, then, claims of innocence are relevant to all habeas cases, but especially for capital cases.

A. *Deterrence Function*

As to the first function, many would agree that there is a certain class of claims which should always be able to obtain federal habeas review. For example, this would include claims alleging "that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods."[51] Added to this list may be those bedrock rules "implicating the fundamental fairness and accuracy of the criminal proceeding," such as the right to counsel at trial.[52] However, at the other end of the spectrum, there is a class of claims which should

49. Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting); *see also* Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990), *aff'd*, 112 S. Ct. 2514 (1992); Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Butler v. McKellar, 494 U.S. 407, 413 (1990).

50. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 256 (1973) (Powell, J., concurring) ("Habeas corpus indeed *should* provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty.") (emphasis added).

51. Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted) (*cited in* Teague v. Lane, 489 U.S. 288, 313–14 (1989) (plurality opinion)); *see also* Friendly, *supra* note 10, at 151–54 (noting four instances where federal habeas review should always be available).

52. *Saffle*, 110 S. Ct. at 1263–64; *Teague*, 489 U.S. at 311–12 (plurality opinion) (exception to general doctrine against retroactive application of "new rules" on collateral review).

not be relitigated in federal habeas court, as is recognized by the U.S. Supreme Court.[53]

Moreover, habeas corpus review is not the sole means to promote the deterrence function, as state prisoners may seek certiorari review before the U.S. Supreme Court as part of the direct review process.[54] Further, absent unavoidable circumstances, the deterrence objective should be fulfilled during one round of federal post-conviction review. Deterrence is not enhanced by multiple rounds of piecemeal litigation.

B. *Innocence*

As to the second objective of habeas review, many recent U.S. Supreme Court cases have noted that innocence should play a role on habeas review, but usually as an exception where a threshold showing has not been met.[55] At least one respected jurist has suggested that a general requirement of "a colorable showing of innocence" should be applied as a precondition for habeas review in the

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53. *See, e.g.*, *Teague*, 489 U.S. at 288 (plurality opinion) (general doctrine against retroactive application of "new rules" on collateral review); Stone v. Powell, 428 U.S. 465, 495 n.37 (1976) (Fourth Amendment exclusionary rule claims barred on habeas review where there is a full and fair opportunity to litigate in state court); *see also Rose*, 455 U.S. at 543–44 (1982) (Stevens, J., dissenting) (categorizing four types of constitutional errors and concluding not all should be subject to collateral review).

54. *See supra* note 1.

55. *See* Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992) (holding in capital punishment case that to demonstrate "actual innocence" a petitioner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"). In several habeas contexts, the United States Supreme Court has recognized what has been considered as a "miscarriage of justice" or "actual innocence" exception. *See, e.g.*, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992) ("[F]ailure to develop a claim in state-court proceedings will be excused and a hearing mandated if [the petitioner] can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."); McCleskey v. Zant, 111 S. Ct. 1454, 1471, (1991) (discussing the miscarriage of justice exception to the abuse of the writ doctrine, and stating that the exception "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty' " (quoting *Stone*, 428 U.S. at 492–93 n.31)); Murray v. Carrier, 477 U.S. 478, 496 (1986) (even where the showing to excuse a procedural default cannot be made, the writ may be granted "where a constitutional violation probably resulted in the conviction of one who is actually innocent"); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) ("ends of justice" exception to general bar against successive petitions "require[s] federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *see also* Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989) (discussing actual innocence in context of sentencing phase of capital case); Smith v. Murray, 477 U.S. 527, 537–38 (1986).

first instance, subject to narrow exceptions.[56] This suggestion has much to commend for it in terms of minimizing the substantial costs incurred by the criminal justice system resulting from a lack of finality, repetitious litigation, and intrusion on sovereign interests by collateral litigation.

At minimum, Congress should adopt the intermediate position of the Powell Committee, which would require a showing related to innocence for all *successive* petitions.[57] As the Powell Committee Report noted with regard to capital cases, "Often factual guilt is not seriously in dispute."[58] This certainly was true of the Harris case.[59] Moreover, the prisoner should be encouraged to assert every legitimate habeas claim during the first round of state and federal post-conviction review.[60]

Under such a system, a state prisoner would be permitted to raise any cognizable claims during the first round of post-conviction relief. Any subsequent habeas petition would not be considered unless the threshold showing of innocence had been established. A requirement of innocence is also an essential safeguard for the death penalty. Any capital prisoner who has new evidence of innocence should be permitted to submit such claims.

It is difficult to say precisely at what point this proposal would have affected the Harris case. It is possible that instead of being motivated by the built-in incentives under the status quo which reward delay, Harris's attorneys may have pursued a different litigation strategy. It is safe to say that had this proposal been in effect, years of unnecessary litigation, unrelated to guilt or innocence, and the accompanying delay would have been curtailed in the Harris case.

In sum, innocence should be relevant to federal habeas review. While the Powell Committee approach is analogous to standards

56. *See* Friendly, *supra* note 10, at 150–54, 160, 167, 172 (noting four exceptions to a general rule precluding federal habeas review where a prisoner has had an opportunity to raise a constitutional claim in state court, in the "absence of a colorable showing of innocence").

57. *See supra* notes 20–21 and accompanying text.

58. POWELL COMMITTEE REPORT, *supra* note 2, at 24.

59. *See supra* notes 4–5 and accompanying text.

60. The threshold showing for innocence should serve to permit consideration of legitimate claims of innocence and preclude frivolous allegations of innocence. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986); *see also* Coleman v. Thompson, 112 S. Ct. 1845 (1992) (per curiam) (noting that after 12 rounds of judicial review over 11 years, petitioner had not produced even a " 'colorable claim of innocence' ").

already adopted in several recent cases,[61] Congress should codify the innocence standard as part of any reform effort.

V. CONCLUSION

This Article has focused upon some of the central public policy issues in light of the first execution in California in a quarter of a century. The friends and family members of the victims should never have to wait as long for finality and justice and suffer through rounds of collateral litigation, particularly where, as here, innocence was not in issue. Unless the public policy proposals highlighted in this Article are given serious consideration, the experience with the Robert Alton Harris case may not be an aberration. More than anything else, the Harris case highlights the decreasing credibility of our criminal justice system. Unless meaningful reforms are adopted in the near future, we may risk losing the trust of the very people which the system is intended to serve.

APPENDIX

THE ROBERT ALTON HARRIS CASE CHRONOLOGY

1978-1992

A chronology of the significant events in the state and federal criminal justice system in the Harris case follows. Forty-four such events (31%) occurred at the state level and ninety-seven events (69%) were at the federal level:

1.	July 7, 1978	Harris arraigned for the July 5th murders of Michael Baker, age sixteen, and John Mayeski, age fifteen, in San Diego.
2.	March 6, 1979	Harris is sentenced to death by San Diego Superior Court Judge Eli Levenson. No. CR 44135 (Super. Ct. S.D. County)
3.	November 30, 1979	Harris files opening brief in California Supreme Court - Direct Appeal. No. CR 20888 (Cal.)
4.	January 29, 1980	Harris files petition for writ of habeas corpus in California Supreme Court - First State Habeas. No. CR 21341 (Cal.)
5.	October 29, 1980	California Supreme Court denies writ No. CR 21341. (Cal.)
6.	February 11, 1981	Death penalty and judgment of conviction affirmed by California Supreme Court in *People v. Harris*, 28 Cal. 3d 935 (1981). No. CR 20888 (Cal.)
7.	April 15, 1981	Superior Court sets execution date of July 7, 1981 - First Execution Date. No. CR 44135 (Super. Ct. S.D. County)
8.	June 22, 1981	California Supreme Court stays execution pending final determination of certiorari petition in U.S. Supreme Court. No. CR 44135 (Super. Ct. S.D. County); No. 80-6702 (U.S.)
9.	October 5, 1981	U.S. Supreme Court denies certiorari in *Harris v. California*, 454 U.S. 882 (1981). No. 80-6702 (U.S.)
10.	October 6, 1981	Superior Court sets execution date of December 15, 1981 - Second Execution Date. No. CR 44135 (Super. Ct. S.D. County)
11.	November 17, 1981	Harris files petition for writ of habeas corpus in San Diego Superior Court - Second State Habeas. No. HC 5841 (Super. Ct. S.D. County)

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12.	November 24, 1981	Superior Court Judge Don Smith denies second state habeas. No. HC 5841 (Super. Ct. S.D. County)
13.	November 25, 1981	Harris files petition for writ of habeas corpus in Court of Appeal, Fourth Appellate District, Division I - Third State Habeas. No. CR 13691 (Cal. App. 4th Dist.)
14.	November 25, 1981	California Court of Appeal denies third state habeas. No. CR 13691 (Cal. App. 4th Dist.)
15.	December 9, 1981	Harris files petition for writ of habeas corpus in California Supreme Court - Fourth State Habeas. No. CR 22380 (Cal.)
16.	December 9, 1981	California Supreme Court grants stay of December 15, 1981 execution date pending resolution of habeas corpus petition. No. CR 44135 (Super. Ct. S.D. County); No. CR 22380 (Cal.)
17.	January 13, 1982	California Supreme Court denies fourth state habeas. No. CR 22380 (Cal.)
18.	January 14, 1982	Superior Court sets execution date of March 16, 1982 - Third Execution Date. No. CR 44135 (Super. Ct. S.D. County)
19.	March 5, 1982	Petition for writ of habeas corpus filed in U.S. District Court for the Southern District of California - First Federal Habeas. No. 82-0249-E (S.D. Cal.)
20.	March 12, 1982	U.S. District Judge William Enright denies first federal habeas. No. 82-0249-E (S.D. Cal.)
21.	March 12, 1982	U.S. Court of Appeals for the Ninth Circuit stays third execution date and orders expedited appeal. No. CR 44135 (Super. Ct. S.D. County); No. 82-5246 (9th Cir.)
22.	April 16, 1982	Harris files petition for writ of habeas corpus in San Diego Superior Court - Fifth State Habeas. No. HC 6063 (Super. Ct. S.D. County)
23.	April 20, 1982	Harris files opening brief in Ninth Circuit from denial of first federal habeas. No. 82-0249-E (S.D. Cal.) - First Federal Appeal. No. 82-5246 (9th Cir.)
24.	May 4, 1982	Superior Court Judge James Malkus denies fifth state habeas petition. No. HC 6063 (Super. Ct. S.D. County)

25.	May 12, 1982	Harris files habeas corpus petition in California Court of Appeal, Fourth Appellate District, Division I - Sixth State Habeas. No. CR 13922 (Cal. App. 4th Dist.)
26.	May 13, 1982	California Court of Appeal summarily denies sixth state habeas. No. CR 13922 (Cal. App. 4th Dist.)
27.	May 19, 1982	Harris files habeas corpus petition in California Supreme Court -Seventh State Habeas. No. CR 22612 (Cal.)
28.	June 7, 1982	U.S. Supreme Court denies certiorari relating to the fourth state habeas (Cal. Crim. No. 22380) in *Harris v. California*, 457 U.S. 1111 (1982) - Second Certiorari Denial. No. 81-6512 (U.S.)
29.	June 30, 1982	California Supreme Court denies seventh state habeas petition. No. CR 22612 (Cal.)
30.	August 8, 1982	Harris files habeas corpus petition in U.S. District Court for the Southern District of California - Second Federal Habeas. No. 82-1005-E (S.D. Cal.)
31.	September 16, 1982	Ninth Circuit decides first federal appeal. No. 82-5246 (9th Cir.) in *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982)—order required, among other things, a remand for the state courts to conduct proportionality review.
32.	November 15, 1982	Ninth Circuit amends September 16, 1982 opinion and denies petition for rehearing and suggestion for rehearing en banc. No. 82-5246 (9th Cir.)
33.	December 29, 1982	Attorney General files petition for writ of certiorari from Ninth Circuit's decision in first federal appeal; Harris files cross-petition - Harris's Third Certiorari Petition. No. 82-1095 (U.S.)
34.	March 21, 1983	U. S. Supreme Court grants Attorney General's petition in *Pulley v. Harris*, 460 U.S. 1036 (1983). No. 82-1095 (U.S.)
35.	January 23, 1984	U. S. Supreme Court reverses Ninth Circuit No. 82-5246 (9th Cir.) in *Pulley v. Harris*, 465 U.S. 37 (1984). No. 82-1095 (U.S.)

36.	February 23, 1984	Ninth Circuit remands to U.S. District Court in light of U.S. Supreme Court reversal, *Harris v. Pulley*, 726 F.2d 569 (9th Cir. 1984). No. 82-5246 (9th Cir.)
37.	July 26, 1984	U.S. District Judge William Enright denies second federal habeas. No. 82-1005-E (S.D. Cal.), and all but one issue (prejudicial pretrial publicity) remaining from Ninth Circuit remand on first habeas No. 82-0249-E. (S.D. Cal.)—additional briefing requested on the pretrial publicity issue.
38.	October 17, 1984	U.S. District Judge Enright denies remaining issue in first federal habeas. No. 82-0249-E (S.D. Cal.)
39.	October 29, 1984	Certificate of probable cause issues to begin second federal appeal - Second Federal Appeal. No. 84-6433 (9th Cir.)
40.	July 3, 1985	Harris files his opening brief in Ninth Circuit. No. 84-6433 (9th Cir.)
41.	July 8, 1988	Ninth Circuit affirms the district court's denial of habeas corpus (four rounds of supplemental briefs were requested after initial briefing was completed in November of 1985) in *Harris v. Pulley*, 852 F.2d 1546 (9th Cir. 1988). No. 84-6433 (9th Cir.)
42.	August 8, 1988	Harris files a petition for rehearing and suggestion for rehearing en banc in Ninth Circuit. No. 84-6433 (9th Cir.)
43.	September 28, 1989	Ninth Circuit denies rehearing and suggestion for rehearing en banc, and amends opinion in *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1989). No. 84-6433 (9th Cir.)
44.	November 13, 1989	Harris files petition for writ of certiorari from the second federal appeal No. 84-6433 (9th Cir.) - Fourth Certiorari Petition. No. 89-767 (U.S.)
45.	December 13, 1989	Attorney General files opposition to certiorari in U.S. Supreme Court. No. 89-767 (U.S.)
46.	January 5, 1990	Harris files petition for writ of habeas corpus in California Supreme Court - Eighth State Habeas. No. S013598 (Cal.)
47.	January 16, 1990	U.S. Supreme Court denies Harris's certiorari petition in *Harris v. Pulley*, 493 U.S. 1051 (1990). No. 89-767 (U.S.)

48.	January 18, 1990	California Supreme Court requests informal response to habeas by February 16, 1990, reply to be thirty days thereafter. No. S013598 (Cal.)
49.	January 26, 1990	Harris files petition for clemency before Governor George Deukmejian.
50.	February 5, 1990	Superior Court sets execution date of April 3, 1990 - Fourth Execution Date. No. CR 44135 (Super. Ct. S.D. County)
51.	February 9, 1990	Attorney General Response to eighth state habeas petition filed. No. S013598 (Cal.)
52.	February 14, 1990	Harris files motion to vacate execution date in Supreme Court. No. S013598 (Cal.)
53.	February 20, 1990	Opposition to motion to vacate execution date filed. No. S013598 (Cal.)
54.	March 12, 1990	Harris files request for extension to file reply brief, request denied, Harris files reply brief with additional allegation. No. S013598 (Cal.)
55.	March 14, 1990	Harris files supplemental allegations and declarations (Daniel Harris). No. S013598 (Cal.)
56.	March 16, 1990	Eighth state habeas petition and motion to vacate execution date denied by California Supreme Court. No. S013598 (Cal.)
57.	March 20, 1990	Harris withdraws petition for clemency.
58.	March 26, 1990	Third federal habeas petition, application for stay of execution, filed in U.S. District Court for the Southern District - Third Federal Habeas. No. 90-380-E (S.D. Cal.)
59.	March 27, 1990	Return to third federal habeas petition. No. 90-380-E (S.D. Cal.)
60.	March 28, 1990	Traverse to third federal habeas, oral argument on petition, petition denied, application for stay denied, certificate of probable cause denied, notice of appeal filed. No. 90-380-E (S.D. Cal.)
61.	March 29, 1990	U.S. District Court's written opinion filed. No. 90-380-E (S.D. Cal.)
62.	March 30, 1990	Emergency application for stay and certificate of probable cause in Ninth Circuit, opposition to stay, issuance of stay by Ninth Circuit Judge Noonan in *Harris v. Vasquez*, 901 F.2d 724 (9th Cir. 1990). No. 90-55402 (9th Cir.)

63.	March 31, 1990	Application to vacate stay in U.S. Supreme Court. No. A-683 (U.S.)
64.	April 1, 1990	Response to application to vacate stay. No. A-683 (U.S.)
65.	April 2, 1990	Application to vacate stay denied in *Vasquez v. Harris*, 494 U.S. 1064 (1990). No. A-683 (U.S.)
66.	April 13, 1990	Harris's Brief on Merits filed. No. 90-55402 (9th Cir.)
67.	April 25, 1990	Attorney General's Brief on Merits filed, along with Amici of Idaho, Montana, Nevada, and Washington. No. 90-55402 (9th Cir.)
68.	May 2, 1990	Harris's Reply Brief filed. No. 90-55402 (9th Cir.)
69.	May 14, 1990	Oral Argument. No. 90-55402 (9th Cir.)
70.	August 29, 1990	Opinion affirming district court in *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990). No. 90-55402 (9th Cir.)
71.	September 26, 1990	Simultaneous briefs filed on petition for rehearing and suggestion for rehearing en banc. No. 90-55402 (9th Cir.)
72.	November 19, 1990	Order modifying Ninth Circuit opinion in *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990). No. 90-55402 (9th Cir.)
73.	November 27, 1990	Harris files supplemental petition for rehearing and suggestion for rehearing en banc. No. 90-55402 (9th Cir.)
74.	November 29, 1990	Harris files motion to remand for evidentiary hearing. No. 90-55402 (9th Cir.)
75.	December 7, 1990	Attorney General files opposition to motion to remand. No. 90-55402 (9th Cir.)
76.	March 22, 1991	Ninth Circuit Remands to District Court for Evidentiary Hearing on Government Agent Claim and Abuse of Writ in *Harris v. Vasquez*, 928 F.2d 891 (9th Cir. 1991). No. 90-55402 (9th Cir.)
77.	May 7-14, 1991	U.S. District Court holds evidentiary hearing pursuant to Ninth Circuit remand. No. 90-55402 (9th Cir.); No. 90-380-E (S.D. Cal.)

78.	May 21, 1991	U.S. District Court issues Memorandum Decision after evidentiary hearing following remand order and supplementing the court's oral ruling on May 15, 1991. No. 90-380-E (S.D. Cal.)
79.	June 19, 1991	Harris's brief on the merits following remand filed in Ninth Circuit. No. 90-55402 (9th Cir.)
80.	July 2, 1991	Attorney General's brief on merits filed in Ninth Circuit. No. 55402 (9th Cir.)
81.	July 10, 1991	Harris's reply brief filed in Ninth Circuit. No. 90-55402 (9th Cir.)
82.	August 21, 1991	Second modification of Ninth Circuit opinion in *Harris v. Vasquez*, 943 F.2d 930 (9th Cir. 1991). No. 90-55402 (9th Cir.)
83.	September 4, 1991	Harris's second supplemental petition for rehearing and suggestion for rehearing en banc filed in Ninth Circuit. No. 90-55402 (9th Cir.)
84.	November 8, 1991	Ninth Circuit Denial of petition for rehearing and rejection of suggestion for rehearing en banc in *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1991). No. 90-55402 (9th Cir.)
85.	November 13, 1991	Harris's motion to stay issuance of mandate filed in Ninth Circuit. No. 90-55402 (9th Cir.)
86.	November 13, 1991	Opposition to Harris's motion to stay issuance of mandate filed in Ninth Circuit. No. 90-55402 (9th Cir.)
87.	November 15, 1991	Ninth Circuit grants sixty-day stay of mandate pending Harris's application for a writ of certiorari before the U.S. Supreme Court. No. 90-55402 (9th Cir.)
88.	November 21, 1991	Attorney General application to vacate stay of mandate filed in United States Supreme Court. No. A-372 (U.S.)
89.	November 25, 1991	Harris's Opposition to vacate stay. No. A-372 (U.S.)
90.	December 9, 1991	Application to vacate stay denied in *Vasquez v. Harris*, 112 S. Ct. 633 (1991). No. A-372 (U.S.)
91.	January 14, 1992	Harris's fifth petition for certiorari filed in U.S. Supreme Court - Fifth Certiorari Petition. No. 91-6990 (U.S.)

92.	February 7, 1992	Opposition to certiorari petition filed. No. 91-6990 (U.S.)
93.	February 20, 1992	Harris's reply filed. No. 91-6990 (U.S.)
94.	March 2, 1992	Petition for certiorari denied by U.S. Supreme Court in *Harris v. Vasquez*, 112 S. Ct. 1275 (1992). No. 91-6990 (U.S.)
95.	March 2, 1992	Harris files motion to stay issuance of mandate in Ninth Circuit. No. 90-55402 (9th Cir.)
96.	March 6, 1992	Motion for stay of mandate denied. No. 90-55402 (9th Cir.)
97.	March 9, 1992	Ninth Circuit issues mandate. No. 90-55402 (9th Cir.)
98.	March 13, 1992	San Diego Superior Court Judge Frederic Link sets execution date of April 21, 1992 - Fifth Execution Date. No. CR 44135 (Super. Ct. S.D. County)
99.	March 17, 1992	Harris applies for clemency before Governor Pete Wilson.
100.	April 15, 1992	Governor Wilson holds clemency hearing.
101.	April 16, 1992	Governor Wilson denies Harris' clemency petition.
102.	April 16, 1992 (6:00 p.m.)	Harris files petition for writ of habeas corpus in California Supreme Court - Ninth State Habeas. No. S026177 (Cal.)
103.	April 17, 1992 (10:00 a.m.)	Harris' attorneys file a civil rights class action in U.S. District Court for the Northern District of California and request a ten-day temporary restraining order prohibiting use of lethal gas, *Fierro v. Gomez*. No. 92-1482-MHP (N.D. Cal.)
104.	April 17, 1992 (4:30 p.m.)	California Supreme Court denies ninth state habeas, 1992 Cal. LEXIS 1830 (Cal. 1992). No. CR S026177 (Cal.)
105.	April 18, 1992 (8:55 a.m.)	Harris files petition for writ of habeas corpus in U.S. District Court for the Southern District of California - Fourth Federal Habeas. No. 92-0588-T (S.D. Cal.)
106.	April 18, 1992 (9:00 a.m.)	U.S. District Judge Howard Turrentine holds hearing on fourth federal habeas petition. No. 92-0588-T (S.D. Cal.)

107.	April 18, 1992 (11:15 a.m.)	U.S. District Judge Howard Turrentine rejects fourth federal habeas petition, denies a request for stay of execution, and denies a certificate of probable cause for an appeal on the merits. No. 92-0588-T (S.D. Cal.)
108.	April 18, 1992 (4:30 p.m.)	Harris files application to recall the mandate in the third federal habeas petition (Harris III) in the Ninth Circuit. No. 90-55402 (9th Cir.)
109.	April 18, 1992 (6:00 p.m.)	Judge Turrentine signs written order denying fourth federal habeas. No. 92-0588-T (S.D. Cal.)
110.	April 18, 1992 (8:00 p.m.)	After a 6:00 p.m. hearing, U.S. District Court Judge Marilyn Hall Patel issues a ten-day temporary restraining order prohibiting the use of lethal gas, *Fierro v. Gomez*, 790 F. Supp. 966 (N.D. Cal. 1992). No. 92-1482-MHP (N.D. Cal.)
111.	April 18, 1992 (8:30 p.m.)	Attorney General files application for a writ of mandamus in the Ninth Circuit to overturn the temporary restraining order. No. 92-70237 (9th Cir.)
112.	April 19, 1992 (11:00 a.m.)	Harris files a request for stay of execution and application for certificate of probable cause in Ninth Circuit to appeal denial of fourth federal habeas. No. 92-55426 (9th Cir.)
113.	April 19, 1992 (6:00 p.m.)	Ninth Circuit panel conducts telephonic oral argument on all issues relating to civil rights action and fourth federal habeas petition. No. 90-55402 (9th Cir.); 92-55426 (9th Cir.); 92-70237 (9th Cir.)
114.	April 19, 1992 (11:30 p.m.)	Ninth Circuit panel grants Attorney General's petition for writ of mandamus on lethal gas case, opinions to follow. 1992 U.S. App. LEXIS 7931, 92 D.A.R. 5330 (9th Cir. 1992) No. 92-70237 (9th Cir.)
115.	April 20, 1992 (10:00 a.m.)	Ninth Circuit panel denies Harris's application to recall mandate in third federal habeas in *Harris v. Vasquez*, 961 F.2d 1449 (9th Cir. 1992). No. 92-55402 (9th Cir.)

116.	April 20, 1992 (10:00 a.m.)	Ninth Circuit panel unanimously denies Harris's application for stay of execution and certificate of probable cause in fourth federal habeas in *Harris v. Vasquez*, 961 F.2d 1450 (9th Cir. 1992). No. 92-55426 (9th Cir.)
117.	April 20, 1992 (3:00 p.m.)	Majority opinion of Ninth Circuit panel granting writ of mandate in civil rights case issues in *Gomez v. United States District Court*, 966 F.2d 460 (9th Cir. 1992). No. 92-70237 (9th Cir.)
118.	April 20, 1992 (5:15 p.m.)	Harris files petition for rehearing, suggestion for rehearing en banc, and request for stay of execution on fourth federal habeas. No. 92-55426 (9th Cir.)
119.	April 20, 1992 (6:25 p.m.)	A single Ninth Circuit Judge issues stay for seven days under Ninth Circuit Rule 22-5 - First Stay. No. 92-55426 (9th Cir.)
120.	April 20, 1992 (6:30 p.m.)	Attorney General files application in U.S. Supreme Court to vacate the first stay. No. A-766 (U.S.)
121.	April 20, 1992 (7:00 p.m.)	Ninth Circuit Judge Noonan issues dissenting opinion on lethal gas case issues in *Gomez v. United States District Court*, 966 F.2d 460-63 (9th Cir. 1992) (Noonan, J., dissenting). No. 92-70237 (9th Cir.)
122.	April 20, 1992 (8:30 p.m.)	Harris files opposition to application to vacate first stay. No. A-766 (U.S.)
123.	April 20, 1992 (10:00 p.m.)	Ten Ninth Circuit judges issue order staying execution in lethal gas case - Second Stay. No. 92-70237 (9th Cir.)
124.	April 20, 1992 (10:15 p.m.)	Attorney General files application to vacate second stay. No. A-767 (U.S.)
125.	April 20, 1992 (11:20 p.m.)	U.S. Supreme Court vacates first stay in *Harris v. Vasquez*, 112 S. Ct. 1713 (1992). No. A-766 (U.S.)
126.	April 20, 1992 (midnight)	Harris files federal habeas corpus petition in U.S. District Court for the Northern District of California - Fifth Federal Habeas. No. 92-1504-RMW (N.D. Cal.)
127.	April 21, 1992 (12:05 a.m.)	A single Ninth Circuit judge issues third stay of execution under Ninth Circuit Rule 22-5 in *Gomez v. Fierro* (9th Cir. 1992). No. 92-70237 (9th Cir.)

128.	April 21, 1992 (12:30 a.m.)	Attorney General files application to vacate third stay in conjunction with application to vacate second stay. No. A-767 (U.S.)
129.	April 21, 1992 (12:30 a.m.)	U.S. District Court Judge Ron Whyte dismisses fifth federal habeas petition and transfers case to the U.S. District Court for the Southern District of California, under established venue rules. No. 92-1504-RMW (N.D. Cal.)
130.	April 21, 1992 (12:45 a.m.)	Fifth federal habeas petition is transferred and filed in San Diego in the U.S. District Court for the Southern District of California. No. 92-615-T (S.D. Cal.)
131.	April 21, 1992 (1:00 a.m.)	Harris's attorneys withdraw the fifth federal habeas petition. No. 92-615-T (S.D. Cal.)
132.	April 21, 1992 (2:47 a.m.)	U.S. District Judge Patel sends order to San Quentin and Attorney General requiring the prison to permit the execution to be videotaped.
133.	April 21, 1992 (3:00 a.m.)	U.S. Supreme Court vacates second and third stays in *Gomez v. United States District Court*, 112 S. Ct. 1652 (1992). No. A-767 (U.S.)
134.	April 21, 1992 (3:40 a.m.)	Harris asks the U.S. District Court for the Northern District of California and the Ninth Circuit to consider his civil rights action to be a sixth federal habeas petition and to grant a stay of execution to exhaust state remedies. No. C-92-1482-MHP (N.D. Cal.); No. 92-70237 (9th Cir.)
135.	April 21, 1992 (3:51 a.m.)	Telephone call from Ninth Circuit Judge Harry Pregerson to San Quentin issuing stay telephonically upon the sixth federal habeas petition, received while Harris is sealed in the gas chamber - Fourth Stay.
136.	April 21, 1992 (4:05 a.m.)	Attorney General files application in United States Supreme Court to vacate fourth stay of execution. No. A-768 (U.S.)
137.	April 21, 1992 (4:39 a.m.)	Written order of Ninth Circuit Judge Pregerson received, granting one-day stay.
138.	April 21, 1992 (5:20 a.m.)	Harris files petition for writ of habeas corpus in California Supreme Court - Tenth State Habeas. No. S026235 (Cal.)

139.	April 21, 1992 (5:45 a.m.)	U.S. Supreme Court grants application to vacate fourth stay and orders no further stays from federal courts in *Vasquez v. Harris*, 112 S. Ct. 1713 (1992). No. A-768 (U.S.)
140.	April 21, 1992 (6:00 a.m.)	California Supreme Court denies tenth state habeas. No. S026235 (Cal.); Harris returns to the gas chamber at 6:01 a.m. and is pronounced dead at 6:21 a.m.
141.	April 22, 1992	Ninth Circuit panel recalls and vacates writ of mandamus as moot and withdraws opinion filed on April 20, 1992 in *Gomez v. United States District Court*, 966 F.2d 463 (9th Cir. 1992). No. 92-70237 (9th Cir.).

Senator METZENBAUM. Thank you very much, Mr. Campbell. We will have three 10-minute sessions for the three members that are here, an additional 10 minutes if anybody else shows up, and then we will conclude this hearing.

Mr. Nunnelley, you said that what has happened to Mr. McMillian, "does not indicate that the criminal justice system somehow failed Mr. McMillian." Now, Mr. McMillian spent 6 years on death row for a murder he did not commit. That is nothing short of a gross injustice. At least if I had been sitting in that penitentiary, or you, I think you would have thought that was pretty much of a gross injustice.

If you spent 6 years on death row for a murder you did not commit, would you consider your release by the State to be proof that the State's criminal justice system had worked for you?

Mr. NUNNELLEY. Senator Metzenbaum, I think you perhaps are to some extent misconstruing what I have said. What I am—my point to that when I say that the system works, and I do contend that the system, in fact, worked in the McMillian case—my point to that is it proves that the State courts are well able to deal with constitutional issues and to protect the rights of criminal defendants.

I would also point out, Senator, that there were two hearings on remand before the trial courts. One of those hearings was requested by the State. The first hearing was requested by Mr. McMillian, but the reason the State requested that second hearing on remand was so we could go ahead and get it over with one way or the other.

The State has no interest in delaying litigation in capital cases because, as Ward has said, time works to the advantage of the defendant. Our interest in capital cases is to get them resolved one way or the other on direct appeal, if possible. If we are going to have to retry the defendant in State court, we want that retrial to be conducted quickly. We don't want a lengthy period of time which passes from original submission on direct appeal until a reversal some years down the road. That does not work to anyone's advantage.

Senator METZENBAUM. Now, in your written testimony discussing the McMillian case you state that:

> The indisputable and most pertinent fact is that the State went to great lengths to investigate the allegation of perjury and, when that allegation proved to be true, immediately informed McMillian's attorney and dismissed the indictment against McMillian."

Mr. Stevenson has testified, Mr. McMillian's lawyer, that he met with considerable resistance from the State during his efforts to gain Mr. McMillian's release. He has said that, "The State vigorously opposed our efforts to achieve Mr. McMillian's release," even after the admission of perjury by the key witness against Mr. McMillian and the discovery that the State had unlawfully failed to disclose exculpatory evidence. Indeed, Mr. McMillian had to go through four court proceedings and thousands of hours of work by Mr. Stevenson over the course of 4 years to gain Mr. McMillian's release.

Now, I ask you, Mr. Nunnelley, haven't you misstated the facts by suggesting that the State moved immediately to grant relief to

Mr. McMillian as soon as evidence began to surface that his conviction had been obtained improperly?

Mr. NUNNELLEY. No, sir, I am not misstating the facts, and in an effort to respond to that allegation I would like to have placed in the record of these proceedings the pleadings filed by the State following the reversal of the McMillian case in which the State waived its right to proceed with rehearing before the Court of Criminal Appeals, and also to submit for the record the opinion of the Court of Criminal Appeals which, in fact, reversed this case, so there will be no doubt some time in the future about the true basis of the reversal by the Alabama Court of Criminal Appeals.

Senator Metzenbaum, let me respond to your question in this way. As an Assistant Attorney General in the State of Alabama, I am a part of what basically is the chief law enforcement agency in the State. My attorney general is the top law enforcement officer in the State of Alabama, and my response to your question would be that while we have an obligation, or had an obligation in this case that we discharged when we recommended that the district attorney dismiss the indictment against Mr. McMillian and release him, we also have an obligation to the citizens of the State of Alabama to make sure that we are not being misled or being sold a bill of goods that has, in fact, been manufactured to demonstrate someone's innocence.

Senator METZENBAUM. Mr. Nunnelley, let me ask you a question. Do you believe that race played a role in Mr. McMillian's wrongful conviction?

Mr. NUNNELLEY. Absolutely not.

Senator METZENBAUM. It had nothing to do with it?

Mr. NUNNELLEY. From what I know, Senator Metzenbaum——

Senator METZENBAUM. Let me ask you this. If race didn't play a role, then why did the district attorney tell the jury that Mr. McMillian was allegedly involved with a white woman?

Mr. NUNNELLEY. I have no idea why the district attorney made that comment.

Senator METZENBAUM. If that wasn't racial, I don't know what was.

Mr. NUNNELLEY. Well, Senator, what I can say is that—and first of all let me point out that this case was not tried in the county in which the crime occurred. It was tried in another county on a change of venue motion that was filed on behalf of Mr. McMillian.

Senator METZENBAUM. What difference would that make?

Mr. NUNNELLEY. I think it makes a lot of difference, Senator. There is absolutely no indication of any racial prejudice against Mr. McMillian from what has been determined and what has been heard in the comments made by the citizenry of Monroeville County, AL, to ABI investigators and attorney general investigators who have been living in Monroeville since November of last year.

Senator METZENBAUM. Mr. Nunnelley, saying that a black man was involved with a white woman in a trial—do you think that that is prejudicial in Alabama? If you don't think so, Mr. Nunnelley, the rest of the country thinks so.

Mr. NUNNELLEY. Well, Senator Metzenbaum——

Senator METZENBAUM. I am not talking only about Alabama. I am talking about almost every State in this Union that that would be prejudicial. That would affect the thinking of the jurors.

Mr. NUNNELLEY. Well, Senator, I think you have to look at the context in which that comment was made, if, in fact, it was made.

Senator METZENBAUM. How could it be made in any context except to be prejudicial? What relevance does it have whether he was involved with a white woman or a black woman or a pink woman?

Mr. NUNNELLEY. Senator, again, the point is the context of the statement, and we are all lawyers and we all know that you can take things out of context and make them mean one thing or another. What you have got to recognize or what you need to be aware of in this case is that this woman whom he was supposedly involved with is one of the ones who basically pointed the finger at him. That is referred to in one of the reported opinions dealing with this case. She was also involved with Myers, as far as we know, but yet she still cooked up a scheme along with Myers to point the finger at Mr. McMillian.

You have got to look at the fact that the chief ABI investigator involved in this case at the time was black. One of the witnesses who perjured himself, Hooks, was black.

Senator METZENBAUM. That doesn't relate to the specifics. If you had all black witnesses, that still wouldn't make a difference. The fact is when you refer to the reality that Mr. McMillian was involved with a white woman, that is prejudicial. That is inflaming race hatred. That is inflaming the jury to say he must be guilty, and I think for you to sit here and deny that is, to me, incredible because I just think it is a reality of life that, whether you live in the South or North or East or West, we know that that kind of a statement does have an impact upon a jury.

Let me go on. Professor Cassell, in your 1988 law review article you stated that the minimal but unavoidable risk of error in the administration of capital punishment must not be allowed to induce a failure of nerve that would paralyze society from taking the steps necessary to protect its citizens.

Suppose the death sentence imposed against Mr. Adams and Mr. McMillian had been carried out. Is it your view that the death penalty is such an essential part of protecting the people of this country that society has no choice but to tolerate the risk of a handful of mistaken executions, and is that the reason you say, well, a lot of people get killed on highways and therefore this is one of the risks, some people are going to get killed, except if it happens to be you or your brother or your cousin or your son or your daughter?

Mr. CASSELL. Senator, let me answer that question this way, and the quotation you referred to—I was quoting at that point Professor van den Haag, who is a professor up in New York, a professor of law, that has written very extensively on criminal justice matters. And I think it is question of relative risk, as I indicated in my statement. It is a question of balancing risk.

You said what if I was the innocent man facing the executioner. That is certainly a possibility, although a very remote one and one that has never come to pass, but there is a much more realistic possibility that either I or a member of my family will be facing the risk of execution not at the hands of the State, but at the

hands of a murderer. And, in fact, that happens 20,000 times each year in this country—more than 20,000.

So when the relative risks are compared, I would much rather have a system that has the death penalty to protect me against that risk than the sort of system that is proposed in S. 221 which would make it impossible to execute anyone at all.

Senator METZENBAUM. If the system that I proposed in S. 221 isn't the right system, you are a professor, a lawyer. I welcome you; come forward and tell us what changes you think can be made in order to protect the McMillians and the others who have been on death row and who shouldn't be there and have a right to get new evidence in.

Mr. CASSELL. If I could——

Senator METZENBAUM. In your testimony——

Senator HATCH. Why don't you let him answer?

Mr. CASSELL. I would be happy to make a suggestion on that point for the committee, and I know Senator Hatch has been supportive of these efforts in the past. One of the problems that we have heard discussed today is chaotic litigation brought about by 11th and 12th hour, almost, petitions and applications made by these death row inmates.

Now, I believe Senator Hatch has put forward or supported a number of proposals that would provide for a statute of limitations or a time requirement that these be presented earlier in the proceedings, and therefore they could be carefully considered by the courts.

Senator METZENBAUM. We will work with Senator Hatch and you.

In your testimony you take issue with a study conducted by the authors of the book "In Spite of Innocence." The three authors of that book found that in this century there have been 416 people who were wrongly convicted of murder or of capital rape and then sentenced to death. Approximately ⅓ of those 416 people were sentenced to death, and the authors state that 23 of those people were actually executed.

In your written testimony you specifically take issue with 5 of the 416 cases cited by the authors, and I will give them a chance to respond in writing for the record. However, in their book the authors state that in about 90 percent of the 416 cases which they cite, there was some government statement or action that admitted error. Doesn't that indicate to you that there is really a significant risk of error in many death penalty cases?

Mr. CASSELL. Well, I would ask not only that my prepared statement be made a part of the record in this proceeding, but also that my Stanford Law Review article be made a part of the record.

We wrote, for example, to Bedau and Radelet back in 1988 and explained to them the circumstances we had found in one of these cases and asked them to correct the record. They did not choose to do so. They did not choose to respond specifically to our allegations even though the pages of the Stanford Law Review were open to them to do so.

Now, your specific question was what about these instances where the Government has admitted error, supposedly, according to Bedau and Radelet, in these death penalty cases. In none of the

instances in which an execution was actually alleged to have been carried out of an innocent person was a government situation, or a situation involving a government admission of error involved.

We also point out in one of our footnotes very early on in the article, and I believe it is footnote 6 or 7, that when they claim there was a governmental admission of error, what they mean was that somebody was ultimately pardoned or released or granted clemency in some fashion. That might have happened for reasons other than innocence.

For example, if somebody has spent 20 or 30 years for a murder, the governor may conclude that that has been sufficient punishment and might release the person. We cite one example where the governor did indeed grant clemency on apparently that ground, and yet the clemency is cited by Professors Bedau and Radelet as proof of that person's innocence. So that is the kind of question I have about relying on that study, and I gave you my examples not only in my prepared statement, but in the Stanford Law Review article, of how they have manufactured, and I think that is not too strong a word, these instances of allegedly innocent people being executed.

Senator METZENBAUM. We will take a look at their book and your article as well.

Ms. Shehane, I want you to understand that my failure to ask questions of you is not to indicate that we are not very, very appreciative of your presenting your testimony here today. There isn't a member of this committee, whether present or not present, who doesn't empathize with your tremendous loss, and we appreciate your coming here. I am sure it was not an easy assignment for you. Thank you so much.

Senator Hatch?

Senator HATCH. Thank you. I would ask that a question by Senator Pressler to Professor Cassell be submitted to him for answer later.

Senator METZENBAUM. Without objection, so ordered.

Senator HATCH. Now, Ms. Shehane, no one can fully appreciate the eternal pain that you are suffering or you must feel for the loss of your daughter, and you have demonstrated great courage in coming here and testifying before this committee.

Now, when you hear about cases of individuals who have been wrongly convicted of murder and later released, how does this affect your support for the death penalty?

Ms. SHEHANE. When I hear of the cases of Mr. Adams and Mr. McMillian——

Senator FEINSTEIN. Could you pull the microphone over? Thank you.

Ms. SHEHANE. I am sorry. When I hear of the cases of Mr. Adams and Mr. McMillian, I honestly hurt for them, but I still say the system has worked. And you say how would I feel if I had spent 6 years in prison wrongfully. I wouldn't feel good, but Mr. McMillian is alive and Mr. Adams is alive because the system worked.

I ask you and the committee which is worse. We have many murderers who have been acquitted—many murderers have been acquitted that are guilty, and no matter—they don't have a timeframe; they have got to swallow it. As you say, you have got to suck and swallow it up. No matter where the proof, 10, 20 years,

comes, you can't try that person again. So while I am not rejoicing—and I don't rejoice when someone is executed, but it is essential.

Senator HATCH. When individuals claim to create additional avenues of review, especially in these death penalty cases, how does that make you feel? What is your reaction to such claims?

Mr. SHEHANE. I know that it took 13½ years to execute the only one that was on death row that killed my daughter, and I know how it felt for them to wait until the last minute to file anything because that is the name of the game. You see how long you can go before you wear someone down, and when I see something like S. 221, I know that is another loophole that we have got to jump through. It is another timeframe that we have got. In essence, I think it will do away with the death penalty.

Senator HATCH. Well, there are many who agree with you and I am one of them.

Mr. Cassell, in your prepared remarks you note that some opponents of the death penalty claim that, quote, "politics," unquote, of clemency prevent justified pardons. It would seem, therefore, that President Clinton, a former governor, and 16 former governors now serving in the Senate were incapable of protecting against the execution of an innocent person.

Now, is clemency an adequate safeguard to protect against wrongful executions?

Mr. CASSELL. Absolutely, Senator Hatch. As you know, the pardon clause in our Federal Constitution, article II, section 2, Clause 1, authorizes the President to grant clemency. States have very similar provisions. In fact, all States that authorize the death penalty provide some means for executive clemency.

Now, with respect to your specific question about how does politics factor into this, politics, it seems to me, plays no role at all in these executive clemency decisions when a claim of innocence is involved. As we heard from the remarks today from virtually every Senator that was present, no one is arguing for the execution of innocent persons. There is no political push for that.

Obviously, all the citizens in this country are opposed to the execution of innocent people, and therefore the governors, their elected representatives, are going to give effect to that and carefully review these cases to make sure that the only executions that go forward are those in which doubt is not there about guilt or innocence.

Senator HATCH. Let me ask you this. Some have indicated here today, or suggested that the Supreme Court in the case of *Herrera* v. *Collins* held that it is constitutional to execute an innocent person. Now, I would like you to discuss your reading of the *Herrera* case and whether the Court's decision in this case was unprecedented.

Mr. CASSELL. Well, as you know, Senator, it is important to parse the various opinions in some of these Supreme Court decisions to put together the holding. There were three dissenters in that case, Justices Souter, Blackmun and Stevens, and all of them believe that a claim of innocence could be raised essentially at any time. Justice White agreed that he would assume that a persuasive showing of actual innocence made after trial would render unconstitutional the execution of Herrera, and therefore the pivotal opin-

ion was the concurrence of Justice O'Connor, joined by Justice Kennedy.

She said that she could not—this is a quotation from the opinion—"could not disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." So it is clear that there are six votes in the Court now—I realize Justice White has resigned, but at least five votes of the currently sitting members, or currently sitting Justices, who would recognize a claim of innocence. Now, this is not just my reading of *Herrera*. In fact, this month's issue of the American Bar Association Journal—I think the most widely distributed legal publication—takes exactly the same view of the case.

Senator HATCH. The remote possibility of some day executing an innocent person has caused some to call for the repeal of capital punishment or repeal of the death penalty. In your view, which would prove more effective in fighting violent crime, to repeal the death penalty or to continue to impose this punishment for the most heinous of offenses?

Mr. CASSELL. There is no question, Senator, that the death penalty is a critical part of fighting violent crime in this country. It is the most visible means of deterrence that we have. I indicated in my prepared testimony that the deterrence argument is supported by logic, by anecdote such as the anecdote provided by Senator Feinstein earlier this morning, supported by deterrence studies which I have cited in my testimony. All of those suggest very clearly that the death penalty deters crime, and that if we do away with the death penalty or make it impossible to carry out, as S. 221 would do, we place innocent lives very clearly at risk.

Senator HATCH. Now, you showed us the Time Magazine article about Roger Coleman. Time claimed that he might be innocent——

Mr. CASSELL. Yes.

Senator HATCH [continuing]. And made a major pitch in a major article on that. Now, have you had the opportunity to investigate that?

Mr. CASSELL. Yes.

Senator HATCH. Could you tell us a little bit about what your findings are?

Mr. CASSELL. Yes. Well, this is all recounted in the Federal district court opinion that very carefully reviewed these claims of innocence much more carefully, I must say, than Time Magazine did. What Time Magazine forgot to tell its readers—I think the omission is deliberate, but that would be speculation on my part. They certainly had access to the information; they didn't report it.

Back in 1982 when Coleman was convicted, they were able to run blood type tests on the sperm that was left in the victim who had been raped and brutally murdered, but DNA testing was not sufficiently developed at that point to allow the State to use it. So then in 1990, Coleman petitioned the district court to have a court-appointed expert appointed at taxpayers' expense, I believe it was, to investigate whether the DNA analysis had now progressed to the point that it could permit a positive identification of the perpetrator of the crime, and Mr. Blake, or Dr. Blake, rather, from California was hired to do that at Coleman's request.

Now, Dr. Coleman came up with a positive match on the DNA——

Senator HATCH. Dr. Blake, you mean?

Mr. CASSELL. I am sorry. Dr. Blake came up with a positive match on the DNA. He was able to actually shrink the odds of it being anybody else over and above what the evidence was at trial. He found that there was—the DNA chromosomes matched, so that with a .2 percent possibility of error, it looked as though Coleman was the perpetrator of the crime. This was on top of all the other evidence. Actually, as the Federal district court judge found, the evidence of Coleman's guilt became stronger as time progressed because of this DNA evidence that linked him to the crime.

Senator HATCH. So, ninety-nine and four-fifths was——

Mr. CASSELL. Just based on this one piece of evidence—and, of course, there were dozens of pieces of evidence in the trial, but 2 out of 10,000 members of the population would be the only ones possible for having perpetrated this crime.

Senator HATCH. Do you agree with Ms. Shehane that if this legislation passes, it is just another gigantic loophole for people retroactively, everybody sitting on death row, to make a last-ditch additional appeal that will give them perhaps years to continue to live even though they are guilty as sin?

Mr. CASSELL. Absolutely, Senator. All they have to do is present some claim of innocence. It need not be reasonable, it need not be well-founded, it need not be anything at all. Indeed, it just needs to be under the terms of——

Senator HATCH. While you are talking about that, please talk about the cost to society, financial and otherwise, for these incessant, frivolous, repetitive appeals that go on for years and years using the whole legal system and, frankly, making a mockery of it, in my opinion.

Mr. CASSELL. Yes. Well, I believe that one of the leading causes of dissatisfaction with our criminal justice system in the United States today is these repetitive and apparently, in many cases, frivolous death penalty appeals. Now, you could talk about the cost in terms of attorney time or cost to the deterrent effect, but I think the cost that is probably hardest to quantify but perhaps the most telling is the sort of cost that Ms. Shehane talked about just a few moments ago, the cost to victims in never having these cases come to a close.

Senator HATCH. And reliving and reliving and reliving and reliving the terrible experiences that they have had to go through.

Mr. CASSELL. Absolutely, Senator.

Senator HATCH. Do you other prosecutors agree with that? Do you agree with what Mr. Cassell has said, Mr. Campbell?

Mr. CAMPBELL. Yes. I think I said in the original statement, absolutely. This is an automatic, last-minute, final stay of execution bill for anyone who can present an affidavit that might establish some probable innocence, no matter how weak or meritless the claim is. It can indefinitely stay the execution.

Senator HATCH. Mr. Nunnelley?

Mr. NUNNELLEY. I think it is a guaranteed, sure-fire, indefinite stay of execution, Senator Hatch.

Senator METZENBAUM. Thank you very much.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much. I think notwithstanding anything we heard today, I still don't know any system of justice anywhere in the world that goes the length that our system does to protect the rights of the accused, and I think everybody in this room knows people who are guilty who are able, for one reason or another, to find themselves acquitted or found not guilty.

I would like to ask a couple of questions, if I may, of Mr. Campbell and begin by saying thank you for coming this long distance. I am increasingly aware how long it is.

Mr. CAMPBELL. Especially at night.

Senator FEINSTEIN. Yes.

Mr. CAMPBELL. Let me just ask you this question. You mentioned Robert Alton Harris. If Senate bill 221 were the law today, and despite the long list of habeas corpus requests made by Mr. Harris, and the delay, could he have utilized this law to have prevented his execution?

Mr. CAMPBELL. Definitely, because normally in that kind of situation we would have arguments about Mr. Harris delaying and not bringing his claim earlier and not raising the claim in State court. None of those claims would be available to us under S. 221. It applies, notwithstanding any other provision of law, which I would include all the laws that are part of the case law that allow us to force defendants to bring these actions early and completely.

Senator FEINSTEIN. And so how many people are presently on death row in California?

Mr. CAMPBELL. Checking the statistics I had this morning, I believe it is 350, approximately, Senator.

Senator FEINSTEIN. 350, and this goes back how long?

Mr. CAMPBELL. This is—well, you mean how long the inmates have been on death row?

Senator FEINSTEIN. That is correct.

Mr. CAMPBELL. These are convictions, I would imagine, dating clear back to 1977.

Senator FEINSTEIN. 1977?

Mr. CAMPBELL. Yes, when the death penalty law in our State went back into effect.

Senator FEINSTEIN. And most, if not all of them, have utilized the habeas corpus to delay their execution?

Mr. CAMPBELL. All of them are either in the process—as you know, you have talked about what a massive review process goes on. Many of them have already had their cases reviewed on direct appeal by the California Supreme Court. Many of them have had their cases reviewed on State habeas corpus by the California Supreme Court. Those cases which have completed that process and which were not reversed by the State courts are now moving into the Federal district court on habeas. I believe we have four cases now before the Ninth Circuit Court of Appeals.

Senator FEINSTEIN. And if this statute or this bill were law, I take it that all 350 would be able to utilize this statute to once again bring about a delay of sentence?

Mr. CAMPBELL. That is our reading of it and I am sure that is the way it would be espoused, and I would emphasize, Senator, not only would they use it, they would wait until the last possible mo-

ment to use it when all other avenues, all other claims have been exhausted. They would take this evidence, put it in their back pocket and hang on to it for the very last minute because once they have filed that petition, there is no discretion. The Federal judge must stay the execution, and it is basically an indefinite stay.

Senator FEINSTEIN. And you have read the bill?

Mr. CAMPBELL. Many times.

Senator FEINSTEIN. How many times could they utilize this bill?

Mr. CAMPBELL. I don't see any—in the way the bill is written, I don't see any inherent limit on it. How the courts will construe it or construct upon it remains to be seen, but reading the bill, it says "notwithstanding any other provision of law." It is a very sweeping bill.

Senator FEINSTEIN. And I understand you are the main man with respect to capital cases in the State of California?

Mr. CAMPBELL. I don't think we have a main man. There is a group of us who keep track of these issues and I am one of them.

Senator FEINSTEIN. You are one of them. So in your judgment, then, this could be utilized over and over and over again, as drafted?

Mr. CAMPBELL. I am confident that there will be attempts to do that. You saw what happened last year with the Harris case, in which we had four stays of execution within a matter of hours, and the article that I have placed in the record has almost a minute-by-minute account of that. I am sure that to the extent that this avenue remains open and there is a Federal judge willing to accept the filing, any defendant will keep trying to use it because they want to delay the execution. Delay is in their favor. Witnesses die, evidence goes stale. The longer you can hang on, the more likely it is that you might be able to gain some relief some day.

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

Senator METZENBAUM. Thank you. Let me just say in response to this last colloquy that the chief criticism of this bill is that it is going to flood the judicial system with frivolous claims of innocence and there will just be continued claims filed. Now, the legislation is not intended to achieve that objective. It is intended to provide a Federal backstop for the relatively rare circumstances in which a death row inmate has new evidence of innocence and no other opportunity for a hearing. It is intended to be a safety valve, not an avenue for needless delay. I don't want needless delay. I think that is inappropriate and I would not be a party to it.

If there is credible evidence which raises questions about whether the Government is executing the wrong individual, then I believe there ought to be a hearing to resolve those doubts before going forward with the execution. That is all this bill is intended to do. Now, I would anticipate that in most instances these claims can be disposed of in a summary manner, but it may be necessary to develop additional safeguards in the legislation to ensure that the remedy created by the bill is not abused, and I am willing to discuss that subject.

I am not wedded to the language of the bill and I am open to any suggestions. The point is to have a safety valve available for those rare instances in which there are serious doubts about

whether the Government is executing an innocent person. *Herrera* removed that safety valve, and now it is necessary to restore it via legislation. That doesn't mean that this Senator or any other member of this committee thinks that we just ought to have a continuum of appeals filed ad infinitum, but rather to provide some procedure in those few cases where there is credible new evidence that indicates that the person subject to being executed has new evidence that should be brought before the court.

I see that Senator Pressler has joined us.

Senator PRESSLER. Yes. I have a brief line of questioning. I had been here earlier, but being the most junior on this side of the aisle on the committee, I decided to go to the Foreign Relations Committee and come back. I don't want to detain people for long, but I did want to address some questions to Professor Cassell regarding his written testimony about studies that demonstrate the effectiveness of the death penalty.

When I was a young man, and even now, I always have heard that all the studies demonstrate that the death penalty is not an effective deterrent. In your testimony, you cite a North Carolina study that indicates the death penalty is a very effective deterrent. In fact, in your testimony you say that you could calculate that thousands of lives have been saved based on your calculations.

Would you, or anybody else who wants to cite a study? elaborate on the studies that have been done? Do studies demonstrate that the death penalty is an effective deterrent to murder?

Mr. CASSELL. Yes, they do, Senator. Before delving into your specific question about the studies, I don't make the deterrence argument based solely on the studies that I cite in my testimony. It rests on a collection of things, that logic suggests the death penalty would deter crime, that we have anecdotes such as the anecdote cited by Senator Feinstein earlier this morning that suggest the death penalty deters crime in some areas, and then we have the structure of our whole criminal justice system. Whenever this committee sees something that is of concern, the natural tendency is to raise the penalties on the hope and belief that that will deter the activity.

That leads us to the last question, then, what do the studies show in this area. Well, the studies that I have collected in my prepared testimony, I think, are the best studies in this area. I had an earlier report prepared, along with then Assistant Attorney General William F. Weld, when we comprehensively reviewed all deterrent studies that had been done at that time in 1987. That was a report to the deputy attorney general and perhaps I could provide that to the committee as well to make that a part of the record of the hearing. That goes through the problems with some of the studies that find no deterrent effect and explains at greater length why the study—and the one you are referring to is the study done by Professor Stephen Layson, who is at, I believe, the University of North Carolina at Greensboro—is, in our view, the best study.

Now, what he did was looked at the homicide data in this country from 1936 to 1977 and he concluded—it was a multiple regression analysis controlling for various factors. He concluded that during that period of time each execution deterred 18 murders, and

that is then the basis of the calculation that you saw in my prepared testimony.

Now, that study is consistent with some other studies that I cite. It is also consistent with the emerging consensus, I think, in other areas outside the very controversial and hotly contested area of the death penalty. The consensus, I believe, is that stronger penalties deter crime, and there is no reason why essentially or quintessentially contemplative crimes like murder for hire and those sorts of things—there is no reason that those crimes should be an exception to the general rule. So I think it is quite clear that the studies do support a deterrent effect.

Senator PRESSLER. OK. Now, in many universities they come up with studies to the contrary. I don't know what those studies are, but the conclusion is commonly repeated—either it is myth or folklore or something, but you run into that all the time. People will stand up and say all the studies show that the death penalty does not deter murder.

Mr. CASSELL. That is right.

Senator PRESSLER. Now, are there other studies besides the North Carolina study? Wasn't there one at Northwestern or the University of Chicago?

Mr. CASSELL. Well, I think I have collected the salient studies in my prepared testimony.

Senator PRESSLER. What page is that on?

Mr. CASSELL. That is at page 22 of my testimony.

Senator PRESSLER. That is right.

Mr. CASSELL. Professor Layson has, in fact, done three studies in this area—one of them is from Canada—concluding that the death penalty deters crime.

Senator PRESSLER. Now, how authoritative is Professor Stephen Layson of the University of North Carolina at Greensboro? Tell me about him.

Mr. CASSELL. Well, I would speak—rather than about his qualifications, I would talk about the quality of his study, which is, to my reading—and, again, this was back in 1987. We surveyed all existing deterrence literature in our report to the deputy attorney general. At that time, I was an associate deputy attorney general in the Justice Department.

This was the best study because the deterrence literature talks about both the supply of crime and the demand for crime. That is maybe a funny way of talking about it, but unless you control for both of those aspects, it is very difficult to do a proper deterrent study. That is what Layson's studies do and his study suggests that each execution deters 18 potential murders.

Senator PRESSLER. And he also did a Canadian study. What did that show?

Mr. CASSELL. I don't recall the exact execution-to innocent lives saved tradeoff, but it reached the same conclusion that there was a deterrent effect.

Senator PRESSLER. That was a 1984 study, as I understand it. In addition to Layson, who else can you cite?

Mr. CASSELL. I would also cite the study by Professor Wolpin published——

Senator PRESSLER. By whom?

Mr. CASSELL. Wolpin, W-o-l-p-i-n, published in the American Economics Review in 1978.

Senator PRESSLER. OK.

Mr. CASSELL. Phillips and Ray also did a 1982 study, and the interesting thing about those studies is we sometimes hear, well, sure, the death penalty might deter, but let us lock somebody in prison for the rest of their life and that has a strong deterrent effect. They controlled for that and concluded, as I think logic would suggest, that the stronger penalty, the death penalty, has an incremental deterrent effect, and that, of course, is a very interesting finding.

It is interesting, too, having recently entered the academy—you talked about hearing these myths repeated. Sometimes—and I think the Bedau and Radelet study claiming that 23 innocent people have been executed—that is one of those myths, too, that just seems to be repeated over and over again by professors or others that have a particular philosophical or political ax to grind in this area, but when you look at the facts, the facts demonstrate something quite different.

Senator PRESSLER. How many people have been executed in error?

Mr. CASSELL. Assistant Attorney General Stephen Markman and I back in 1988 reviewed all of the claims back at least through the last 50 years, back through 1940. When we started going back further than that, it was sometimes difficult to find court records. But at least in the last 50 years, no innocent person has been executed in this country according to the best available evidence.

Senator PRESSLER. Is that under Federal law or the State law?

Mr. CASSELL. Both Federal, State, everywhere in the United States of America. No innocent person has been executed in this country for at least the last 50 years.

Senator PRESSLER. OK. There was a case in South Dakota where a death-bed confession was made by somebody else, but maybe that was over 50 years ago.

Mr. CASSELL. There may be some older cases that I am unfamiliar with.

Senator PRESSLER. Yes. This was a very troublesome case. Let me just ask one more question. You talk about the fellow who was on the front of Time Magazine. Now, that fellow has been executed in Virginia correct?

Mr. CASSELL. Yes.

Senator PRESSLER. Maybe you have covered this. If you have covered this, I will read it in the testimony. This is my last question. You reference talk on the bottom of page 12 the fellow who was on the front cover of Time Magazine. Time says this man is innocent or may be innocent. You mentioned there was a DNA test. Time Magazine states, "This man might be innocent, this man is due to die."

Mr. CASSELL. Right. This is the magazine. I don't commend it to your reading, but it certainly was——

Senator PRESSLER. I would like to read it again and I will get a copy. Have you already covered this? Can I cover this real quickly?

Mr. CASSELL. Yes, I did discuss this briefly with Senator Hatch.

Senator PRESSLER. OK.

Mr. CASSELL. I think the quickest way to resolve this is to simply make as a part of the record of this hearing the findings of the Federal district court judge that reviewed all of these claims that were recounted in Time Magazine—did exactly, I guess, what S. 221 would allow. And after doing that, the district court judge concluded that there was not even a, "colorable claim"—not even a colorable claim of innocence on Roger Coleman's behalf, and that Federal district court opinion reviews all the evidence very thoroughly, including the so-called newly discovered evidence.

Senator PRESSLER. Yes. The case in South Dakota was of John Egan's great-grandfather. John Egan is a writer for the Argus Leader. The wrong person was hung. Subsequently the person who did commit the crime gave a detailed death-bed or cancer confession. It might have been over 50 years ago, so I guess that clearly was a mistake. Mr. Egan is writing a book about his great-grandfather.

I think it is important that we look at these studies and consider them. Your testimony is very good, what I have read here today. I appreciate your testimony very much, and I say that to all the witnesses.

Senator METZENBAUM. Thank you very much, Senator Pressler. Thank you to the members of the panel. We appreciate your being with us this morning. The hearing stands adjourned.

[Whereupon, at 1:33 p.m., the Committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

II

103D CONGRESS
1ST SESSION

S. 221

To allow a prisoner under sentence of death to obtain judicial review of newly discovered evidence showing that he is probably innocent.

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 5), 1993

Mr. METZENBAUM (for himself and Mr. HATFIELD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To allow a prisoner under sentence of death to obtain judicial review of newly discovered evidence showing that he is probably innocent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1651 of title 28, United States Code, is amended by adding at the end the following:

"(c)(1) At any time, and notwithstanding any other provision of law, a district court shall issue any appropriate writ or relief on behalf of an applicant under sentence of death, imposed either in Federal or in State court, who establishes that he is probably innocent of the offense for which the death sentence was imposed.

"(2) On receipt of an application filed pursuant to paragraph (1), a district court shall promptly stay the applicant's execution pending consideration of the application and, upon an unfavorable disposition, until the court's action is affirmed on direct review.

"(3) The court shall dismiss the application, unless it alleges facts, supported by sworn affidavits or documentary evidence, that—

"(A) could not have been discovered through the exercise of due diligence in time to be presented at trial; and

"(B) if proven, would establish that the applicant is probably innocent.

"(4) If the court determines that the applicant is currently entitled to pursue other available and effective remedies in either State or Federal court, the court shall suspend its consideration of the application under this section until the applicant has exhausted those remedies. The stay issued pursuant to paragraph (2) shall remain in effect during such a suspension.".

O

ADDITIONAL SUBMISSIONS FOR THE RECORD

UNIVERSITY OF FLORIDA,
Gainesville, FL, May 25, 1993.

Hon. HOWARD M. METZENBAUM,
Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: On April 1, 1993, the Senate Judiciary Committee heard testimony from Paul G. Cassell concerning S. 221, a Bill that would allow death-sentenced inmates to obtain judicial review if evidence showed probable innocence. Mr. Cassell concluded that the American system of criminal justice "is doing an admirable, if not indeed perfect, job of preventing the execution of innocent defendants." Mr. Cassell has himself never conducted any original research on this important question; his testimony consisted largely of an attempt to discredit the research on this issue that Hugo Adam Bedau and 1 have been doing for the last decade. Professor Bedau and 1 would appreciate the opportunity to respond briefly to Mr. Cassell's comments.[1]

Mr. Cassell neglected to inform the Committee that Professor Bedau and 1 have responded in print to all of the criticisms he has made of our work,[2] and we hereby request that our response be incorporated into the record. Worse yet, Mr. Cassell completely ignores the *content* of our response. His testimony is simply a rehash of his earlier criticisms, with absolutely no attempt to respond to our reply.

In his discussion of 5 of the 23 cases that Professor Bedau and I characterize as erroneous executions, Mr. Cassell does little more than repeat the prosecution's theory of the case, making it appear that the evidence against the defendants was strong and conclusive. In all the cases, he simply ignores the evidence of innocence that we detailed in our original work.[3] In the Tucker case, for example, over 100,000 citizens and the county medical examiner demanded clemency because of doubts about guilt. In the Hill case Cassell fails to inform the Committee that President Woodrow Wilson was among those who believed it was a miscarriage of justice. In the Appelgate case, we point to the concerns about guilt that were expressed by the then Governor of New York, Herbert H. Lehman. In effect, Mr. Cassell is trying to convince this Committee that the doubts of 100,000 citizens, of governors, and of presidents are not "reasonable"—and in fact are not even worth mentioning.

Moreover, Mr. Cassell charges us with "scholarly abuses" because we cite sources in our work that disagree with our conclusions. In fact, as we explained in our published response that Mr. Cassell failed to mention, we cited all sources known to us about the cases we studied, even if they did not support our conclusion. Norms of scholarly objectivity demand no less. Mr. Cassell, on the other hand, ignores all sources that disagree with his settled view. Clearly, Mr. Cassell is trained as an advocate and a litigator, not as an objective scholar.

Mr. Cassell has never disputed the fact that in over ninety percent of the cases we presented, there is one or more official actions by the State (either judicial, legislative, or executive) that either formally or informally admits that a substantive (as opposed to due process) error was committed. He would have his readers reach the false conclusion that only Bedau and Radelet—rather than the State officials themselves—support the conclusion of innocence. In fact, neither Cassell nor anyone else

[1] Prof. Cassell, in Note 4 of his prepared testimony, noted that Prof. Radelet had testified before the Senate Judiciary Committee in 1989. He does not add that he also testified in those hearings, and that his 1993 testimony is largely a repeat of what he said in 1989.

[2] Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell,* 41 STAN. L. REV. 161 (1988).

[3] Mr. Cassell's written testimony to this Committee distorts even his own work. He states that his 1988 article "reviewed all eleven cases of alleged executions of innocent persons in which appellate opinions set forth facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of Bedau and Radelet's claims, including all of the cases since 1940." In fact, he ignored three of the examples we give as erroneous executions—Sacco, Vanzetti, and Hauptmann—despite the fact that they are among the best documented cases of the century. Further, Mr. Cassell has never challenged the innocence of one of the four post-1940 examples of erroneous execution we do provide, that of William Anderson in 1945.

has ever challenged the inclusion in our book of 98 percent of the cases we present. He simply ignores the irrefutable evidence of the fallibility of trial and appellate courts in capital cases.

Mr. Cassell also presented the Committee with a distorted discussion of the research that has been done on the deterrent effect of capital punishment. Again, the belief that only sources that support his conclusion should be cited is seen. Mr. Cassell argues that the death penalty has strong deterrent effects, and cites a study done by Stephen Layson, a young economist, not a criminologist, and published in a regional economics journal, as support.[4] He ignores the fact that a meticulous critique of this study has been published since 1989 that showed that Mr. Layson's conclusions do not follow from his data.[5] In addition, Mr. Cassell ignores the fact that no criminologist or sociologist in the country today claims to have data that show the death penalty has a better deterrent effect than long imprisonment. He ignores the fact that virtually every study done on deterrence in the United States in the last sixty years has found no deterrent effects. He ignores such authority as the National Academy of Sciences, whose study on this topic in 1978 concluded that a study similar to that cited by Mr. Cassell had no relevance for public policy.[6] Even Stephen Layson, author of the study cited by Mr. Cassell, acknowledged in his 1985 Congressional testimony that his results were an artifact of the 1960s, when few executions occurred, and thus the findings could not be generalized to other years in the irresponsible way done by Mr. Cassell.[7] By ignoring the problems with the work on deterrence he cites, as well as ignoring numerous other studies that conflict with his preset conclusions, Mr. Cassell misleads this Committee about the status of modern research on deterrence.[8]

We conclude by noting Mr. Cassell's assertion that no innocent defendants have been executed in America in the last 50 years. The statement is preposterous; neither Mr. Cassell nor anyone else has attempted to study the hundreds of executions that have occurred in this country since 1940 to see what evidence of innocence remains. As we said in our 1988 reply to the Markman and Cassell piece (the reply that Mr. Cassell ignores), we never claimed to "prove" beyond a reasonable doubt that any specific executed defendant was unquestionably innocent. There is no forum, as Mr. Cassell knows, in which any such "proof" could be presented and verified, and, as our research pointed out, no State has "officially" acknowledged that a prisoner executed under its authority in the twentieth century was actually innocent.

What we have claimed is that there is evidence sufficient to convince reasonable and unbiased observers that innocent people have been executed in the past fifty years, and that numerous innocent persons have been sentenced to death and spared execution in the last few days, hours, or minutes only by extraordinary good luck. Mr. Cassell does not dispute this latter point, but he ignores it— just as he conveniently ignores the way the demonstrable and undeniable truth of these close calls totally undermines his complacent belief that no innocent people have been executed in the last fifty years.

The Committee heard testimony from Randall Adams and Walter McMillian. Our book presents 400 similar case studies, ninety percent of which involve the admission of error by State authorities. This body of evidence clearly shows that innocent

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[4] Layson, *Homicide and Deterrence: A Reexamination of the United States Times-Series Evidence*, 52 S. ECON. J. 68 (1985).

[5] Fox & Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. OF L.A. L. REV. 29 (1989). This critique was coauthored by Professors James Alan Fox and Michael L. Radelet. Fox is now Dean of the College of Criminal Justice at Northeastern University and the editor of the journal, Quantitative Criminology. Their conclusion that Layson's results are worthless has never been challenged.

[6] Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 336 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

[7] *Capital Punishment: Hearings On H.R. 2837 and H.R. 343 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. 311 (1985) (testimony of Stephen Layson).

[8] The best recent review of deterrence research, and other issues related to the death penalty, was prepared for the United Nations Committee on Crime Prevention and Control. *See* R. Hood, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (1989) (concluding that the research on deterrence "should lead any dispassionate analyst to conclude . . . that it is not prudent to accept the hypothesis that capital punishment deters murder" (p. 147)). Raymond Paternoster, in his textbook on capital punishment, reaches a similar conclusion. "After years of research with different methodologies and statistical approaches, the empirical evidence seems to clearly suggest that capital punishment is not a superior general deterrent." Paternoster, CAPITAL PUNISHMENT IN AMERICA 241 (1991).

people continue to be sentenced to death, and a near certainty that innocent people continue to be executed.

Yours sincerely,

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The Myth of Infallibility: A Reply to Markman and Cassell

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The Myth of Infallibility: A Reply to Markman and Cassell

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Markman and Cassell[1] summarize their principal objections to our research by claiming that: (1) we have "employed an unacceptable standard for determining innocence. . . . [that] gives no weight at all to the considered judgment of the juries and judges who decided and reviewed the cases";[2] (2) we have presented "incomplete and misleading accounts of the evidence" relevant to guilt or innocence;[3] and (3) in those cases where "a reasonably complete account of the facts is readily available," our claim that "the defendant was later 'found' or 'proven' to be innocent is unconvincing."[4] They go on to argue that even if our research did not suffer from these grave flaws, "it would not provide a rational basis for rejecting capital punishment."[5] Paucity of space here denies us the opportunity to reply in detail to Markman and Cassell's criticisms, but the discrepancy between their characterizations and what we actually asserted, argued, and implied is so great that it warrants at least a brief response.

I. Subjective Methodology

Markman and Cassell complain again and again about what they call our "methodology."[6] They do not mean by this what we called our "methodology," namely, the methods we used to obtain information

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1. Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988). The first draft of the Markman and Cassell response appeared in the form of an 18-page internal Department of Justice memorandum. *See* S. Markman, Response to Bedau-Radelet Death Penalty Study (Jan. 13, 1986) (memorandum submitted by Stephen J. Markman, Assistant Attorney General, to Edwin Meese III, Attorney General) (on file with the *Stanford Law Review*). The opening sentence reads: "This memorandum responds to your request for a response to the recent study of capital cases conducted by Hugo Bedau and Michael Radelet . . . ." *Id.* at 1.
2. Markman & Cassell, *supra* note 1, at 145.
3. *Id.*
4. *Id.*
5. *Id.*
6. *See, e.g., id.*, at 122, 123, 126.

about alleged cases of wrongful conviction.[7] Nor do they offer an alternative "methodology" that they regard as superior to ours. Our practice was simply to review all the information we could find about a given case, citing our sources so others could follow our trail, before including or excluding the case from our catalogue. Although they disagree with our evaluation of the evidence for innocence in several borderline cases, their critique of our evaluation appears to us to have involved no departures in principle from our own practice. Their criticisms would establish a flaw in our methodology only if their disagreements were based on evidence or reasoning available to them because they relied on a different (and to this extent superior) "methodology." Mere disagreement with our evaluation in any given case does not impeach our "methodology"; if anything, it vindicates it.

II. Compelling Evidence and Unanimous Juries

Markman and Cassell contend that in the Adams case, our article "ignores the compelling evidence that convinced a unanimous jury of his guilt beyond a reasonable doubt,"[8] and that in this and other cases, we alone have judged the convicted defendants to be innocent.[9] Their charge is false and misleading. First, in 160 of our cases, we point to appellate courts that reversed convictions, to trial juries that acquitted defendants previously convicted, or to prosecutors who decided not to retry the defendant whose conviction had been reversed, as evidence of a prior miscarriage of justice.[10] So we did indeed give weight to the "considered judgment of the juries and judges," although we did not take it as conclusive evidence of guilt—any more than we treated acquittals at retrial as conclusive evidence of innocence. There are only forty-one cases, including the twenty-three where we believe that the defendant was executed in error, in which we cannot point to some official nullification of the conviction.[11] We remain convinced that the trial courts in these forty-one cases were in error—just as various government officials, juries, and courts in effect agreed that the trial courts had erred in the other 309 cases.

Second, we of course recognize that in all of the 350 cases, as in the Adams case, a trial court accepted a plea of guilty or rendered a guilty verdict. Nonetheless, we believe that the defendant was innocent in every one of these cases. Markman and Cassell write as if the trial court is the final authority on the factual question of the defendant's guilt.

7. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 27-31 (1987).

8. Markman & Cassell, *supra* note 1, at 131.

9. *See id.* at 126.

10. *See* Bedau & Radelet, *supra* note 7, at 49, table 5, line I-C.

11. *See id.* at line II. In regard to these 23 cases, we noted that it was unsurprising that "we have found no instance in which the government has officially acknowledged that an execution . . . was in error." *Id.* at 25.

Worse, they write as if part of the evidence against the defendant is the fact that a trial court judged the defendant to be guilty "beyond a reasonable doubt." Since many of these unanimous juries[12] (and some unanimous appellate courts[13]) have been demonstrably in factual error, we are unpersuaded by the ostensibly "compelling evidence" that persuaded the trial court in the first instance in each of our 350 cases. The issue our research undertook to investigate is whether trial courts, including unanimous juries, in potentially capital cases are always factually correct in their judgments of guilt "beyond a reasonable doubt." We have demonstrated that they are not.

Third, we do not ignore "compelling evidence" in the Adams case or in any other. It is true that we did not state or even summarize in our vignettes all the evidence in the public record; our vignettes averaged only about 150 words each.[14] We tried to provide the reader with only the information that sufficed to explain our classification of each case under the variables we chose to study,[15] to indicate what grounds we had for judging the conviction to be in error, and to refer the interested reader to further information on the case, whether or not these sources discussed or alleged the defendant's innocence. Markman and Cassell, as their discussion of the Adams case shows, prefer instead simply to restate the case for the prosecution, as though that by itself impeaches our judgment. Unlike our critics, we attempted to refer readers to all major sources where information could be obtained, not simply to those sources that buttress our conclusions. All our critics show is the inadequacy of our case summaries for their own purposes. Suffice it to say here that nothing these critics have noted removes the very serious doubts in the Adams case, or in any other case included in our catalogue.

III. Execution of the Innocent

Markman and Cassell allege that our study lacks "relevance."[16] In no single case, however, do they show how a proffered fact or argument is irrelevant to the purpose of our study, which, as we plainly stated, was to give as full a picture as we could of the extent, variety, causes, and remedies of errors in potentially capital cases.[17] Instead, they imply that everything we wrote is to be measured for its "relevance"

12. We did not record which of our 350 defendants were convicted without a jury trial. The number, in any case, is small.

13. See, for example, the following death sentence cases: James Foster (Bedau & Radelet, *supra* note 7, at 114); Lloyd Miller (*id* at 147-48); Isidore Zimmerman (*id.* at 171-72).

14. *See* Bedau & Radelet, *supra* note 7, at app. A at 91-172. We do not have the opportunity here to outline the many problems in the distorted summaries Markman and Cassell have presented of the cases they contest. The space they devote to the Adams case alone is roughly equivalent to three-fourths of the space allotted for our entire reply.

15. *See generally id.* at app. B at 173-79.

16. *See* Markman & Cassell, *supra* note 1, at 122.

17. *See* Bedau & Radelet, *supra* note 7, at 23, 26, 86.

against the theme in our essay on which they focus their criticism: the execution of the innocent defendant,[18] a theme to which we devoted less than five percent of our article.[19] We note that our critics do not dispute that: (1) many persons convicted of homicide were innocent; (2) many of these convictions occurred in capital jurisdictions; (3) many of these defendants were sentenced to death; (4) some of these death sentences would have been carried out had it not been for interventions shortly before the scheduled execution; and (5) many of these interventions had nothing to do with normal judicial review procedures, much less with any recent statutory safeguards.[20] They object mainly to our claim that (6) some of these innocent defendants were executed. They argue that we have not proved this in regard to at least a dozen of the twenty-three cases we count in the column of executed innocents.

We of course anticipated that subsequent investigators might disagree with us on some borderline cases,[21] either on the basis of their interpretation of the available record (which is all that Markman and Cassell rely on) or on the basis of evidence not available to us. We agree with our critics that we have not "proved" these executed defendants to be innocent; we never claimed that we had. It is completely unclear to us what Markman and Cassell would count as "proof" in such cases—except possibly the discovery that no potentially capital crime had even occurred. As we noted, the kinds of evidence to which we could and did point—such as confessions by another person or alibi evidence—are not definitive. How, for example, we or anyone else should now set about trying to "prove" that Joe Hill was not guilty in 1915 of the murder for which he was executed, is an interesting but unresolvable question.[22] Our claim that he is to be counted among the innocent is of course contestable; we did not set ourselves up as a Court of Final Judgment in Capital Cases. We reiterate, however, that we believe all 350 defendants to have been innocent, and we shall continue in this belief until shown otherwise with adequate evidence.

IV. The Risk of Executing the Innocent

Markman and Cassell make much of our professed inability to compute an estimate of the risk of erroneous execution. They argue that computing (or estimating) this risk is a necessary condition for any argument against the death penalty.[23] But we did not argue that the pol-

18. *See* Markman & Cassell, *supra* note 1, at 122.

19. *See* Bedau & Radelet, *supra* note 7, at 72-75.

20. That is, safeguards enacted since Furman v. Georgia, 408 U.S. 238 (1972).

21. *See* Bedau & Radelet, *supra* note 7, at 74-75.

22. Markman and Cassell are quite wrong when they imply that we relied on Wallace Stegner's fictitious account of the Joe Hill case. *See* Markman & Cassell, *supra* note 1, at 139 n.90. We relied on Philip Foner's research and cited Stegner's novel for informative purposes only, *see* Bedau & Radelet, *supra* note 7, at 126 nn.587-588, just as elsewhere we cited movies in connection with the cases of Barbara Graham and Joseph Majczek. *See id.* at 54, 143 n.716.

23. Markman & Cassell, *supra* note 1, at 146-47.

icy question whether to retain, expand, shrink, or abolish the death penalty should be settled solely by "speculation" as to the estimated risk of executing the innocent.[24] As our article shows: (1) we did not investigate more than a small fraction of the more than 7000 executions in this century;[25] (2) given the coincidences and sheer luck in many cases that led to eventual exoneration of innocent persons on death row[26] (not to mention our chance discovery of many of these cases[27]), it is likely that among these 7000+ executions, there are many more than the twenty-three cases we cite in the executed-but-innocent category;[28] and therefore (3) our research does not show that the risk of executing the innocent approximates the fraction 23/7000+.[29] Despite their claims, Markman and Cassell are unable to make accurate or even reasonable estimates of the risk; instead they simply ignore the methodological obstacles to making such estimates.[30]

Lest there be any confusion on the matter, we must stress two points. We, like other opponents of the death penalty, oppose executions of the guilty as well as executions of the innocent—which presumably even friends of the death penalty deplore. So our personal rejection of capital punishment, on moral grounds and on grounds of social policy, does not turn on estimating the risk of executing the innocent.[31] We believe likewise that social policy on the death penalty should turn not only on the risk of executing innocents, or even on the other important generalizations that our research established,[32] but

24. *Id.*

25. Bedau & Radelet, *supra* note 7, at 74.

26. *See, e.g., id.* at 64-65, 68-70.

27. *See id.* at 29-31.

28. *See id.* at 70, 84-85.

29. *See id.* at 84-85.

30. When Markman and Cassell calculate from our data that the risk of erroneous execution approximates the fraction 23/7000, *see* Markman & Cassell, *supra* note 1, at 146, they imply that we believe that each of the roughly 6977 executions we did not count as miscarriages involved no innocent defendants. But we made it clear that we had not investigated more than a few of these 6977 cases and that so far as we knew, no one else had restudied them. *See* Bedau & Radelet, *supra* note 7, at 74. It is a fallacy to treat our 23 examples as though they constitute what we believe to be the entire relevant population. Consider the following parallel: Markman and Cassell quote the husband of a murder victim as demanding the death penalty for the offender. Markman & Cassell, *supra* note 1, at 158 n.224. It would be absurd to infer from their failure to cite more than this one example that they believe no other relatives of homicide victims demand the death penalty.

31. Evaluations of the death penalty, by both its proponents and its opponents, are ideologically complex and multidimensional. Precisely what role the risk of executing innocent defendants plays is thus likely to vary from person to person. When Markman and Cassell assert that we "now concede that the risk of executing the innocent is relatively unimportant to the death penalty debate," they confuse the role this factor plays in our personal thinking with the role it evidently has in the public debate over the death penalty. *See* Markman & Cassell, *supra* note 1, at 160 n.227. Recent survey research indicates that 15% of those who oppose the death penalty cite as a rationale the possibility of wrongful conviction. *Gallup Report*, Jan.-Feb. 1985, at 3. Thus, concern over executing the innocent remains an important factor for many Americans who oppose the death penalty.

32. *See* text accompanying note 20 *supra*, at (1) to (5).

should turn on other political and moral considerations as well.[33]

V. Statutory Safeguards to Prevent Miscarriages

Markman and Cassell point to seven statutory provisions, most of which they claim "are intended to safeguard against erroneous imposition of the death penalty."[34] These seven are a mixed bag. The first (limitation of capital punishment to murder) has nothing to do with the intention to reduce the risk of wrongful execution, and it is hypocritical for Markman and Cassell to point to it when the Department of Justice itself is on record elsewhere as currently favoring the death penalty for several nonhomicidal crimes.[35] The fourth (jury required to find at least one aggravating circumstance not cancelled or outweighed by any mitigating circumstance) is severely flawed, given what is known about how juries actually use their "guided discretion" in sentencing.[36] The sixth standard (judicial override of jury recommended sentence) is similarly unworthy of praise given what is known about its actual operation.[37]

We applaud every effort of the criminal justice system to afford due process and equal protection of the laws to criminal defendants. But the glowing picture our critics paint of the current intent and effect of the system is simply not confirmed by those who actually litigate capital cases.[38] Furthermore, the seventh and most important of these recent statutory safeguards (post-conviction and collateral review on appeal), which leads our critics to praise the current system, has led others, including Justices of the Supreme Court, to deplore it.[39] Finally, it is

33. *See generally* H.A. Bedau, Death is Different: Studies in the Morality, Law, and Politics of Capital Punishment (1987); S. Nathanson, An Eye For An Eye?: The Morality of Punishing By Death (1987).

34. Markman & Cassell, *supra* note 1, at 147.

35. *See Death Penalty Legislation: Hearing on S. 239 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 49-50 (1985) (prepared statement of Stephen S. Trott, Assistant Attorney General) (advocating death penalty for espionage, treason, and attempted assassination of the President). For further evidence of support for the death penalty by the current administration for nonhomicidal crimes, see H.A. Bedau, *supra* note 33, at 152.

36. For example, the "heinous and cruel" aggravating factor is widely abused. *See generally* Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller*, 13 Stetson L. Rev. 523 (1984); Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941 (1986); *see also* Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 Am. Crim. L. Rev. 1 (1981) (describing unreliability of expert prediction testimony).

37. *See generally* Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U.L. Rev. 31 (1985); Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. Davis L. Rev. 1409 (1985).

38. *See* Amsterdam, In Favorem Mortis: *The Supreme Court and Capital Punishment*, Hum. Rts. Winter 1987, at 14; Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U.L. Rev. 513 (1988); Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. Rev. L. & Soc. Change 797 (1986).

39. *See* Smith v. Murray, 477 U.S. 527, 548-49 (1986) (Stevens, J., dissenting, joined by Marshall, J. and Blackmun, J.) (charging that in this death penalty case, the Supreme Court "lost its way in a procedural maze of its own creation"); Ford v. Wainwright, 477 U.S. 399,

circular for our critics to treat as miscarriages only those cases in which post-conviction safeguards worked to exonerate the innocent. Their criterion guarantees that recognition of innocence is "possible only because the system permits all manner of post-conviction interventions."[40]

VI. The Innocent Currently on Death Row

In their unqualified endorsement of current death row law and practice, Markman and Cassell observe that we "do not include in [our] catalogue any individual on death row at the end of 1986."[41] Thus, they imply that our research does not put into doubt the current capital sentencing system. No such implication can be drawn from our research. Since as a matter of policy we did not discuss any cases still *sub judice*, we expressed no views about the innocence of any given inmate currently on death row. We did add a footnote describing several cases of former death row inmates released from prison because of doubts about their guilt while our article was being prepared for publication in 1987.[42] Based on the continuing record of discovery of erroneous convictions, we fully expect future inquiry will show one or more of the 2000 persons now under death sentence to be innocent.[43]

VII. The Deterrent Effect of the Death Penalty

Markman and Cassell conclude their criticism by placing the issue of erroneous executions into the context of a general defense of the death penalty.[44] They invoke anecdotal evidence in support of the death penalty as a deterrent,[45] but fail to acknowledge comparable evidence that certain homicides might never have occurred had the existence of the death penalty not incited or inspired persons of unbalanced mind.[46] They also claim support from recent econometric studies, primarily the work of Stephen Layson,[47] which they allege is the "most recent sub-

413-17 (1986) (criticizing aspects of Florida's death penalty review process as unfair); Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 Colum. L. Rev. 1 (1986).

40. Markman & Cassell, *supra* note 1, at 125 n.23.

41. *Id.* at 150.

42. *See* Bedau & Radelet, *supra* note 7, at 29 n.40 (including a description of eight capital cases in which inmates were released in the first six months of 1987).

43. *Id.* at 38.

44. Markman & Cassell, *supra* note 1, at 152-59.

45. *Id.* at 154 n.205.

46. *See* T. Sellin, The Death Penalty: A Report for the Model Penal Code Project of The American Law Institute 65-69 (1959) (reprinted from Tent. Draft No. 9 of the Model Penal Code); Diamond, *Murder and the Death Penalty: A Case Report*, 45 Am. J. Orthopsychiatry 712 (1975).

47. *See* S. Layson, Homicide and Deterrence: A Re-examination of the United States and Canadian Time-Series Evidence (June 1983) (Ph.D. dissertation, University of Chicago) (available at University of Chicago library); Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. Econ. J. 68 (1985).

stantial econometric study" of the subject.[48] Careful examination reveals both that this study is flawed and that its results would not support Markman and Cassell's positions, anyway.[49] Worst of all, Markman and Cassell make the blunder of thinking that a demonstrable deterrent effect from capital statutes, death sentences, or executions is sufficient justification for the death penalty on deterrent grounds. This is a gross *non sequitur*; only proof of the deterrent superiority of the death penalty (or death sentences or executions) over the alternative punishment of long-term imprisonment is relevant. Marginal deterrence is what counts.[50] Indeed, no econometrically oriented research that supports the death penalty has addressed the crucial assumption that the punitive severity of execution, discounted by the likelihood of its actual enforcement and independent of any incapacitative effects, creates a measurably greater deterrent effect on persons capable of

48. Markman & Cassell, *supra* note 1, at 155.

49. One eminent critic of Layson's work has shown that Layson's research suffers from the same flaws that undermined the spectacular findings, announced a decade ago by James Yunker, that each execution deterred over a hundred murders. *Compare Capital Punishment: Hearings on H.R. 2837 and H.R. 343 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 334-47 (1985 & 1986) [hereinafter *House Hearings*] (prepared statement of Alan Fox, *Persistent Flaws in Econometric Studies of the Death Penalty: A Discussion of Layson's Findings) with* Fox, *The Identification and Estimation of Deterrence: An Evaluation of Yunker's Model*, J. BEHAV. ECON., Summer-Winter 1977, at 225 (criticizing Yunker, *Is the Death Penalty a Deterrent to Homicide?: Some Time Series Evidence*, J. BEHAV. ECON., Summer 1976, at 45). As Markman and Cassell must know, the great bulk of research over the past decade on the question of the deterrent effect of executions has either failed to demonstrate any such effect or has exposed the numerous shortcomings of the handful of studies purportedly demonstrating such an effect. *See, e.g.*, Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 336-80 (A. Blumstein, J. Cohen & D. Nagin eds. 1978); Barnett, *The Deterrent Effect of Capital Punishment: A Test of Some Recent Studies*, 29 OPERATIONS RESEARCH 346 (1981); Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIMINOLOGY 827 (1983); Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927 (1983); D. Archer & R. Gartner, *Violence and Crime in Cross-National Perspective* 118-39 (1984); Gibbs, *Punishment and Deterrence: Theory, Research, and Penal Policy*, in LAW AND THE SOCIAL SCIENCES 319-68 (L. Lipson & S. Wheeler eds. 1986). Our critics thus fail to heed their own admonition that "[r]esponsible social policy should be based on the best information available." Markman & Cassell, *supra* note 1, at 147.

In addition, even if correct, Layson's research would not allow Markman and Cassell to estimate the number of lives saved through the deterrent effect of capital punishment. First, Layson's estimates of deterrence cover only the years 1934-1977, *see House Hearings, supra*, at 312 (testimony of Stephen Layson), whereas our research spanned 1900-1985; there is no validity to the assumption that what may be true for half this period is true for the entire period. *See* Markman & Cassell, *supra* note 1, at 156 n.214. Second, the deterrent effect that Layson purports to establish appears only during the last fifteen years of the period he studied (and in eight of those years there were no executions). As Layson himself has stated, "if I exclude all of the data past 1960, I do find that evidence for the deterrent effect of capital punishment is very weak" or even "nonexistent." *See House Hearings, supra*, at 312, 316 (testimony of Stephen Layson). Finally, Layson himself has conceded that his views are not shared by a majority of experts in the field, *see id.* at 315, and has stated that "I don't regard my evidence on the deterrent effect of capital punishment as conclusive. Before you could even attempt to make that sort of argument, you need many more studies." *See id.* at 313.

50. *See* Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 539 (1971).

committing murder than does the alternative punishment, similarly discounted.[51]

VIII. Conclusion

The Department of Justice under the Reagan Administration has made quite clear its support for the death penalty,[52] and the critique of our research by Markman and Cassell is but one more indication of that support. We view this hostile attention as evidence of how influential the Department thinks our research may prove to be. Since Markman and Cassell begin their critique by conceding that human judgments are not infallible and that "the possibility exists"[53] that innocent defendants will be executed, they evidently concede one of the basic assumptions of our research. The fundamental questions in dispute are thus how to measure the risk of such error, the extent to which our research enables one to make that measurement, the role this risk should play in a rational assessment of the death penalty, and the adequacy of the evidence to convince the unbiased observer that such errors have indeed occurred. In their zeal to attack our research, our critics have failed to shed light on these important issues. Their efforts appear to spring largely from unacknowledged political roots; as a result, they either obfuscate the issues or merely trumpet the limits of our research as though we had failed to state them in the first place.

The basic problem with Markman and Cassell's response is that it seems bent on defending the criminal justice system in every regard that bears on the death penalty and its administration. This inflexible stance requires our critics to deny that anyone actually innocent has ever been executed, lest the criminal justice system itself be charged with such an error. It may be that the failure of the criminal justice system to acknowledge error of this sort is itself part of the problem rather than evidence that no such errors have occurred. Criticism of Markman and Cassell's sort seems to us not seriously intended to show how the death penalty is "Protecting the Innocent."[54] Instead, it is an effort to protect the myth of systemic infallibility: the myth that prose-

51. For examples of articles generally showing the insufficiency of econometric research that purports to show a deterrent effect, see Beyleveld, *Ehrlich's Analysis of Deterrence: Methodological Strategy and Ethics in Isaac Ehrlich's Research and Writing on the Death Penalty as a Deterrent*, 22 Brit. J. Criminology 101 (1982); Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 Mich. L. Rev. 1177 (1981); Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 Crime & Delinq. 88 (1983).

52. *See* note 35 *supra* and accompanying text; *see also House Hearings*, *supra* note 49, at 5-6 (testimony of Stephen S. Trott, Assistant Attorney General); *Prison Violence and Capital Punishment: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 4-6 (1983) (statement of Norman A. Carlson, Director, Bureau of Prisons); *id.* at 9-12 (statement of D. Lowell Jensen, Associate Attorney General); *Capital Punishment: Hearings on S. 114 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 33-35 (1981) (statement of D. Lowell Jensen, Assistant Attorney General).

53. Markman & Cassell, *supra* note 1, at 121.

54. *Id.*

cutors in capital cases never indict an innocent person; that if they do the trial courts can be counted on to acquit; that if the courts convict they sentence to prison rather than to death; that if courts do convict and sentence to death the appellate courts may be relied on to rectify an erroneous conviction; and that if the appellate courts fail then the chief executive will come to the rescue. We do not believe this myth, we do not sympathize with the effort to protect it, and we trust that anyone who studies our research will agree with us in rejecting the myth. We stand firmly behind every conclusion reached in our original essay.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
NATIONAL OFFICE,
New York, NY, June 15, 1993.

Hon. HOWARD M. METZENBAUM,
Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: On April 1, 1993, the Committee on the Judiciary held hearings on S. 221, a bill that provides a Federal forum for claims of innocence for condemned prisoners. While Elaine R. Jones, Director Counsel of the NAACP LDF, testified at this hearing, we believe it is important to respond briefly to several points raised by the later panel of witnesses, and to bring to the committee's attention events which have transpired since which demonstrate the plain need for this legislation.

1. Enactment of S. 221 is necessary: Its remedy is available only to those who can make a legitimate showing of actual innocence and it will not impede execution of the guilty

The several witnesses who testified in opposition to S. 221 presented a parade of horribles that surely will be witnessed, they argue, if this legislation becomes law. While each acknowledged the Federal constitution protects innocent citizens who are wrongly convicted from execution, each oppose S. 221 because the bill would increase, not decrease, "abusive litigation by capital defendants," would add years of delay in the process, and would make it impossible to enforce the death penalty in America. These arguments are red herrings, and garble what must remain the principal concern of the committee—to embrace a sensible approach for handling post-trial claims of innocence raised by death-sentenced inmates.

The statute does not ignore the "abuse" problem; it forthrightly addresses it. First, it requires dismissal of the petition unless sworn affidavits or documentary evidence set forth facts that "could not have been discovered through the exercise of due diligence in time to be presented at trial." This threshold requirement is hardly wimpy; it withholds Federal relief from arguably innocent prisoners where proof of innocence could reasonably have been uncovered and presented at trial. This hurdle also sends a clear signal that issues of innocence must be litigated at trial, and will be entertained afterwards only for good cause.

Second, the proposed statute rejects notice pleading and requires a substantial showing that the newly discovered facts "establish that the person is probably innocent." This demanding pleading requirement provides an additional threshold that must be met to avoid prompt dismissal, and is higher than any Congress has imposed for other civil proceedings.

Moreover, S. 221 does not, as some suggest, create a "new cause of action." The Supreme Court's decision in *Herrera* v. *Collins,* 113 S.Ct. 853 (1993) makes clear that Federal courts may act to insure the States do not execute innocent persons, but fails to set forth the standards and procedures for the hearing of such claims. S. 221 sensibly fills this void. Critics of S. 221 do not appear to dispute that our Constitution prohibits the execution of an innocent person.[1] The problem is that while Congress has provided remedies for most constitutional violations, it has not provided a remedy for this one, which is certainly the most distressing violation of all.

Nor would S. 221 "amount to the abolition of the death penalty." Indeed, this suggestion by Mr. Lungren, Mr. Nunnelley and Professor Cassell is patently absurd. These distinguished attorneys cannot seriously believe that Federal District Courts around the country will readily conclude that every one of the 2700 inmates on death row is "probably innocent"? In fact, it is likely that very few petitioners will avoid certain and immediate dismissal unless prisoners show clearly that the State courts are condemning to death substantial numbers of innocent citizens. Most filings under S. 221 will likely be handled summarily; the ones that are found to require more searching review will generate delay, but rightly so.

We also take issue with Professor Cassell's argument that no innocent person has been executed in this country in recent times. As he well knows, it is simply impossible to know whether that is true. No formal body has attempted a comprehensive study of this issue. Moreover, as was shown with the testimony of Mr. McMillan

[1] Nor could they. *See. e.g., Herrera* v. *Collins,* 113 S. Ct. 853, 869 (1993) (Court assumes that a "persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"); *see also id.* at 875 (White, J., concurring) (same); *id.* at 870 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"); *id.* at 882 (Blackmun, J., dissenting).

and Mr. Adams, *innocent* indigent death-sentenced inmates face tremendous obstacles in proving their innocence, not least of which is the continuing lack of qualified counsel (or in many cases of *any* counsel) to represent them, or of adequate funding for qualified counsel when it can be found. We simply do not know how many innocent persons have been executed, and there is compelling evidence that several individuals executed during the last two decades may have been actually innocent.

2. New developments show the need for S. 221

We do not quarrel with the second panel's assertion that some States will provide for the thorough airing of probable innocence claims. But there is no question that others fail to provide any suitable remedy. Indeed, since the April 1 hearing, the need for a Federal forum has been made clear by the Gary Graham case in Texas.

Federal habeas review in Mr. Graham's case was denied, on a vote of 5–4, by the Supreme Court on the same day that *Herrera* v. *Collins* was announced. At that time, there was no legal claim that Mr. Graham was innocent. Afterwards, attorneys from the Legal Defense Fund were asked to look into Mr. Graham's long standing assertion that he is innocent. What we found was shocking by any measure.

Mr. Graham was convicted on the basis of one eye-witness. No other forensic evidence tied him to the crime. Mr. Graham's trial counsel made no effort whatsoever to investigate Mr. Graham's innocence claim, and unpaid, volunteer counsel thereafter were unable to conduct a careful investigation. Thus, when Mr. Graham's case was heard by the Supreme Court, no one had seriously checked into his innocence claim.

We have subsequently discovered substantial evidence that Mr. Graham is innocent of the crime for which he is death-sentenced. A number of eye-witnesses to the crime have now come forward and sworn that Mr. Graham is not the man they saw commit the murder. Moreover, four witnesses, each of whom has submitted to and passed a polygraph examination, has sworn that Mr. Graham was with them, several miles from the crime scene, at the time of the crime.

Despite the immediate presentation of this substantial evidence in the State System, no court or executive body has provided a forum to hear the evidence. The Texas Board of Pardons and Paroles, the body responsible for recommending clemency to the governor, has refused to order a hearing. The Chairman of the Board recently told counsel that the Board is ill-equipped to handle claims of innocence. This is surely a switch from what the Texas Attorney General told the Supreme Court in *Herrera*—that the clemency process in Texas was more than adequate to entertain claims of innocence.

Moreover, the State courts have also refused to provide any forum to hear Mr. Graham's evidence. In its recent opinion staying Mr. Graham's most recent execution date, a majority of the Texas Court of Criminal Appeals refused to reconsider its rule that forecloses judicial review of innocence claims brought more than 30 days after trial. In a vigorous dissent, Judge Maloney forthrightly acknowledged that "the process of seeking executive clemency is inadequate for testing the credibility of newly discovered evidence of innocence due to the lack of formal procedures controlling its use." *Ex Parte Gary Graham,* No. 17,568–03 (Tex.Cr.App. June 2, 1993)(Maloney, J., concurring and dissenting opinion at p. 2). He recognized as well that "where an arguably innocent person, wrongly convicted and sentenced to death, is wholly without a meaningful forum in which to present newly discovered evidence in support of his claims of actual innocence, this court should be compelled, as a matter of public policy, to provide sufficient safeguard to ensure that State and Federal constitutional protections are given effect." *Id* at 5.

But a majority of that court remains unmoved, and as a result, Mr. Graham still has no State forum whatsoever to present his troubling new evidence. Hence, for arguably innocent inmates in States like Texas, it is a Federal forum or no forum. For prisoners like Mr. Graham, as well as for society as a whole, S. 221 is plainly needed.

3. Even where states provide some review, federal review is appropriate in capital cases

Other thoughtful State judges agree that even where a State forum is available for reviewing Federal claims, a Federal forum should also be available, at least in capital cases. For example, Ohio Supreme Court Justice J. Craig Wright testified before the ABA Task Force on Death Penalty Habeas Corpus that he welcomes "Federal review of State death penalty decisions," because he realizes that "the Fed-

eral courts are a backstop—the leader in capital litigation."[2] Similarly, Justice Christine M. Durham of the Utah Supreme Court, stressing that "[n]o one has a healthier respect than I for the primary role occupied by the State courts in this country," testified before the House Subcommittee on Civil and Constitutional Rights in July 1991 that, "[a]s a State judge, I welcome and rely upon the availability of Federal habeas review of criminal * * * because we in the State courts lack the fundamental resources necessary to ensure full and fair representation of all criminal defendants."[3] Justice Rosemary Barkett of the Florida Supreme Court testified before the same House subcommittee, stating: "I have absolutely no problem with having the Federal courts look over my shoulder in capital cases. In fact, in light of the historical data, I feel compelled to invite their review."[4]

4. Repeated studies have shown that the death penalty is not a superior deterrent of crime

We were very surprised that anyone would come forward in opposition to this bill with arguments regarding the supposed deterrent effect of capital punishment. We don't think executing innocent persons could be justified regardless of any "deterrent effect" that sanction might provide, and we frankly don't see the relevance of this argument. In addition, it has long been established that there is no demonstrable deterrent effect of capital punishment as opposed to life imprisonment. Some of the critics of S. 221, in particular Professor Paul Cassell, would have this committee ignore decades of scholarship in this area in accepting a view to the contrary. While we don't think this committee wants to get mired down in a discussion of the extensive scholarship and research in this area, we do think it is worth making a few general observations about that research, at least to indicate just how far afield is Professor Cassell.

1. Incapacitation

In general, two arguments for "specific deterrence", or incapacitation, have been explored during the last couple of decades. The first is that capital punishment is needed to prevent prisoners from committing murders when they are released on parole. The second argument is that the death penalty is necessary to protect prison guards from being killed by inmates serving life sentences.

As to the first argument, numerous studies, conducted recently as well as in past decades, have shown that the number of parolees who actually commit murders after release is extremely small. For example, one study found that of 197 capital offenders in 22 States who had been one to thirty-eight years on parole, only eleven violated parole by committing new offenses and none committed a homicide.[5] Another study concluded that "as of 1956 only one of 342 male prisoners paroled in California from first-degree murder convictions between 1945 and 1954 had been returned to prison after being convicted of murder."[6] That study also reported that "none of sixty-three first-degree murderers paroled in New York between the years 1930 and 1961 and none of 273 first-degree murderers paroled in Ohio between 1945 and 1965 was returned to prison for committing homicide."[7] A more recent study found that of 239 death sentenced inmates released to the community following the Supreme Court's decision in *Furman* v. *Georgia,* only one parolee committed a second homicide during an average of five years in society.[8] Finally, a study of 84 commuted capital offenders in Texas from 1924–1988 found that none of the parolees committed a murder while in the free community.[9] Thus, the data shows that "the number of such repeaters is very small. Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism."[10]

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[2] *See* Robbins, *Toward A More Just and Effective System of Review In State Death Penalty Cases,* 40 Am.U.L.Rev. 1, 31(1990).

[3] C. Durham, *Federal Habeas Corpus Review of State Criminal Convictions,* Testimony before the House Subcommittee on Civil and Constitutional Rights (July 17, 1991).

[4] R. Barkett, *Prepared Statememt of Justice Rosemary Barkett,* Supreme Court of Florida, Testimony before the House Subcommittee on Civil and Constitutional Rights (May 22, 1991).

[5] Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment,* 79 MICH. L. REV. 1177, 1189 (citing Giardini and Farrow, *The Paroling of Capital offenders,* in CAPITAL PUNISHMENT 207 (T. Sellin ed. 1967)).

[6] CAPITAL PUNISHMENT at 185–186 (T. Sellin ed. 1967).

[7] *Id.*

[8] Marquart & Sorensen, *From Death Row to Prison Society: A National Study of the Furman-Commuted Inmates,* 23 LOY. L.A. L. REV. 5, 27 (1989).

[9] Wagner,A Commutation Study of Ex-Capital Offenders In Texas, 1924–1971 at 37,38 (1988) (unpublished dissertation available at Sam Houston State Univ.).

[10] Marquart & Sorensen, *supra* note 8, at 25 (citing H. Bedau).

Second, although some prisoners have murdered while on parole, most such murders could not have been prevented by the death penalty for several reasons. First, most of these prisoners were not convicted of the most severe degree of homicide (or even of any homicide) in the first instance, so they could not constitutionally have been given the death penalty. In addition, even if these prisoners had been convicted of the most severe degree of homicide, and therefore could have been sentenced to death, in most of the well-publicized cases they were not given the most severe sentence available. This allowed them to get an early parole.[11] In these situations, the problem was with the initial sentencer, who did not impose a more severe sentence, not with the lack of a death penalty provision.[12] Some of the most frequently used examples serve to illustrate the point.

Mauricio Silva is often cited as a killer who murdered again while on parole. Silva, however, was originally convicted of manslaughter, and the death penalty could not have been constitutionally imposed and therefore could not have prevented his subsequent murders. Another example often cited is the case of Clifford Phillips, who murdered while on parole. Like Silva, in Phillips' case the original conviction was for manslaughter. His subsequent murder could not have been prevented by the death penalty, because it could not have been imposed upon him.[13] These cases and others like them are often cited by death penalty advocates, who, failing to note the facts, argue that the death penalty would prevent murder by parolees.

Second, many of the studies or cases cited to support the deterrence argument rely on a time period where State provisions were such that the most severe life sentence permitted parole consideration after a relatively short period of time. Most of those States no longer permit parole in such cases in less than twenty, twenty-five, thirty or forty years, and many provide for the possibility of life sentences without parole.[14] Those States which have not yet changed their laws are of course free to do so, thus correcting the problem without the serious risks and other costs associated with capital punishment.

Death penalty supporters have also argued in this connection that capital punishment is needed to prevent prisoners from murdering prison guards while serving their life sentences. However, studies show that there is no significant additional deterrence in this regard between the death penalty and life imprisonment. In fact, prisoners serving life sentences are known to be among the best-behaved inmates because they have strong incentives to follow the rules.[15]

One study shows that out of 558 inmates across thirty States whose death sentences were commuted pursuant to the Supreme Court decision in *Furman* v. *Georgia,* only two inmates, both in Ohio, killed prison guards in the ensuing 15 years after the sentences were commuted.[16] A similar study of inmates who were convicted after Furman, and whose death sentences were commuted to life for some other reason, shows that none of those inmates committed prison murders.[17] Another study looked at the parole performance of capital offenders who received clemency or were otherwise released—and noted that of 46 capital offenders commuted in a period of 53 years in New Jersey and Oregon, none of them committed an additional murder either in prison or while on parole.[18] Thus, repeated studies indicate that the death penalty is not a relevant response to the concern of deterring the murder of prison guards by inmates.

2. General deterrence

Repeated studies conducted over the last thirty years have found no general deterrent effect of the death penalty. Indeed, there is no demonstrable correlation between the number or probability of executions in a State and its murder rate.[19] If anything, the studies suggest a possible "brutalizing effect" of executions, such that

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[11] Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: a Cost and Lack-of-Benefit Analysis of the Death Penalty,* 23 Loy. L.A. L. Rev. 59 at 120 (1989).

[12] *Id.,* at 122.

[13] *Id.,* at 120–121.

[14] See J. Mark Lane, *"'Is There Life Without Parole': A Capital Defendant's Right to a Meaningful Alternative Sentence,"* 26 LOYOLA L.A. L. REV. 327, 362–64 & nn. 199–200 (1993).

[15] Tabak & Lane, *supra* note 11, at 124–125 (quoting Thomas Coughlin, Commissioner of the New York State Department of Correctional Services, and Leo Lalonde, of the Michigan Department of Corrections).

[16] Marquart & Sorensen, *supra* note 4.

[17] Tabak & Lane, *supra* note 11 (citing J. Marquart, S. Ekland-Olson & J. Sorensen, *Gazing into the Crystal Ball: Can Jurors and Psychiatrists Accurately Predict Future Dangerousness in Capital Cases?* (1989) (unpublished manuscript)).

[18] Bedau, *Capital Punishment in Oregon,* 1903–1964, 45 OR. L. REV. 1(1965); Bedau, *Death Sentences in New Jersey,* 1907–1960, 19 RUTGERS L. REV. 1, 46–47 (1964).

[19] Tabak & Lane, *supra* note 11, at 116–117.

the decision of a State to utilize the death penalty may cause additional homicides rather than deterring them.

Virtually every study conducted on general deterrence has concluded that the death penalty does not deter criminals. The most recent review of deterrence research concluded that, although several different methods and data sources have been employed, the studies have failed to support "the hypothesis that the death penalty is a marginally more effective deterrent than lengthy imprisonment."[20] Another recent study reached a similar conclusion. The author of that study concluded that, "(a)fter years of research with different methodologies and statistical approaches, the empirical evidence seems to clearly suggest that capital punishment is not a superior general deterrent."[21]

The two most frequently cited studies in support of the view that capital punishment is a deterrent, the econometric studies of Isaac Ehrlich and Stephen Layson, have been widely discredited.[22] Layson himself has admitted that "his results were a product of the 1960's, when few executions occurred, and thus the findings could not be generalized to other years."[23] Professor Cassell's reliance on these discredited studies in his Statement to the committee is disingenuous, at best.

The author of a recent textbook on deterrence and other issues related to the death penalty stated that a "recent review of all comparative studies carried out between 1919 and 1969 has shown that in the majority of cases, abolitionist States had lower homicide rates than their retentionist neighbors and that States which abolished the death penalty generally tended to have a smaller increase in homicides than their retentionist neighbors."[24] According to another study in 1985, Texas, the State with the most executions in American history and with the most active current death penalty, also has one of the highest murder rates.[25] In fact, in 1985, all the most active death penalty States—including Florida (11.4), Georgia (10.4), Alabama (9.8), and Louisiana (10.9), as well as Texas (13.0)—had higher murder rates than New York (9.5), which has no death penalty.[26] Those States' high murder rates persist, and even grow, despite their high number of executions. From 1984 to 1985, the number of executions in Texas increased by 100 percent; from 1985 to 1986, it nearly doubled again.[27] Yet during this same period, the murder rate in Texas continued to rise.[28] Similar increases occurred during this period in Florida, Georgia, Louisiana and Alabama.[29]

In fact, far from showing that an increase in the number of executions decreases the rate of murders in a State, at least one study suggests that there may be a "brutalizing effect" of executions. This study looked at the relationship between executions and homicides in the months following executions in New York between 1906 and 1963, and estimated that each execution leads to 2 to 3 additional homicides.[30] A later study which focused on the ten weeks before and after an execution found that each execution was associated with an increase of 2.4 homicides. "The increase was at least twice as high after the most publicized cases (measured by news-space) as after the less publicized cases."[31] Furthermore, "(t)here was no evidence that this

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[20] R. Hood, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 130 (1989).

[21] Paternoster, CAPITAL PUNISHMENT IN AMERICA 241(1991).

[22] See, Fox & Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989) (the conclusion that Layson's results are worthless has never been challenged); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317 (1976); Lempert, *supra* note 2; W. L. Bowers and G. L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975); P. Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975); *William Bailey, A Multivariate Cross-Sectional Analysis of the Deterrent Effect of the Death Penalty*, 64 SOC.& SOC. RES. 183 (1980).

[23] CAPITAL PUNISHMENT: *Hearings On HR. 2837 and H.R. 343 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. 311 (1985)(testimony of Stephen Layson).

[24] Hood, *supra* note 21, at 128.

[25] 1985 FBI UNIFORM CRIME REP. 52, 52–62, Table 5 (released July 1, 1986) (hereinafter CRIME REPORTS 1985).

[26] *Id.*

[27] U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1984, CAPITAL PUNISHMENT 1985, & 1986 FBI UNIFORM CRIME REP. 52, Table 5.

[28] *Compare* CRIME REPORTS 1985, *supra* note 23, at 61, Table 5 *with* CRIME REPORTS 1986, *supra* note 25 at 61, Table 5.

[29] *Compare* CRIME REPORTS 1985, *supra* note 23 at 53–61, Table 5 with CRIME REPORTS 1986, *supra* note 25, at 53–61, Table 5.

[30] Bowers & Pierce, *Deterrence or Brutailzation: what is the Effect of Executions?*, 26 CRIME & DELINQ. 453, 453–484 (1980).

[31] Hood, *supra* note 21 at 132 (citing Bowers, The Effect of Executions is Brutalization, Not Deterrence).

was due to an 'anticipatory deterrent effect' producing a lower than normal level of homicides prior to the execution."[32]

The overwhelming number of studies have concluded that the death penalty is not an effective deterrent. Subjecting those guilty of the most serious degree of homicide to a sentence of life imprisonment with limitations of 20 or more years before they can be considered for parole serves the same deterrence purpose as the death penalty and is at least as effective, without the grave risk of irreversible error.

I hope these additional comments are helpful to you and other members of the Committee.

Very truly yours,

GEORGE H. KENDALL,
Associate Counsel.

PREPARED STATEMENT OF ROBERT L. STEARNS

My name is Robert L. Stearns of Round Rock, Texas. I am here as both a victim of a capital murder and as a ten year veteran of the Texas Crime Victim Advocacy Movement. I am a past State Chairman of the Texas Victim Advocacy Organization People Against Violent Crime and the founder and only chairman of the coalition of crime victims organizations named VIGIL.

My purpose in coming before you today is to ask you to give serious consideration to the effect this proposed legislation will have on the victims of the crimes involved before you take action on it. I agree with the underlying concept behind this proposal. I agree that it is essential that our criminal justice system do everything in its power to avoid the conviction of an innocent person. However, providing redundant checks on the validity of the jury finding of guilt or innocence does little to further this goal. However, it would add substantially to the pain and suffering of the victims of the crimes to extend the period of uncertainty about the finality of the conviction.

My introduction to the Texas Criminal Justice System occurred in April 1972 when the Radio Shack Store in west Houston that was managed by my son, Thomas Robert Stearns was robbed at gunpoint by four youths. The gunman was a criminal well known to the local police. He was on parole for an attempted murder conviction at the time of the robbery. His name was James Isaac "Sugarman" Russell. Tom was the only witness to the rubbery. In March, 1974, the day before the armed robbery case was finally brought to trial, Tom disappeared. The facts of the case, as established by the trial court, showed that James Isaac "Sugarman" Russell, the armed robber, had kidnapped and murdered Tom to keep him from testifying at the trial.

Russell was tried and convicted of capital murder in November 1977. The State and Federal Appeals took 12 years to decide that the trial was free of error and the sentence could be carried out. During the entire period, my family and I could never be sure that a fault would be found in the trial and the case sent back to the district court for retrial. We were painfully aware that a successful retrial would be possible only if the crucial evidence was allowed and the witnesses were available and could remember sufficient detail to convince a second jury of Russell's guilt. I don't know how to convey to you the effect of uncertainty, fear and discouragement of the delay on my family and me. In fact, have difficulty now, with the case finally closed, recalling the depth of the feelings that made life so miserable during the years that the appeal process lasted.

The evidence used to convict James Russell of the murder of my Son was circumstantial but overwhelmingly convincing. In fact Russell didn't take the opportunity to say he didn't do it when he was on the stand. There was no evidence at all to bring doubt to the minds of the jury that Russell was guilty. No one I have talked to who has reviewed the evidence, and I have talked to every one I could find, has any doubt that Russell committed the crime. So, what happened when the final execution date arrived? Russell and his lawyers claimed that they had evidence that proved his innocence. Evidence which they had not brought forward during the 12 years since the trial. The information they claimed to have indicated nothing that had not been presented to the jury. This did not stop Russell's lawyers from claiming that it was grounds for a stay of execution. He even petitioned the Governor for a stay.

Even more than this, Russell had the audacity to make the statement that as long as our society continued to use the death penalty to solve its problems, we will never have a truly mature society. This from a man who used murder to avoid con-

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[32] *Id.*

viction for an armed robbery for which he really had no defense. This also from a man who was described to me by the law enforcement people as one of the two most dangerous criminals in Texas.

The effect on my family and myself of this attempt to defer justice on what amounted to trumped up evidence was devastating. First, we feared that it would he successful and we would be subjected to more years of uncertainty. Second, it made us realize that there were people out there who felt that we were trying to hound an innocent man to his death. The try for a stay was not successful but had it been, we would have been faced with yet another round of the severe emotional trauma which all victims are subjected to. Please, lets not do anything to extend the process beyond the point where it can be proved beyond a reasonable doubt that the person accused is guilty.

In work in t Texas Victims Advocacy Movement, I have had the opportunity to meet a number of victims of violent crimes and can speak to you from a wider experience than my own. I have also become interested in their cases. I can assure you that the concerns of these victim parallel my own.

I have followed the progress of the convicts on death row I Texas since becoming involved in 1974. One thing seems to be pretty common. At the last minute, the murderer normally claims that he is innocent and that he has some evidence to prove it. Should we give credence to that claim? What is necessary to assure ourselves that the claim is frivolous. That is the job of the State court, in Texas, the Court of Criminal Appeals. The Governor also has the power to provide a moderate stay of execution for consideration of such evidence. Do we need a third opinion from the Federal courts to insure that an injustice is not done? Hell No!

A Federal law which would provide the accused appeal to the Federal courts for a decision which has already been made at the State level would do nothing to protect the innocent from execution. It would provide yet another way for a murderer to avoid or dear paying for his crime. It would do much to subject the innocent victims of crime to additional torture by the system, lets not do that. The victims have more than enough to contend with already.

Before I stop talking, I must say a word on my beliefs concerning what the criminal justice system needs to do for cons like the man who killed my son. Texas law, as well as the laws of many other States, provides two penalties for capital murder. These are death or life imprisonment with eligibility for parole after some years in prison. In Texas, the time before parole was recently increased from 15 to 35 years. In essence, that means that a man who commits a capital murder and who is not sentenced to death has a good chance of gaining parole with the chance to commit more crimes on release. In Texas, the conditions under which a felon can be convicted of capital murder make it pretty well certain that the man will be a danger to Society if released. If a jury has decided that, he shouldn't be released. We need an effective life without parole to handle those who will never be an acceptable risk for release. The case of Kenneth Allen McDuff illustrates the worst of the problem the system can cause under present law. McDuff was released from prison to kill several additional young women after his parole from a capital murder conviction for the murder of three young people.

Perhaps a better way to cope with this situation is to provide a sentence of life imprisonment without the possibility for parole for those who commit capital murder and those whose record indicate that they will be just as dangerous on release as if they had committed capital murder. I realize that that must be addressed in the State Legislatures and I have worked for a decade with the Texas Legislature to try to convince them that such a change was needed without success. If the aim of society is to get revenge for the crimes these felons commit, capital punishment is needed. If the goal Is to protect society from the most dangerous of its members, other ways may work as well. Most of the victims I know believe that the goal of this system should be the protection of society and any desire for revenge should be squelched.

In summary, the State courts and the State Governors have the authority to review the evidence of a capital case and can be expected to do as good a job as the Federal courts. I beg you not to add another redundant step to process for a third review of last minute claims which are likely to be frivolous, which cannot help the cause of justice and which cannot help but add a great deal to the burden which innocent victims of crime must suffer.

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