



AMERICAN BAR ASSOCIATION

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TESTIMONY OF

STEPHEN F. HANLON

on behalf of the

AMERICAN BAR ASSOCIATION

before the

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES**

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

**Hearing on the Impact of Federal Habeas Corpus Limitations
on Death Penalty Appeals**

December 8, 2009

Mr. Chairman and Members of the Subcommittee:

I am Stephen F. Hanlon, and I am the Chair of the American Bar Association's Death Penalty Moratorium Project Steering Committee and a partner at the law firm of Holland and Knight LLP. The American Bar Association is the world's largest voluntary professional organization, with a membership of almost 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Carolyn B. Lamm to share with you our views and concerns about the current state of federal habeas litigation in death penalty cases.

The public often assesses the value of our legal system by its perception of how well it functions. Capital cases are the most visible and complicated of all criminal cases. The consequences of making mistakes in these cases are severe and all too often irrevocable. The fundamental principle of fairness that we cherish in America requires that justice must be done, especially if the consequence of legal action is the death penalty. Effective defense representation at every stage of the proceedings in death penalty cases is a *sine qua non* of that principle. Despite this knowledge, state governments have failed for many years to implement the necessary reforms to address long-standing and systemic problems in our death penalty counsel systems. Mistakes that occur at trial as a result of these failures are aggravated by ever-tightening restrictions on federal court review, making it difficult, if not impossible, for federal courts to correct even the most serious deprivation of constitutional rights. A system that wrongly sentences people to death and then erects considerable obstacles to bar judicial review of their cases is not a system that comports with our principles of justice. It should not surprise

us that one consequence is a loss of public confidence in the integrity and accuracy of our legal system.

Let me be clear at the outset about where the American Bar Association stands on this issue. Except for its opposition to imposing the death penalty on individuals who committed their crimes while juveniles, individuals with mental retardation, and individuals with serious mental illness, the ABA has not taken a position on the constitutionality or appropriateness of the death penalty. However, in the decades since the death penalty was reinstated in 1976, the Association has adopted a series of policies concerning the administration of capital punishment. The ABA has made the right to effective assistance of counsel for all defendants at all stages of a capital case the cornerstone of its reform efforts. Further, the ABA recognizes that improvement in the availability and quality of legal representation must be supported by a system that provides rational and fair review in state and federal courts. The Association has adopted a series of recommendations since *Furman* to strengthen the courts' authority and responsibility to exercise independent judgment on the merits regarding constitutional claims during state post conviction and federal habeas corpus proceedings.

The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. In 1989, for example, the Association first adopted the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines). These Guidelines were greatly expanded and updated in 2003 to detail the minimal effort required by defense counsel and death penalty jurisdictions to ensure competent legal representation. They are now the accepted standard of care for the defense of death penalty cases, are cited by state and federal

courts, including the US Supreme Court, and have been adopted in a number of death penalty jurisdictions.

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

In a landmark study of capital cases from 1973 through 1995, 7 out of every 10 cases (68%) that were fully reviewed by the courts had serious, constitutional, reversible error. Although state courts threw out 47% of the capital convictions due to such errors, 40% of the *remaining* death sentences were found also to have serious error upon federal review. The most common errors prompting reversal of death sentences were “egregiously incompetent defense lawyers” and suppression of exculpatory evidence by prosecutors or the police.

Today, defendants who suffer serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, often have no available remedy. The constraints on the ability of federal courts to serve as a final check on state capital convictions are particularly daunting for prisoners asserting claims of actual innocence. We know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes. In fact, as of December 1 of this year, 139 death-row inmates from 26 states have been officially exonerated upon proof of innocence and released from custody after serving years (often decades) on death row. The conviction and execution of innocent

defendants is not only a moral travesty, but also a disservice to the community's need for justice and public safety.

It has often been said that the death penalty is "broken." This is because states have failed to ensure that capital defendants are provided with competent legal representation and fair trials. When state and federal courts also fail to undertake a thoughtful and searching review of mistakes that occurred at trial – including mistakes that result in convicting the innocent – a responsible society cannot permit executions to continue. It is for this reason that in 1997, the House of Delegates of the ABA voted overwhelmingly to call for a halt to executions until death penalty jurisdictions implement procedures that: (1) guarantee fundamental fairness and due process to those facing capital punishment; and (2) minimize the risk that innocent persons are executed.

Despite grave concerns about the reliability of capital convictions, Congress, most prominently by enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly *limited* the ability of death row prisoners to obtain independent judicial review and correction of their convictions and sentences of death. For the first time ever, AEDPA created a one-year statute of limitations for the filing of post-conviction appeals and instituted an arcane set of procedures that made the federal habeas process much more complex. Unfortunately, that same year Congress eliminated all federal funding for the resource centers that had handled state post-conviction proceedings for death row prisoners. As a result, many death row prisoners were left without counsel at all, and risked losing all potential claims on appeal when the statute of limitations period ended. Since ADEPA was enacted, many death row prisoners have lost their right to seek federal court review because their lawyers missed AEDPA's filing deadline; several have already been executed without any federal judicial review of their convictions and

sentences of death. And because the same incompetent lawyers who missed the statute of limitations also represented these defendants in state court, it is clear that some individuals have been executed without any meaningful judicial review at all.

When Congress enacted the Innocence Protection Act of 2004 (IPA), it sought to address the serious problem of lack of funding in the death penalty system. Part of the IPA authorizes \$75 million in state grants each year for five years to improve training and qualification standards for prosecutors and defense counsel appointed to state capital cases. However, this provision has gone either completely unfunded or received only a tiny fraction of its authorized support since 2004. The IPA is scheduled for reauthorization in 2009, and the ABA supports its reauthorization and full funding to realize the intent of Congress.

AEDPA also provided for states to “opt-in” to expedited habeas procedures if the state demonstrated that it had a counsel system that provided competent legal representation to death row prisoners in state post-conviction proceedings. But death penalty states found it more to their interests to retain their current inadequate systems for the provision of counsel than to improve their counsel systems and obtain the benefits of opt-in. Dozens of federal courts that reviewed opt-in applications from many states found their counsel systems to be uniformly inadequate and therefore not qualified for opt-in certification. The work that the ABA has conducted, including an extensive examination of these systems in several jurisdictions, also found that state counsel systems do not ensure effective legal representation; the ABA has thus recommended immediate reforms.

Despite these glaring inadequacies, the USA PATRIOT Improvement and Reauthorization Act, passed by the 109th Congress and signed into law by President Bush in March 2006, included amendments to the opt-in provisions that *eased* the requirement of states

to make the necessary improvements. These amendments authorized the U.S. Attorney General, rather than federal courts, to determine which counsel systems qualified for the opt-in procedures, but did not do anything meaningful to require improvement to the quality and availability of counsel in state post-conviction proceedings. The plain effect of shifting the decision-making authority from the independent federal courts to the Attorney General (who is the nation's chief prosecutor and subject to only the most nominal judicial review) is to make certification easier by demanding less proof of a competent counsel system. This shift also virtually eliminates oversight of a state's compliance with the opt-in requirements. Perhaps most troubling, the retroactive application of the certification would immediately throw many death row defendants out of court because the new, shorter statute of limitations would have already run in their cases. There is a very real concern that if these amendments are implemented, the meritorious claims of death row defendants will never be subject to federal court review, where a majority of exonerations have occurred.

The integrity of the criminal justice system turns on the fairness of criminal trials, which is concomitantly dependent on the effectiveness of defense counsel's representation. But the promise of effective assistance of counsel, embodied in the Sixth Amendment, has often been broken for poor people. Capital defendants are almost always indigent and must rely upon a seriously flawed and malfunctioning indigent defense system that can often only provide counsel who are overworked, underpaid, or inexperienced. Capital defendants are disadvantaged from the start, and many receive death sentences that are both arbitrary and unfair. Moreover, the absence of a right to counsel in post-conviction proceedings, coupled with the myriad procedural and substantive obstacles to raising a claim of ineffective assistance of counsel, deprives capital defendants of justice. The initial success of the now-defunded federal resource centers

demonstrated how proper training, resources, and support for death penalty counsel can dramatically increase the quality of capital representation in state and federal post-conviction proceedings. The loss of this funding has resulted in terrible injustices in every death penalty jurisdiction the ABA has studied.

There is simply no excuse for executing individuals who were not first afforded their constitutional rights. Justice Kennedy recently opined that “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” This statement underscores the reality that “death is different.” There is a greater urgency for the federal government to implement the following reform proposals in order to protect the constitutional rights of each individual at risk of execution. The guiding principle behind these recommendations is the need to administer the death penalty in a fair and equitable manner. This includes all assurances of effective and fully funded legal representation; appropriate judicial review to remedy constitutional violations and serious, reversible errors; and necessary procedures to protect the innocent. A dedicated, institutionalized federal commitment to effective capital representation is more important now than ever before.

There is much that needs to be done to address our broken death penalty system, including reform of federal habeas corpus law. Three broad reforms should be a priority for Congress and the Obama Administration in the near future:

- Suspend all federal executions pending a thorough data collection and analysis of racial and geographical disparities and the adequacy of legal representation in the death penalty system;

- Create an institutionalized federal commitment to fund defender organizations that provide state trial and post-conviction representation and are independent of the judiciary in every capital jurisdiction; and
- Amend the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that prisoners have better access to federal court review, eliminate the requirement of federal courts to defer to state court decisions, and eliminate or revise the USA PATRIOT ACT amendments to restore the appropriate role of federal courts in the opt-in certification process.

Thank you for the opportunity to appear before the Subcommittee and share the views of the American Bar Association on this important area of concern. I will be pleased to answer any questions you may have.