

**COUNSEL FOR THE POOR: THE DEATH PENALTY
NOT FOR THE WORST CRIME BUT FOR THE WORST LAWYER**

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After years in which she and her children were physically abused by her adulterous husband, a woman in Talladega County, Alabama, arranged to have him killed. Tragically, murders of abusive spouses are not rare in our violent society, but seldom are they punished by the death penalty. Yet this woman was sentenced to death. Why?

It may have been in part because one of her court-appointed lawyers was so drunk that the trial had to be delayed for a day after he was held in contempt and sent to jail. The next morning, he and his client were both produced from jail, the trial resumed, and the death penalty was imposed a few days later.² It may also have been in part because this lawyer failed to find hospital records documenting injuries received by the woman and her daughter, which would have corroborated their testimony about abuse. And it may also have been because her lawyers did not bring their expert witness on domestic abuse to see the defendant until 8 p.m. on the night before he testified at trial.³

Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case. It is not the facts of the crime, but the quality of legal representation,⁴ that distinguishes this case, where the death

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²Record at 846-49, *State v. Haney*, No. 7 Div. 148 (Ala. Crim. App. 1989).

³Nevertheless, both the Alabama Court of Criminal Appeals, *Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991), and the Alabama Supreme Court, *Ex parte Haney*, 603 So. 2d 412 (Ala. 1992), upheld the conviction and death sentence in the case.

⁴The defendant's other court-appointed lawyer was later disciplined by the Alabama Bar for neglect in two worker's compensation cases, allowing the statute of limitations to run in both cases. *Disciplinary Report*, ALA. LAW., Nov. 1993, at 401.

penalty was imposed, from many similar cases, where it was not.⁵

The woman in Talladega, like any other person facing the death penalty who cannot afford counsel, is entitled to a court-appointed lawyer under the Supreme Court's decision in *Powell v. Alabama*.⁶ But achieving competent representation in capital and other criminal cases requires much more than the Court's recognition, in *Powell* and in *Gideon v. Wainwright*,⁷ of the vital importance of counsel and of "thoroughgoing investigation and preparation."⁸ Providing better representation today than the defendants had in Scottsboro in 1931 requires money, a structure for providing indigent defense that is independent of the judiciary and prosecution, and skilled and dedicated lawyers. As Anthony Lewis observed after the *Gideon* decision extended the right to counsel to all state felony prosecutions:

It will be an enormous task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every person charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.⁹

⁵See, e.g., *Mullis v. State*, 545 So. 2d 205 (Ala. Crim. App. 1989) (person who hired others to rob, kidnap, and kill victim, sentenced to life in prison); *Busby v. State*, 412 So. 2d 837 (Ala. Crim. App. 1982) (woman charged with capital murder for hiring others to kill her husband, but convicted of noncapital murder); see also *Thacker v. State*, 556 N.E.2d 1315 (Ind. 1990) (woman who asked three men to kill her husband, gave them money and ammunition, and formed plan with them, not sentenced to death); *Murder Victim's Family Settles Case for Cash*, HUNTSVILLE TIMES, Aug. 7, 1990, at B1 (charges dropped against woman charged with capital murder for having hired somebody to kill her boyfriend when she agreed to surrender \$30,000 in retirement benefits to the victim's family).

⁶*Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* involved seven young African-Americans sentenced to death in Scottsboro, another Alabama community north of Talladega. The Supreme Court concluded that the defendants "did not have the aid of counsel in any real sense" based upon the casual way in which the responsibility for defending the case had been handled, the lack of preparation and investigation by the two lawyers who defended the accused, and community hostility toward the defendants. *Id.* at 51-57.

⁷*Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

⁸*Powell v. Alabama*, 287 U.S. at 57.

⁹ANTHONY LEWIS, *GIDEON'S TRUMPET* 205 (1964).

More than sixty years after *Powell* and thirty years after *Gideon*, this task remains uncompleted, the dream unrealized. This Essay describes the pervasiveness of deficient representation, examines the reasons for it, and considers the likelihood of improvement.

I. THE DIFFERENCE A COMPETENT LAWYER MAKES IN A CAPITAL CASE

Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing.¹⁰ Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

For instance, the failure of defense counsel to present critical information is one reason that Horace Dunkins was sentenced to death in Alabama. Before his execution in 1989, when newspapers reported that Dunkins was mentally retarded, at least one juror came forward and said she would not have voted for the death sentence if she had known of his condition.¹¹ Nevertheless, Dunkins was executed.

This same failure of defense counsel to present critical information also helps account for the death sentences imposed on Jerome Holloway—who has an IQ of 49 and the intellectual capacity of a 7-year old—in Bryan County, Georgia,¹² and William Alvin Smith—who has an IQ of 65—in Oglethorpe County, Georgia.¹³ It helps explain why Donald Thomas, a schizophrenic youth, was sentenced to

¹⁰This Essay deals primarily with the problem at trial and on direct appeal where the state is required to provide counsel for the indigent accused. It does not analyze the equally serious crisis regarding lack of representation and inadequate representation in postconviction review. For such a review, see American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 79-92 (1990). The Supreme Court has held there is no right to counsel, even in capital cases, in postconviction review. *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion).

¹¹Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.

¹²*Holloway v. State*, 361 S.E.2d 794, 796 (Ga. 1987).

¹³*Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), *aff'd sub nom. Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (en banc).

death in Atlanta, where the jury knew nothing about his mental impairment because his lawyer failed to present any evidence about his condition.¹⁴ In each of these cases, the jury was unable to perform its constitutional obligation to impose a sentence based on "a reasoned *moral* response to the defendant's background, character and crime,"¹⁵ because it was not informed by defense counsel of the defendant's background and character.

It can be said confidently that the failure to present such evidence made a difference in the Holloway, Smith, and Thomas cases. After each was reversed—one of them for reasons having nothing to do with counsel's incompetence—the pertinent information was presented to the court by new counsel, the death sentence was not imposed. But for many sentenced to death, such as Horace Dunkins, there is no second chance.

Quality legal representation also made a difference for Gary Nelson and Frederico Martinez-Macias, but they did not receive it until years after they were wrongly convicted and sentenced to death. Nelson was represented at his capital trial in Georgia in 1980 by a sole practitioner who had never tried a capital case.¹⁶ The court-appointed lawyer, who was struggling with financial problems and a divorce, was paid at a rate of only \$15 to \$20 per hour.¹⁷ His request for co-counsel was denied.¹⁸ The case against Nelson was entirely circumstantial, based on questionable scientific evidence, including the opinion of a prosecution expert that a hair found on the victim's body could have come from Nelson.¹⁹ Nevertheless, the appointed lawyer was not provided funds for an investigator²⁰ and, knowing a request would be denied, did not seek funds for an expert.²¹ Counsel's closing argument was only

¹⁴Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986).

¹⁵Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

¹⁶David Lundy, *Bondurant's Costly Death Appeal*, FULTON COUNTY DAILY REP., Aug. 18, 1989, at 6.

¹⁷*Id.*; See also Affidavit of Howard A. McGlasson, Jr. at 6, 8, Nelson v. Zant (Super. Ct. Butts County, Ga. 1989) (No. 5387), *rev'd*, 405 S.E.2d 250 (Ga. 1991).

¹⁸McGlasson Affidavit, *supra* note **Error! Bookmark not defined.**, at 7.

¹⁹*Id.* at 6, 15.

²⁰*Id.* at 7.

²¹*Id.* at 8.

255 words long.²² The lawyer was later disbarred for other reasons.²³

Nelson had the good fortune to be represented pro bono in postconviction proceedings by lawyers willing to spend their own money to investigate Nelson's case.²⁴ They discovered that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison.²⁵ Indeed, they found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared.²⁶ As a result of such inquiry, Gary Nelson was released after eleven years on death row.

Frederico Martinez-Macias was represented at his capital trial in El Paso, Texas, by a court-appointed attorney paid only \$11.84 per hour.²⁷ Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the prosecutor's case.²⁸ Martinez-Macias was sentenced to death.

Martinez-Macias received competent representation for the first time when a Washington, D.C., firm took his case pro bono. After a full investigation and development of facts regarding his innocence, Martinez-Macias won federal habeas corpus relief.²⁹ An El Paso grand jury refused to re-indict him and he was released after nine years on death row.³⁰

²²Lundy, *supra* note 15, at 6.

²³*Id.*

²⁴*Id.* Georgia does not provide counsel for condemned inmates in postconviction proceedings. Nelson was represented first by a lawyer recruited by the NAACP Legal Defense and Educational Fund who sent the record to a lawyer at another firm, which took the case for postconviction proceedings. *Id.* Because of his poverty, Nelson was completely at the mercy of these forces with regard to whether he would be represented and the quality of that representation. Many are not as fortunate as Nelson.

²⁵*Id.*

²⁶Nelson v. Zant, 405 S.E.2d at 252.

²⁷Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

²⁸Martinez-Macias v. Collins, 810 F. Supp. 782, 786-87, 796-813 (W.D. Tex. 1991), *aff'd*, 979 F.2d 1067 (5th Cir. 1992).

²⁹*Id.* at 823.

³⁰Gordon Dickinson, *Man Freed in Machete Murder Case*, EL PASO TIMES, June 24, 1993, at 1.

Inadequate representation often leaves the poor without the protections of the Bill of Rights. An impoverished person was sentenced to death in Jefferson County, Georgia, in violation of one of the most basic guarantees of our Bill of Rights—the right to a representative jury selected without discrimination on the basis of race.³¹ African-Americans make up 54.5% of the population of that county, but the jury pool was only 21.6% black, a severe under-representation of over 50%.³² But this issue was not properly raised and preserved by the court-appointed lawyer for the accused. The defendant had the extreme misfortune of being represented—over his protests—by a court-appointed lawyer who, when later asked to name the criminal law decisions from any court with which he was familiar, could name only two: "*Miranda* and *Dred Scott*."³³ As a result of the lawyer's failure to challenge the racial discrimination at or before trial, the reviewing courts held that the defendant was barred from vindication of his constitutional rights.³⁴

The difference that representative juries and competent counsel make in capital cases is illustrated by the cases of two codefendants, John Eldon Smith and Rebecca Machetti. They were sentenced to death by unconstitutionally composed juries within a few weeks of each other in Bibb County, Georgia.³⁵ Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of the Supreme Court decision prohibiting gender discrimination in juries.³⁶

³¹U.S. CONST. amends. VI, XIV; *Strauder v. West Virginia*, 100 U.S. 303 (1879); see also *Whitus v. Georgia*, 385 U.S. 545 (1967).

³²*Birt v. Montgomery*, 725 F.2d 587, 598 n.25 (11th Cir. 1984), cert. denied, 469 U.S. 874 (1984).

³³Transcript of Hearing of April 25-27, 1988, at 231, *State v. Birt* (Super. Ct. Jefferson County, Ga. 1988) (No. 2360). The lawyer referred to *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* was not a criminal case.

³⁴*Birt v. Montgomery*, 725 F.2d at 601.

³⁵Georgia's "opt-out" provision allowing women to decline jury service was found to result in the unconstitutional underrepresentation of women. *Machetti v. Linahan*, 679 F.2d 236, 241 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (applying *Duren v. Missouri*, 439 U.S. 357 (1979), and *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

³⁶Because Smith and Machetti were tried within a few weeks of each other in the same county, "the Georgia provision applied to both juries." *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir.), application for cert. denied, 463 U.S. 1344, 1345, cert. denied, 464 U.S. 1003 (1983). Smith's lawyers were unaware of the Supreme Court

A new trial was ordered for Machetti by the federal court of appeals.³⁷ At that trial, a jury which fairly represented the community imposed a sentence of life imprisonment.³⁸ The federal courts refused to consider the identical issue in Smith's case because his lawyers had not preserved it.³⁹ He was executed, becoming the first person to be executed under the Georgia death penalty statute upheld by the U.S. Supreme Court in 1976.⁴⁰ Had Machetti been represented by Smith's lawyers in state court and Smith by Machetti's lawyers, Machetti would have been executed and Smith would have obtained federal habeas corpus relief.

In these examples, imposition of the death penalty was not so much the result of the heinousness of the crime or the incorrigibility of the defendant—the factors upon which imposition of capital punishment supposedly is to turn—but rather of how bad the lawyers were. In consequence, a large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received.

A member of the Georgia Board of Pardons and Paroles has said that if the files of 100 cases punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender.⁴¹ A justice of the Mississippi Supreme Court made the same observation about the imposition of death sentences in his state in testimony before the U.S. Senate Judiciary Committee:

I dare say I could take every death sentence case that we have had where we have affirmed, give you the facts and not tell you the outcome, and then pull an equal number of murder cases that have been in our system, give you the facts and not tell you the outcome, and challenge you to pick which ones got the death sentence and which ones did not, and you couldn't

Court's decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975), decided six days before Smith's trial started. *Smith v. Kemp*, 715 F.2d at 1470.

³⁷*Machetti v. Linahan*, 679 F.2d at 242.

³⁸*Smith v. Kemp*, 715 F.2d at 1476 (Hatchett, J., concurring in part and dissenting in part).

³⁹*Id.* at 1469-72; see also *id.* at 1476 (Hatchett, J., concurring in part and dissenting in part).

⁴⁰*Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴¹Tracy Thompson, *Once 'Unfit To Live,' Ex-Death-Row Inmates Winning Parole*, ATLANTA CONST., Mar. 12, 1987, at A1.

do it.⁴²

Although it has long been fashionable to recite the disgusting facts of murder cases to show how deserving of death particular defendants may be,⁴³ such renditions fail to answer whether the selection process is a principled one based on neutral, objective factors that provide a "meaningful basis for distinguishing the few cases in which the [death] penalty is imposed from the many cases in which it is not."⁴⁴ Virtually all murders involve tragic and gruesome facts. However, the death penalty is imposed, on average, in only 250 cases of the approximately 20,000 homicides that occur each year in the United States.⁴⁵ Whether death is imposed frequently turns on the quality of counsel assigned to the accused.

II. THE PERVERSIVE INADEQUACY OF COUNSEL FOR THE POOR AND THE REASONS FOR IT

Inadequate legal representation does not occur in just a few capital cases. It is pervasive in those jurisdictions which account for most of the death sentences. The American Bar Association concluded after an exhaustive study of the issues that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today."⁴⁶ Justice Thurgood Marshall observed

⁴²*Habeas Corpus Reform: Hearings Before the Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. 349 (1989-90) (statement of Justice James Robertson of the Supreme Court of Mississippi).

⁴³See, e.g., *Callins v. Collins*, 62 U.S.L.W. 3546 (Feb. 22, 1994) (Scalia, J., concurring in the denial of certiorari).

⁴⁴*Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring))).

⁴⁵Fewer than 300 death sentences have been imposed each year in the United States over the last 20 years. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL JUSTICE SOURCEBOOK 673, Table 6.132 (1992). There have been approximately 20,000 homicides in each of those years. *Id.* at 357, Table 3.122; see also *id.* at 539, Table 5.72 (death imposed in one percent of murder cases in 75 largest counties).

⁴⁶American Bar Association, *supra* note 9, at 16. The ABA's report illustrates the pervasiveness of the problem:

Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to

that "capital defendants frequently suffer the consequences of having trial counsel who are ill equipped to handle capital cases."⁴⁷ The *National Law Journal*, after an extensive study of capital cases in six Southern states, found that capital trials

lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase. . . .

. . . Defense representation is not necessarily better in other death penalty states. In Tennessee, for another example, defense lawyers offered no evidence in mitigation in approximately one-quarter of all death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute.

Id. at 65-67. Among the cases cited by the ABA in support of its description of the inadequate representation in Georgia are: *Thomas v. Kemp*, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (counsel failed to present any evidence in mitigation), *cert. denied*, 479 U.S. 996 (1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985) (counsel failed to present any evidence in mitigation); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985) (counsel had been a member of the bar for only six months prior to his appointment), *cert. denied*, 474 U.S. 1026 (1985); *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984) (counsel not even present during portions of capital trial), *cert. denied*, 469 U.S. 870 (1984); *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983) (counsel conceded guilt at closing argument of *guilt phase*); *Goodwin v. Balkcom*, 684 F.2d 794, 817-20 (11th Cir. 1982) (counsel unaware of law, distanced himself from client, and otherwise failed to render effective assistance), *cert. denied*, 460 U.S. 1098 (1983); *Young v. Zant*, 677 F.2d 792, 795 (11th Cir. 1982) (counsel failed to provide "even a modicum of professional assistance at any time" during capital trial); *Mathis v. Zant*, 704 F. Supp. 1062, 1064 (N.D. Ga. 1989) ("In addition to betraying his duty to present what evidence he could on petitioner's behalf, [counsel] delivered a closing argument that the Court in its prior order generously termed an 'apology for having served as [petitioner's] counsel'"); *Johnson v. Kemp*, 615 F. Supp. 355, 364 (S.D. Ga. 1985) (counsel failed to present evidence in mitigation), *aff'd without opinion*, 781 F.2d 1483 (11th Cir. 1986); *Cury v. Zant*, 371 S.E.2d 647 (Ga. 1988) (counsel failed to get independent psychiatric evaluation of defendant to determine mental competency).

⁴⁷Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-2 (1986). Justice Marshall noted that "[t]he federal reports are filled with stories of counsel who presented no evidence in mitigation of their clients' sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute." *Id.*

are "more like a random flip of the coin than a delicate balancing of the scales" because the defense lawyer is too often "ill trained, unprepared . . . [and] grossly underpaid."⁴⁸ Many observers from a variety of perspectives and from different states have found the same scandalous quality of legal representation.⁴⁹

These assessments are supported by numerous cases in which the poor were defended by lawyers who lacked even the most rudimentary knowledge, resources, and capabilities needed for the defense of a capital case. Death sentences have been imposed in cases in which defense lawyers had not even read the state's death penalty statute or did not know that a capital trial is bifurcated into separate determinations of guilt and punishment.⁵⁰ State trial

⁴⁸Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT. L.J., June 11, 1990, at 30. Twelve articles examining the quality of representation in numerous cases in the six states appear in *id.*, at 30-44.

⁴⁹Witnesses before an ABA Task Force studying the capital punishment system described the current state of affairs for indigent criminal defendants as "'scandalous,' 'shameful,' 'abysmal,' 'pathetic,' 'deplorable,' and 'at best, exceedingly uneven.'" American Bar Association, *supra* note 9, at 69; see also Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 32-37 (1992); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 491-99 (1993); Tom Wicker, *Defending the Indigent in Capital Cases*, 2 CRIM. JUSTICE ETHICS 2 (1983); Jeanne Cummings, *Bad Lawyers Tip the Scales of Justice Toward Death Row*, ATLANTA J.-CONST., April 1, 1990, at A1; Anthony Lewis, *Crime in Politics*, N.Y. TIMES, Oct. 1, 1990, at A21; Andrea Neal, *Death Row Inmates Point to Poor Quality of Lawyers Who Defend Them*, L.A. TIMES, Oct. 29, 1986, at 12; Frederic N. Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A1 [hereinafter Tulsky, *What Price Justice?*]; Frederic N. Tulsky, *Big-Time Trials, Small Time Defenses*, PHILA. INQUIRER, Sept 14, 1992, at A1 [hereinafter Tulsky, *Big-Time Trials*]; Andrew Wolfson & Susan Craighead, *Effectiveness of Lawyers in Capital Cases Is Questioned*, COURIER J., Nov. 18, 1990, at 1, 23.

⁵⁰A lawyer in one Georgia case conceded his client's guilt and argued for a life sentence at the guilt phase; he continued to plead for mercy even after he was admonished by the trial judge to save his argument on punishment for the sentencing phase. *Young v. Zant*, 677 F.2d 792, 797 (11th Cir. 1982). A judge in a Florida case took a defense lawyer in chambers during the penalty phase to explain what it was about. The lawyer responded: "I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time." *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983), *vacated and remanded*, 468 U.S. 1206 (1984), *on remand*, 739

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judges and prosecutors—who have taken oaths to uphold the law, including the Sixth Amendment—have allowed capital trials to proceed and death sentences to be imposed even when defense counsel fought among themselves or presented conflicting defenses for the same client,⁵¹ referred to their clients by a racial slur,⁵² cross-examined a witness whose direct testimony counsel missed because he was parking his car,⁵³ slept through part of the trial,⁵⁴ or was intoxicated during trial.⁵⁵ Appellate courts often review

F.2d 531 (11th Cir. 1984), *and cert. denied*, 469 U.S. 1208 (1985). An Alabama defense lawyer asked for time between the guilt and penalty phases so that he could read the state's death penalty statute. Record at 1875-76, *State v. Smith*, 581 So. 2d 497 (Ala. Crim. App. 1990). The lawyer in a Pennsylvania case tailored his presentation of evidence and argument around a death penalty statute that had been declared unconstitutional three years earlier because it limited the arguments on which the defense could rely as to mitigating circumstances. *Frey v. Fulcomer*, 974 F.2d 348, 359 (3d Cir. 1992) (reversing finding of ineffective assistance of counsel).

⁵¹In one Alabama case, one defense lawyer sued co-counsel over attorneys fees before trial and the attorneys were in conflict over personal differences during trial. *Daniel v. Thigpen*, 742 F. Supp. 1535, 1558-59 (M.D. Ala. 1990); Friedman & Stevenson, *supra* note 48, at 34. In a Georgia case, one attorney presented an incredible alibi defense while the other asserted a mental health defense that acknowledged the accused's participation in the crime. *Ross v. Kemp*, 393 S.E.2d 244, 245 (Ga. 1990).

⁵²*Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (defendant called a "little old nigger boy" in closing argument by defense counsel); *Ex parte Guzman*, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (Mexican client referred to as "wet back" in front of all-white jury by defense counsel); Record Excerpts at 102, *Dungee v. Kemp*, (11th Cir.) No. 85-8202 (defendant called "nigger" by defense counsel), *decided sub nom. Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied* 476 U.S. 1164 (1986).

⁵³*House v. Balkcom*, 725 F.2d 608, 612 (11th Cir. 1984), *cert. denied*, 469 U.S. 870 (1984).

⁵⁴A judge in Harris County, Texas, responding to a capital defendant's complaints about his lawyer sleeping during the trial at which death was imposed, stated: "The Constitution does not say that the lawyer has to be awake." John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUS. CHRON., Aug. 14, 1992, at A35. Defense counsel was found to have slept during a capital trial in *Harrison v. Zant*, No. 88-V-1640, Order at 2 (Super. Ct. Butts County, Ga. Oct. 5, 1990), *aff'd*, 402 S.E.2d 518 (Ga. 1991).

⁵⁵*People v. Garrison*, 254 Cal. Rptr. 257 (1986). Counsel, an

and decide capital cases on the basis of appellate briefs that would be rejected in a first-year legal writing course in law school.⁵⁶

There are several interrelated reasons for the poor quality of representation in these important cases. Most fundamental is the wholly inadequate funding for the defense of indigents. As a result, there is simply no functioning adversary system in many states. Public defender programs have never been created or

alcoholic, was arrested en route to court one morning and found to have a blood alcohol level of 0.27. Yet the court was unwilling to create a presumption against the competence of attorneys under the influence of alcohol.

⁵⁶See, e.g., *Morgan v. Zant*, 743 F.2d 775, 780 (11th Cir. 1984) (Georgia Supreme Court affirmed death sentence after receiving brief that contained only five pages of argument and was filed only in response to threat of sanctions against the lawyer); *Banda v. State*, 768 S.W.2d 294, 297 (Tex. Crim. App. 1989) (dissent notes that court-appointed counsel raised a single point of error and the substantive portion of the brief was 150 words); *Modden v. State*, 721 S.W.2d 859, 860 n.1 (Tex. Crim. App. 1986) ("the points of error are multifarious, contain incomplete or no citations to the record, and fail to state an adequate legal basis upon which complaint is made"); Brief and Argument in Support of Petition for Writ of Certiorari, *Ex parte Heath*, 455 So. 2d 905 (Ala. 1984) (No. 4 Div. 134) (one page of argument, raising a single issue and citing one case) (set out in full in note 154 *infra*); Brief for Appellant, *Thomas v. State*, 266 S.E.2d 499 (Ga. 1980) (No. 36046) (six pages of poorly written argument, citing only nine cases, which failed to raise issues regarding mental incompetence of the defendant, lack of any counsel at the preliminary hearing, mental competency of the state's two key witnesses, vagueness of the aggravating circumstance on which the death sentence rested, and other issues that were later raised in a brief of 70 pages which cited 96 cases in the postconviction appeal of the case to the Eleventh Circuit); see also *In re Dale*, 247 S.E.2d 246, 248 (N.C. Ct. App. 1978) (due to financial considerations, attorney did not file appeal in capital case); Docket Entry of July 8, 1983, of Clerk of Alabama Court of Criminal Appeals, *State v. Waldrop*, 459 So. 2d 959 (Ala. Crim. App. 1984) (No. 7 Div. 133) (clerk wrote a letter to appellate counsel, who had not cited any authority in his brief, asking him to include some citation to authority; counsel sent a list of cases); Brief of Appellant, *Morrison v. State*, 373 S.E.2d 506 (Ga. 1988) (No. 45572) (two pages of argument, citing two cases); Brief of Appellant, *Newland v. State*, 366 S.E.2d 689 (Ga. 1988) (No. 45264) (62-page digest of the transcript, followed by only three pages of argument, citing not a single case); Brief of Appellant, *Cohen v. State*, 361 S.E.2d 373 (Ga. 1987) (No. 44457) (four pages of argument, citing two cases).

properly funded in many jurisdictions. The compensation provided to individual court-appointed lawyers is so minimal that few accomplished lawyers can be enticed to defend capital cases. Those who do take a capital case cannot afford to devote the time required to defend it properly. As a result, the accused are usually represented by lawyers who lack the experience, expertise, and resources of their adversaries on the prosecution side.

Many state court judges, instead of correcting this imbalance, foster it by intentionally appointing inexperienced and incapable lawyers to defend capital cases, and denying funding for essential expert and investigative needs of the defense. The minimal standard of legal representation in the defense of poor people, as currently interpreted by the Supreme Court, offers little protection to the poor person stuck with a bad lawyer.

A. The Lack of a Functioning Adversary System

Many death penalty states have two state-funded offices that specialize in handling serious criminal cases. Both employ attorneys who generally spend years—some even their entire careers—handling criminal cases. Both pay decent annual salaries and provide health care and retirement benefits. Both send their employees to conferences and continuing legal education programs each year to keep them up to date on the latest developments in the law. Both have at their disposal a stable of investigative agencies, a wide range of experts, and mental health professionals anxious to help develop and interpret facts favorable to their side. Unfortunately, however, in many states both of these offices are on the same side: the prosecution.

One is the District Attorney's office in each judicial district, whose lawyers devote their time exclusively to handling criminal matters in the local court systems. These lawyers acquire considerable expertise in the trial of criminal cases, including capital cases. There are, for example, prosecutors in the District Attorney's office in Columbus, Georgia, who have been trying death penalty cases since the state's current death penalty statute was adopted in 1973.

The other office is the state Attorney General's office, which usually has a unit made up of lawyers who specialize in handling the appeals of criminal cases and habeas corpus matters. Here, too, lawyers build expertise in handling capital cases. For example, the head of the unit that handles capital litigation for the Georgia Attorney General has been involved in that work since 1976, the same year the Supreme Court upheld Georgia's death penalty statute. She brings to every case a wealth of expertise developed in 17 years of litigating capital cases in all the state and federal courts involved in Georgia cases. She and her staff are called upon by district attorneys around the state for consultation on pending cases and, on occasion, will assist in trial work. It is the normal practice in Georgia that briefs by *both* the district attorney and the attorney general are filed with the Georgia Supreme Court on the direct appeal of a capital case.

The specialists in the offices of both the district attorneys

and the attorneys general have at their call local, state, and, when needed, federal investigative and law enforcement agencies. They have a group of full-time experts at the crime laboratory and in the medical examiner's offices to respond to crime scenes and provide expert testimony when needed. If mental health issues are raised, the prosecution has a group of mental health professionals at the state mental facilities. No one seriously contends that these professional witnesses are objective. They routinely testify for the prosecution as part of their work, and prosecutors enjoy longstanding working relationships with them.

In Alabama, Georgia, Mississippi, Louisiana, Texas, and many other states with a unique fondness for capital punishment, there is no similar degree of specialization or resources on the other side of capital cases. A poor person facing the death penalty may be assigned an attorney who has little or no experience in the defense of capital or even serious criminal cases,⁵⁷ one reluctant or unwilling to defend him,⁵⁸ one with little or no empathy or understanding of the accused or his particular plight,⁵⁹ one with

⁵⁷See, e.g., *Paradis v. Arave*, 954 F.2d 1483, 1490-91 (9th Cir. 1992) (defendant represented at capital trial by lawyer who had passed the bar six months earlier, had tried no criminal cases, and had not taken any courses in criminal law, criminal procedure, or trial advocacy in law school); *Tyler v. Kemp*, 755 F.2d 741, 743 (11th Cir.) (defendant represented at Georgia trial by attorney with little criminal law experience who had been admitted to the bar just a few months before trial), *cert. denied*, 474 U.S. 1026 (1985); *Bell v. Watkins*, 692 F.2d 999, 1008 (5th Cir. 1982) (defendant represented at Mississippi capital trial by attorney who had recently graduated from law school and never tried a criminal case all the way to verdict); *State v. Wigley*, 624 So. 2d 425, 427 (La. 1993) (three of four attorneys appointed to defend two defendants "were civil practitioners with little criminal law experience"); *Parker v. State*, 587 So. 2d 1072, 1100-03 (Ala. Crim. App. 1991) (defense lawyers asserted they were inexperienced in defense of criminal cases and incompetent to handle a capital case in unsuccessful attempt to withdraw); *State v. Leatherwood*, Miss. S. Ct. No. DP-70 (trial transcript) (defendant in capital case represented by third-year law student and attorney), *rev'd on other grounds*, 548 So. 2d 389 (Miss. 1989).

⁵⁸See, e.g., *Coleman v. Kemp*, 778 F.2d 1487, 1494, 1495, 1503, 1516, 1522 (11th Cir. 1985) (one attorney appointed to defend capital cases claimed the appointment was "the worst thing that's ever happened to me professionally"; another stayed on the case because "[t]o refuse would be contempt of court"), *cert. denied*, 476 U.S. 1164 (1986).

⁵⁹An African-American facing the death penalty in Walker County, Georgia, was represented by a white defense attorney whose attitudes on race were described as follows by a federal district

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little or no knowledge of criminal or capital punishment law, or one with no understanding of the need to document and present mitigating circumstances.⁶⁰ Although it is widely acknowledged that at least two lawyers, supported by investigative and expert assistance, are required to defend a capital case, some of the jurisdictions with the largest number of death sentences still assign only one lawyer to defend a capital case.⁶¹

In contrast to the prosecution's virtually unlimited access to experts and investigative assistance, the lawyer defending the indigent accused in a capital case may not have any investigative or expert assistance to prepare for trial and present a defense. A study of twenty capital cases in Philadelphia in 1991 and 1992 found that the court "paid for investigators in eight of the twenty cases, spending an average of \$605 in each of the eight" and that the court "paid for psychologists in two of them, costing \$400 in one case, \$500 in the other."⁶² It is impossible even to

court before concluding that the lawyer had not rendered ineffective assistance:

Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my grand-daddy had slaves." He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia] Dobbs v. Zant, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989) (denying habeas corpus relief), *aff'd*, 963 F.2d 1519 (11th Cir. 1991), *remanded*, 113 S. Ct. 835 (1993). Defendants in other cases have been referred to by their lawyers with racial slurs. See *supra* note 51.

⁶⁰See *supra* notes 10-13 and accompanying text.

⁶¹In Texas, which has the second largest death row in the nation and has carried out more executions than any other state, the accused is given only one lawyer in many cases. THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 156, 157 (1993) (prepared for the State Bar of Texas). In Philadelphia, where the number of people sentenced to death is greater than the combined death rows of 21 of the 36 states which have the death penalty, a capital case is often defended by a single attorney. See Michael DeCourcy Hinds, *Circumstances in Philadelphia Consign Killers*, N.Y. TIMES, June 8, 1992, at K1; Tulsky, *What Price Justice?*, *supra* note 48, at A18.

⁶²Tulsky, *What Price Justice?*, *supra* note 48, at A18.

begin a thorough investigation or obtain a comprehensive mental health evaluation for such paltry amounts.

Although the Supreme Court has held that indigent defendants may be entitled to expert assistance in certain circumstances,⁶³ defense attorneys often do not even request such assistance because they are indifferent or know that no funds will be available.⁶⁴ Courts often refuse to authorize funds for investigation and experts by requiring an extensive showing of need that frequently cannot be made without the very expert assistance that is sought.⁶⁵ Many lawyers find it impossible to

⁶³*Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (indigent defendant has a right to mental health expert where mental health issues are a "significant factor" at trial); see, e.g., *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) ("The right to psychiatric assistance. . . means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate").

⁶⁴A survey of lawyers and judges in Texas found that approximately one-half of the attorneys who had handled a capital case and 33% of judges who had recently presided over a capital case indicated that resources were inadequate to pay expert witnesses and attorneys. *THE SPANGENBERG GROUP*, *supra* note 60, at 159; see, e.g., Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 *ARK. L. REV.* 409, 410 (1991) (describing the dilemma of an Arkansas attorney in a capital case who needed a psychiatrist to examine a defendant who had previously been diagnosed as schizophrenic; the lawyer was first told by the judge to find a mental health expert closer to home and then denied funds after he located a local psychologist).

⁶⁵In response to the denial of expert assistance for failure to make a sufficient showing in one case, Judge Frank M. Johnson, Jr. pointed out for the dissenters: "[H]ow could [counsel] know if he needed a microbiologist, an organic chemist, a urologist, a hematologist, or that which the state used, a serologist? How further could he specify the type of testing he needed without first hiring an expert to make that determination?" *Moore v. Kemp*, 809 F.2d 702, 743 (11th Cir. 1987) (Johnson, J., concurring in part and dissenting in part); see also *Stephens v. Kemp*, 846 F.2d 642, 646 (11th Cir.) (upholding denial of ballistics expert because of insufficient showing by defense counsel of need for expert), *cert. denied*, 488 U.S. 872 (1988); *Messer v. Kemp*, 831 F.2d 946 (11th Cir. 1987) (en banc) (although the only issue at both guilt and penalty phases was insanity and defense counsel made numerous motions for an independent psychiatrist, denial of expert assistance was upheld because of the vague nature of defense counsel's request and counsel's failure to provide any factual basis for his belief that defendant had psychiatric problems), *cert. denied*, 485 U.S. 1029 (1988).

maneuver around this "Catch 22,"⁶⁶ but even when a court recognizes the right to an expert, it often authorizes so little money that no competent expert will get involved.⁶⁷

An indigent accused facing the death penalty in Columbus, Georgia, was assigned counsel by the local trial judge, a former district attorney who had tried high profile capital cases on the way to becoming a judge.⁶⁸ Neither of the two lawyers appointed had ever tried a capital case before. The lawyers were denied any funds for an investigator or expert assistance. The case was prosecuted by an assistant district attorney with over fifteen years of experience in trying capital and other criminal cases. The defense was unable to investigate the case or present any expert testimony in response to the state's fingerprint and identification technicians, ballistics expert, coroner, and medical examiner.

An Alabama attorney, appointed without co-counsel and granted only \$500 for expert and investigative expenses to defend a highly publicized capital case, facing three prosecutors and an array of law enforcement agencies and expert witnesses, described his situation:

Without more than \$500, there was only one choice, and that is to go to the bank and to finance this litigation, myself, and I was just financially unable to do that. It would have cost probably in excess of thirty to forty thousand dollars, and I just could not justify taking those funds from my practice, or my family at that time.⁶⁹

⁶⁶In dissenting in *Moore v. Kemp*, Judge Johnson observed: "[T]he majority's reading of *Ake* creates a proverbial 'Catch 22,' making it impossible for all but the most nimble (and prescient) defendant[s] to obtain expert assistance." 809 F.2d at 742 (Johnson, J., dissenting).

⁶⁷For example, a review of capital cases in Philadelphia suggested experts were unwilling to consult with defense lawyers because of the meager compensation. Tulskey, *What Price Justice?*, *supra* note 48, at A1, A18. One expert observed to a group of defense lawyers that she made more than they did. *Id.* Another, a University of Pennsylvania professor who takes cases for defense lawyers outside Philadelphia, explained his refusal to be retained by court-appointed counsel in capital cases in Philadelphia: "I like to choose my charities. . . . This is a bad system, and unfair to the defendant." *Id.*

⁶⁸*State v. Walker*, No. 89 CR 56742-2 (Super. Ct. Muscogee County, Ga., 1991), *rev'd on other grounds*, 424 S.E.2d 782 (Ga. 1993).

⁶⁹Deposition of Richard Bell at 24-25, *Grayson v. State* (Cir. Ct. Shelby County, Ala., Oct. 10, 1991) (No. CV 86-193).

Not surprisingly, the attorney was simply unable to investigate the case properly:

I could not take days at a time out of my office to do essentially non-legal work. And investigation is necessary, certainly, to prepare a case, but it is non-legal. . . . You're actually pounding the pavement, trying to come up with the same information that a person who is paid substantially less per hour could take care of, I mean, whether it be the investigator for the Sheriff's Department or the District Attorney's office or the F.B.I., or the U.S. Attorney's office. You don't find the U.S. Attorney pounding the pavement, trying to investigate facts. . . . And it just creates a terrible situation when you have to do everything for yourself.⁷⁰

As a result, much of the investigation simply was not done and critical evidence was not presented.⁷¹ With regard to the lack of funds for expert witnesses, the lawyer testified that in civil cases, which constituted ninety percent of his caseload, he would have hired the required experts because failure to do so would have constituted malpractice.⁷²

An attorney involved in the defense of many capital cases in Arkansas has described how lawyers in that state are forced to perform "a sort of uninformed legal triage," ignoring some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources.⁷³ He described the costs of such an approach: "The lawyer pays some in reputation, perhaps, but it is his client who must pay with his liberty or life."⁷⁴

The adversary system often breaks down at the appellate level as well. The poor defendant usually does not receive representation equal to that of the prosecution in a state like Georgia, where on direct appeal of capital cases, specialists in the offices of the Attorney General and District Attorney both file briefs for the state. The poor person sentenced to death may be represented by a lawyer with little or no appellate experience, no knowledge of capital punishment law, and little or no incentive or inclination to provide vigorous advocacy. For example, in one Georgia case, the court-appointed attorney filed a brief

⁷⁰ *Id.* at 62-63.

⁷¹ *Id.* at 56-59.

⁷² *Id.* at 29-31, 46-48.

⁷³ Rosenzweig, *supra* note 63, at 412.

⁷⁴ *Id.*

containing only five pages of argument, and that only after the Georgia Supreme Court threatened to impose sanctions.⁷⁵ The lawyer did not raise as an issue the trial court's charge to the sentencing jury, which was later found by the U.S. Court of Appeals to have violated the Constitution, did not appear for oral argument, and did not file a supplemental brief on the jury instruction issue even after requested to do so by the court.⁷⁶ Nevertheless, the Georgia Supreme Court did not appoint other counsel or require adequate briefing. Instead, with nothing more before it than counsel's deficient performance, the court upheld the conviction and death sentence.⁷⁷ The death sentence was later set aside by the U.S. Court of Appeals.⁷⁸ There have been numerous other instances of grossly deficient representation on appeal in cases of those condemned to die.⁷⁹

B. *The Lack of Indigent Defense Programs*

In many jurisdictions where capital punishment is frequently imposed, there are no comprehensive public defender systems whose resources can parallel the prosecutorial functions of the district attorneys' offices.⁸⁰ There are no appellate defender offices that

⁷⁵Morgan v. Zant, 743 F.2d 775, 780 (11th Cir. 1984).

⁷⁶*Id.*

⁷⁷State v. Morgan, 246 S.E.2d 198 (Ga. 1978), *cert. denied*, 441 U.S. 967 (1979).

⁷⁸Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984).

⁷⁹For other examples of deficient representation on appeal see *supra* note 55.

⁸⁰Only 11 of the 36 states which have the death penalty have statewide public defender programs. THE SPANGENBERG GROUP, *supra* note 60, at 122, 125. Some of those state public defender programs have specialized full-time capital litigation groups that provide representation in capital cases at trial. *Id.* Two of those states, New Hampshire and Wyoming, have no one under death sentence. *Id.* at 119; NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW USA 1 (Winter 1993). Eight of the states with statewide defense programs have death rows that are comparatively small: Connecticut (5); Delaware (16); Maryland (14); New Jersey (9); New Mexico (1). *Id.* at 17, 27, 25, 28, 29. This leaves two states with large death row populations, Ohio (127) and Missouri (83), with statewide programs and capital litigation sections. *Id.* at 26, 29; THE SPANGENBERG GROUP, *supra* note 60, at 122. Florida and California, which have two of the country's three largest death rows, have public defender programs, but many capital cases in those states are handled by assigned counsel outside of the public defender system. Florida has an elected public defender in each judicial circuit. *Id.* at 122-23. California has county public defender agencies in all of

parallel the function of the capital litigation sections of the attorneys general's offices. In fact, there is no coherent system at all, but a hodgepodge of approaches that vary from county to county.

In many jurisdictions, judges simply appoint members of the bar in private practice to defend indigents accused of crimes.⁸¹ The lawyers appointed may not want the cases,⁸² may receive little or no compensation for the time and expense of handling them,⁸³ may lack any interest in criminal law, and may not have the skill to defend those accused of a crime. As a result, the poor are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills. Lawyers can make more money doing almost anything else. Even many lawyers who have an interest in criminal defense work

its major counties. *Id.* at 123. Even though these programs cannot handle the huge volume of capital cases in those states, they have annual training programs and provide materials which improve the quality of representation in those states. No similar programs exist in Texas or many other states with large death row populations.

⁸¹Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled To Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 370 (1993).

⁸²For example, indigent defense boards in Louisiana maintain lists of "volunteer" and "non-volunteer" lawyers and may appoint counsel from either list. LA. REV. STAT. ANN. § 15:145(A), (B)(1)(a) (West 1992); *State v. Wigley*, 624 So. 2d 425 (La. 1993) (involving four "non-volunteer" attorneys, three of whom had little criminal law experience, appointed without compensation to defend two defendants facing death penalty); *State v. Clark*, 624 So. 2d 422 (La. 1993) (finding attorney in contempt for refusing to accept armed robbery case without compensation, his fifth felony appointment in four months). In some judicial circuits, it is a requirement that attorneys newly admitted to practice take indigent appointments during their first years in the bar. Jeanne Cummings, *In Some Courts, It's "No Contest" for Lawyers Given Indigent Cases*, ATLANTA CONST., Apr. 6, 1990, at A1 (noting requirement in Rome, Georgia, that all attorneys with 15 years experience or less take criminal appointments)

⁸³"In all too many jurisdictions, the total compensation paid to court-appointed counsel does not even meet their regular hourly overhead costs." RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 5 (1993) (prepared for the American Bar Association Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis). For example, in Virginia, the maximum fee allowable for most felonies is \$350. *Id.* at 6.

simply cannot afford to continue to represent indigents while also repaying their student loans and meeting their familial obligations.

Some counties employ a "contract system" in which the county contracts with an attorney in private practice to handle all of the indigent cases for a specified amount. Often contracts are awarded to the lawyer—or group of lawyers—who bids the lowest.⁸⁴ The lawyer is still free to generate other income through private practice. Any money spent on investigation and experts comes out of the amount the lawyer receives. These programs are well known for the exceptionally short shrift that the poor clients receive and the lack of expenditures for investigative and expert assistance.⁸⁵

A third system is the employment of a group of lawyers or an organization to handle all indigent criminal cases while not engaging in any outside practice. These lawyers are usually called "public defenders," although in some jurisdictions they lack the investigative and support staff that is considered part of a genuine public defender program. Some of these offices employ remarkably dedicated attorneys, whose jobs are nonetheless made almost impossible by overwhelming caseloads and low funding.

For example, the Fulton County Public Defender program, which serves the courts in Atlanta, has achieved nationwide notoriety for its high caseloads—an average of 530 felony cases per attorney for each year plus extraditions, probation revocations, commitment, and special hearings—and grossly inadequate funding.⁸⁶ A public defender in Atlanta may be assigned as many as forty-five new cases at one arraignment. At that time, upon first meeting these clients—chained together—for a nonprivate, nonconfidential "interview" in a holding area near the courtroom, she may plead many of them guilty and have them sentenced on the spot. As one

⁸⁴Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 679 (1986).

⁸⁵*Id.* at 680. A contract arrangement in one Georgia county required that the attorney pay any investigative and expert expenses out of the \$4265 he was to be paid that year for representing all of the county's indigent defendants. Not surprisingly, often not one penny is spent on either investigative or expert assistance in an entire year in some Georgia counties.

⁸⁶See THE SPANGENBERG GROUP, OVERVIEW OF THE FULTON COUNTY, GEORGIA INDIGENT DEFENSE SYSTEM (1990); Peter Appelbome, *Study Faults Atlanta's System of Defending Poor*, N.Y. TIMES, Nov. 30, 1990, at B5; Monroe Freedman, *Third World Justice, First World Shame*, FULTON COUNTY DAILY REP., Feb. 8, 1991, at 6-7 (observing "daily, active collaboration" by judges in the "debasement of justice"); see also Sandra McIntosh & Jeanne Cummings, *Crisis in the Courts: Inmates Wait Months To See a Lawyer*, ATLANTA J.-CONST., Jan. 6, 1991, at A1.

public defender described disposing of seventeen indigent defendants: "I met `em, pled `em and closed `em—all in the same day."⁸⁷ This system of criminal procedure is known as "slaughterhouse justice." When one lawyer in the office, after closing 476 cases in ten months and still carrying a caseload of 122, asserted her ethical obligation to limit her caseload, she was berated by the trial judge, who refused her request; she was eventually demoted to juvenile court by the director of her office.⁸⁸

A public defender in New Orleans represented 418 defendants during the first seven months of 1991.⁸⁹ During this time, he entered 130 guilty pleas at arraignment and had at least one serious case set for trial on every single trial date during the period.⁹⁰ In "routine cases," he received no investigative support because the three investigators in the public defender office were responsible for more than 7000 cases per year.⁹¹ No funds were available for expert witnesses. The Louisiana Supreme Court found that, because of the excessive caseloads and insufficient resources of the public defender office, the clients served by this system are "not provided with the effective assistance of counsel the [C]onstitution requires."⁹²

The structure of indigent defense not only varies among states, it varies within many states from county to county. Some localities employ a combination of these programs. All of these approaches have several things in common. They evince the gross underfunding that pervades indigent defense. They are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads.⁹³ Just when

⁸⁷Trisha Renaud & Ann Woolner, *Meet Em and Plead Em: Slaughterhouse Justice in Fulton's Decaying Indigent Defense System*, FULTON COUNTY DAILY REP., Oct. 8, 1990, at 1.

⁸⁸Appelbome, *supra* note 85, at B5; Trisha Renaud & Ann Woolner, *Borsuk Grilled in Fryer Firestorm*, FULTON COUNTY DAILY REP., Oct. 12, 1990, at 1; Richard Shumate, "I Will Not Accept Any More Cases," BARRISTER MAG., Winter 1991-92, at 11.

⁸⁹State v. Peart, 621 So. 2d 780, 784 (La. 1993).

⁹⁰*Id.* A serious case was defined as "one involving an offense necessarily punishable by a jail term which may not be suspended." *Id.* at 784 n.3.

⁹¹*Id.*

⁹²*Id.* at 790.

⁹³"The caseload crisis can devastate the morale of often idealistic and dedicated attorneys." Klein, *supra* note 80, at 393-94. In some offices, caseloads make it impossible for even the most competent and well-intentioned lawyers to provide their clients with adequate representation. KLEIN & SPANGENBERG, *supra* note

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lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads. Generally, no standards are employed for assignment of cases to counsel or for the performance of counsel. And virtually no resources are provided for investigative and expert assistance or defense counsel training.

The situation has further deteriorated in the last few years. This is largely due to the increased complexity of cases and the increase in the number of cases resulting from expanded resources for police and prosecution and the lack of a similar increase, and perhaps even a decline, in funding for defense programs.⁹⁴ The quality and funding for defense programs often varies greatly from one county or judicial district to another in the same state. Texas, which has one of the largest death row populations and has carried out the most executions since the resumption of capital punishment in 1976,⁹⁵ is one of eight states in which indigent defense is handled at the county level with no state funding.⁹⁶ Funding for indigent defense varies significantly from county to county.⁹⁷ In Louisiana, the indigent defense system is funded by

82, at 6, 7, 9.

⁹⁴Klein, *supra* note 80, at 393, 398, 403-04, 407. For example, Kentucky police and prosecutors received \$4.6 million from civil seizure and forfeitures in drug cases and \$6 million from drug grants under the Federal Comprehensive Crime Control Act in fiscal year 1990, resulting in an increase of 114% in drug arrests, but the state's public defender program received no money from either source. Edward C. Monahan, *Who Is Trying To Kill the Sixth Amendment?* ABA CRIM. JUSTICE, (Summer 1991), at 24, 27-28. When this money is added to state funding, Kentucky's police and prosecutors received \$156 million compared to the public defenders receiving \$11.4 million. *Id.* at 28. Thus, Kentucky police and prosecutors receive \$14 for every \$1 provided for public defense.

⁹⁵Texas had 365 people under death sentence and had carried out 69 executions by October 1993. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, *supra* note 79, at 9, 39. Since 1976, Texas has carried out more than twice as many executions as any other state. *Id.*

⁹⁶THE SPANGENBERG GROUP, *supra* note 60, at 151.

⁹⁷*Id.* The same variations are also found in other states. A report by a task force on indigent defense appointed by the Governor of Kentucky found that funding per public defender case in one Kentucky county was \$44.22, while in another county the funding was \$296.44. *The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations*, reprinted in *ADVOCATE*, Dec. 1993, at 8 (published by Ky. Dep't of Public Advocacy, Frankfort, Ky.) [hereinafter

assessments from traffic tickets. As a result, there have been "wide variations in levels of funding," adding to a "general pattern . . . of chronic underfunding of indigent defense programs in most areas of the state."⁹⁸ Alabama finances its indigent defense system through a tax on all civil and criminal filings in the court system.⁹⁹

The deficiencies in representation resulting from such haphazard and underfunded approaches have been acknowledged. The vice president of the Georgia Trial Lawyers Association once described the simple test used in that state to determine whether a defendant receives adequate counsel as "the mirror test." "You put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel."¹⁰⁰ It is not surprising that such a dysfunctional system is incapable of providing legal representation in capital cases. Unlike the offices of the district attorneys and attorneys general, there is no structure in many states for training and supervising young lawyers in their initial years of practice to develop a cadre of attorneys who specialize in the defense of complex cases. There are no job opportunities in indigent defense for the young law graduates who want to become criminal lawyers. And, because of the financial incentives, most of those who have or develop good trial skills quickly move on to personal injury work or, if they remain in criminal law, the more lucrative defense of drug, pornography, and white collar cases.

C. Compensation of Attorneys: The Wages of Death

The United States Court of Appeals for the Fifth Circuit, finding that Federico Martinez-Macias "was denied his constitutional right to adequate counsel in a capital case in which [his] actual innocence was a close question," observed that, "The state [Texas] paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for."¹⁰¹ What is unusual about the case is not the amount paid to counsel, but the court's acknowledgement of its impact on the quality of services rendered.

Kentucky Task Force Report].

⁹⁸State v. Peart, 621 So. 2d 780, 789 (La. 1993). A study of the system found that there is a "desperate need to double the budget for indigent defense in Louisiana in the next two years." *Id.* (quoting THE SPANGENBERG GROUP, STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA 50 (1992)).

⁹⁹ALA. CODE § 12-19-250 *et seq* (1975).

¹⁰⁰Hal Strauss, *Indigent Legal Defense Called "Terrible,"* ATLANTA J.-CONST., July 7, 1985, at 12A.

¹⁰¹Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

As we have seen, in many jurisdictions poor people facing the death penalty are not assigned specialists who work for indigent defense programs, but individual attorneys, often sole practitioners. In some jurisdictions, the hourly rates in capital cases may be below the minimum wage or less than the lawyer's overhead expenses.¹⁰² Many jurisdictions limit the maximum fee for a case. At such rates it is usually impossible to obtain a good lawyer willing to spend the necessary time.

Alabama limits compensation for out-of-court preparation to \$20 per hour, up to a limit of \$1000.¹⁰³ In one rare Alabama case where two lawyers devoted 246.86 and 187.90 hours respectively to out-of-court preparation, they were still paid \$1000 each, or \$4.05 and \$5.32 per hour.¹⁰⁴

In some rural areas in Texas, lawyers receive no more than \$800 to handle a capital case.¹⁰⁵ Generally, the hourly rate is \$50 or less.¹⁰⁶ Attorneys appointed to defend capital cases in Philadelphia are paid an average of \$6399 per case.¹⁰⁷ In the few cases where a second attorney has been appointed, it is often at a flat rate of \$500.¹⁰⁸ A study in Virginia found that, after taking into account an attorney's overhead expenses, the effective hourly rate paid to counsel representing an indigent accused in a capital case was \$13.¹⁰⁹ In Kentucky, the limit for a capital case is

¹⁰²For the rates and maximums for each state, see Anthony Paduano & Clive A.S. Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 349-53 (1991).

¹⁰³ALA. CODE § 15-12-21 (a) (Supp. 1992).

¹⁰⁴Smith v. State, 581 So. 2d 497, 526 (Ala. Crim. App. 1990). An opinion of the Alabama Attorney General has since concluded that the sentencing phase of a capital case is to be considered a separate case, allowing a maximum payment of \$2000 for out-of-court time at a rate of \$20 per hour. Op. Ala. Att'y Gen. No. 91-00206 (Mar. 21, 1991).

¹⁰⁵Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34.

¹⁰⁶THE SPANGENBERG GROUP, *supra* note 60, at 157.

¹⁰⁷Tulsky, *What Price Justice?*, *supra* note 48, at A18.

¹⁰⁸Tulsky, *Big-Time Trials*, *supra* note 48, at A1, A8. The \$500 fee was to encourage lawyers to get experience in capital cases. However, only a handful of lawyers took on cases because of the low compensation. *Id.*

¹⁰⁹Klein, *supra* note 80, at 366.

\$2500.¹¹⁰

Sometimes even these modest fees are denied to appointed counsel. A capital case in Georgia was resolved with a guilty plea only after the defense attorneys, a sole practitioner and this author, agreed not to seek attorneys fees as part of the bargain in which the state withdrew its request for the death penalty.¹¹¹

In cases involving financial as opposed to moral bankruptcy, Atlanta law firms charge around \$125 per hour for their associates, \$200 per hour for partners, and \$50 to \$80 per hour for paralegals.¹¹² In civil rights and other civil litigation, courts routinely order attorneys fees much higher than those paid to appointed lawyers in capital cases.¹¹³ Paralegals and law clerks in civil rights cases may be compensated at rates equal to or better than what experienced attorneys are paid in capital

¹¹⁰*Kentucky Task Force Report, supra note 96, at 11.*

¹¹¹Mark Curriden, *Fees for Pleas Called Improper*, A.B.A. J., May 1993, at 28; *Hard Bargain*, NAT'L L.J., Nov. 19, 1990, at 12 (editorial); Marianne Lavelle, *Cop Plea, But Forfeit Your Fee*, NAT'L L.J., Nov. 19, 1990, at 29. Counsel had been forced to appeal to the Georgia Supreme Court to be appointed because the local trial judge had refused to appoint the lawyers who won the defendant a new trial in federal habeas corpus. See *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989).

¹¹²Tim O'Reiley, *Billing Rates Crept Upward in 1992*, FULTON COUNTY DAILY REP., Feb. 15, 1993, at 1B; Tim O'Reiley, *Lawyers Raised Prices Despite Slump*, FULTON COUNTY DAILY REP., Jan. 25, 1994, at 1. The rates charged are supposed to be the attorneys' usual and customary prices.

¹¹³See, e.g., *Brooks v. Georgia State Bd. of Elections*, 997 F.2d 857 (11th Cir. 1993) (remanding voting rights case for assessment of fees between \$125 and \$175 per hour); *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991) (affirming attorneys fees of \$150 per hour in civil rights action against prison guards); *Associated Builders & Contractors v. Orleans Parish Sch. Bd.*, 919 F.2d 374 (5th Cir. 1990) (affirming award of \$165-\$175 per hour for partners and \$100 per hour for associates in suit alleging equal protection violation in connection with school system set-aside construction program); *Von Clark v. Butler*, 916 F.2d 255 (5th Cir. 1990) (affirming attorneys fees of \$100 per hour for preparation time and \$200 per hour for in-court time in civil rights claim of excessive use of force in arrest); *Cobb v. Miller*, 818 F.2d 1227 (5th Cir. 1987) (mandating \$90 per hour in civil rights litigation for damages resulting during plaintiff's arrest and conviction); *Knight v. Alabama*, 824 F. Supp. 1022 (N.D. Ala. 1993) (awarding attorneys fees ranging from \$275 per hour for lead counsel to \$100-\$200 per hour for other attorneys in school discrimination action).

cases.¹¹⁴ A new attorney at the Southern Center for Human Rights, straight out of law school, was awarded \$65 per hour by a federal court in 1990 for work on a prison conditions case.¹¹⁵ More experienced lawyers on that case were paid at rates of \$90, \$100, and \$150 per hour. Attorneys appointed to death penalty cases in state courts can never expect compensation at such rates.

A justice of the Georgia Supreme Court recently criticized that court's limitation of attorneys fees in an employment discrimination case.¹¹⁶ Limiting the attorney to \$50 per hour¹¹⁷ instead of providing the opportunity to recover reasonable attorneys fees would, the justice argued, make it unduly difficult to find lawyers for those who were victims of discrimination and "effectively den[y] many Georgians the key to the courthouse door."¹¹⁸ At lower rates it is even more difficult to find attorneys for capital cases.

Thus, it is unlikely that lawyers will seek appointments in capital cases when they can earn more handling other types of cases. It is undeniable that "[i]n our pecuniary culture the caliber of personal services rendered usually has a corresponding relationship to the compensation provided."¹¹⁹ Lawyers who have been appointed to defend the poor in capital trials often vow never to handle another. It is financially disastrous, emotionally draining,¹²⁰ and, for the small-town sole practitioner, it may be

¹¹⁴See, e.g., *Martin v. Mabus*, 734 F. Supp. 1216, 1230 (S.D. Miss. 1990) (awarding \$35 per hour for paralegal and student law clerk work in voting rights action).

¹¹⁵*Plyler v. Evatt*, 902 F.2d 273, 276 (4th Cir. 1990).

¹¹⁶The court held that where a successful plaintiff was not contractually obligated to pay any fees to her lawyer because the lawyer had been appointed by the Office of Fair Employment Practices, the Georgia Fair Employment Practices Act did not allow an award of "reasonable attorneys fees." *Finney v. Department of Corrections*, 434 S.E.2d 45 (Ga. 1993).

¹¹⁷The attorney had contracted with the Commission on Equal Opportunity to provide representation for \$50 per hour, a fee which had already been paid. Katie Wood, *Court Limits Fees in Bias Cases: Decision Restricting Attorneys Fees Divides High Court*, FULTON COUNTY DAILY REP., July 6, 1993, at 11.

¹¹⁸*Finney v. Department of Corrections*, 434 S.E.2d at 48 (Sears-Collins, J., dissenting).

¹¹⁹*Makemson v. Martin County*, 491 So. 2d 1109, 1114-15 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987) (quoting *MacKenzie v. Hillsborough County*, 288 So. 2d 200, 202 (Fla. 1973) (Ervin, J., dissenting)).

¹²⁰See, e.g., Michael A. Kroll, *Death Watch*, CAL. LAW., Dec. Page 27

very damaging to relations with paying clients. Even at \$200 an hour, it would be difficult to attract lawyers to handle these cases.

Not surprisingly, a recent study in Texas found that "more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and expert expenses and the enormous pressure that they feel in handling these cases."¹²¹ "In many counties, the most qualified attorneys often ask not to be considered for court appointments in capital cases due to the fact that the rate of compensation would not allow them to cover the expense of running a law practice."¹²² The same unwillingness to take cases because of the low fees has been observed in other states.¹²³ Consequently, although capital cases require special skills,¹²⁴ the level of compensation is often not enough even to attract those who regularly practice in the indigent defense system.

D. The Role of Judges: Appointment and Oversight of Mediocrity and Incompetence

Even if, despite the lack of indigent defense programs and adequate compensation, capable lawyers were willing to move to jurisdictions with many capital cases, forego more lucrative business, and take appointments to capital cases, there is still no assurance that those lawyers would be appointed to the cases. It is no secret that elected state court judges do not appoint the best and brightest of the legal profession to defend capital cases.¹²⁵ In part, this is because many judges do not want to

1987, at 24-27 (describing unwillingness of some lawyers in California to take capital cases because of emotional toll and "burnout").

¹²¹THE SPANGENBERG GROUP, *supra* note 60, at 152.

¹²²*Id.* at 157.

¹²³See, e.g., Friedman & Stevenson, *supra* note 48, at 30; Paduano & Smith, *supra* note 101, at 333.

¹²⁴"Capital cases require perceptions, attitudes, preparation, training, and skills that ordinary criminal defense attorneys may lack." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303-04 (1983); see also Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (describing in detail the "evolving standard of care" for the defense of capital cases).

¹²⁵Trial and appellate judges are elected or face retention elections after appointment in most states that have the death

impose on those members of the profession they believe to have more important, financially lucrative things to do. But even when choosing from among those who seek criminal appointments, judges often appoint less capable lawyers to defend the most important cases.

Judges have appointed to capital cases lawyers who have never tried a case before.¹²⁶ A study of homicide cases in Philadelphia found that the quality of lawyers appointed to capital cases in Philadelphia is so bad that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."¹²⁷ The study found that many of the attorneys were appointed by judges based on political connections, not legal ability. "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaigns."¹²⁸

An Alabama judge refused to relieve counsel even when they filed a motion to be relieved of the appointment because they had inadequate experience in defending criminal cases and considered themselves incompetent to defend a capital case.¹²⁹ Georgia trial judges have repeatedly refused to appoint or compensate the experienced attorneys who, doing pro bono representation in postconviction stages of review, had successfully won new trials for clients who had been sentenced to death.¹³⁰ In several of those cases, the Georgia Supreme Court ordered continued representation at the new trials by the lawyers who were familiar with the case and the client. Despite those precedents, a Georgia judge refused to appoint an expert capital litigator from the NAACP Legal Defense and Educational Fund to continue representation of an indigent defendant, even though the Legal Defense Fund lawyer had won a new trial for the client by showing in federal habeas corpus

penalty. Some of the difficulties that elected judges have in protecting the rights of the accused are described in Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability To Protect Criminal Defendants' Rights*, 7 LAW & INEQ. J. 107 (1988).

¹²⁶See *supra* note 56.

¹²⁷Tulsky, *Big-Time Trials*, *supra* note 48, at A8.

¹²⁸*Id.*

¹²⁹*Parker v. State*, 587 So. 2d 1071, 1100-03 (Ala. Crim. App. 1991).

¹³⁰*Davis v. State*, 404 S.E.2d 800 (Ga. 1991); *Birt v. Montgomery*, 387 S.E.2d 879 (Ga. 1990); *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989).

proceedings that he had received ineffective assistance from the lawyer appointed by the judge at the initial capital trial.¹³¹ And the lower court judges who have been reversed for failing to allow continuity in representation are still appointing lawyers when new cases come through the system. Those new defendants have no one to assist them in securing competent representation.

A newly-admitted member of the Georgia bar was surprised to be appointed to handle the appeal of a capital case on her fifth day of practice in Columbus, Georgia. Two days earlier she had met the judge who appointed her when she accompanied her boss to a divorce proceeding. Only after she asked for help was a second attorney brought onto the case. Another lawyer in that same circuit was appointed to a capital case, but after submitting his first billing statement to the judge for approval was told by the judge that he was spending too much time on the case. He was summarily replaced by another lawyer and the defendant was ultimately sentenced to death. For a number of years, judges in that circuit appointed a lawyer to capital cases who did not challenge the underrepresentation of black citizens in the jury pools for fear of incurring hostility from the community and alienating potential jurors.¹³² As a result, a number of African-Americans were tried by all-white juries in capital cases even though one-third of the population of the circuit is African-American.

The many other examples of exceptionally poor legal representation documented by the American Bar Association (ABA), the *National Law Journal*, and others indicate that judges either are intentionally appointing lawyers who are not equal to the task or are completely inept at securing competent counsel in capital cases. The reality is that popularly elected judges, confronted by a local community that is outraged over the murder of a prominent citizen or angered by the facts of a crime, have little incentive to protect the constitutional rights of the one accused in such a killing. Many state judges are former prosecutors who won their seats on the bench by exploiting high-publicity death penalty cases. Some of those judges have not yet given up the prosecutorial attitude.

United States Congressman William J. Hughes, a former New Jersey prosecutor and leader on crime issues in the Congress, observed: "With some of the horror stories we've heard—lawyers who didn't call witnesses, who waived final argument—it is incredible that the courts allowed these cases to move forward."¹³³ What is even more incredible is that in most of these instances the judges appointed the lawyers to the case.

¹³¹Roberts v. State, No. S93A1857, 1994 Ga. LEXIS 200 (Ga. Feb. 21, 1994).

¹³²See Gates v. Zant, 863 F.2d 1492, 1497-1500 (11th Cir.), cert. denied, 493 U.S. 945 (1989).

¹³³Marcia Coyle et. al, *Washington Brief: High Noon for Congressional Habeas*, NAT. L.J.. July 9, 1990, at 5.

*E. The Minimal Standard of Legal
Representation Tolerated in Capital Cases*

This sad state of affairs is tolerated in our nation's courts in part because the United States Supreme Court has said that the Constitution requires no more. Instead of actually requiring *effective* representation to fulfill the Sixth Amendment's guarantee of counsel, the Court has brought the standard down to the level of ineffective practice. Stating that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," the Court in *Strickland v. Washington*¹³⁴ adopted a standard that is "highly deferential" to the performance of counsel.¹³⁵ To prevail on a claim of ineffective assistance of counsel, a defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," show that the attorney's representation "fell below an objective standard of reasonableness,"¹³⁶ and establish "prejudice," which is defined as a reasonable probability that counsel's errors affected the outcome.¹³⁷

As Judge Alvin Rubin of the Fifth Circuit concluded:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.¹³⁸

Much less than mediocre assistance passes muster under the *Strickland* standard. Errors in judgment and other mistakes may readily be characterized as "strategy" or "tactics" and thus are beyond review.¹³⁹ Indeed, courts employ a lesser standard for

¹³⁴466 U.S. 668, 689 (1984).

¹³⁵*Id.*

¹³⁶*Id.* at 688-89.

¹³⁷*Id.* at 694.

¹³⁸*Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

¹³⁹Klein, *supra* note 83, at 634. For an example of the extraordinary lengths to which some courts will go to avoid finding a lawyer ineffective, see *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994), where the court, in reversing a finding by the district court of ineffective assistance in a capital case,

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judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects.¹⁴⁰

The defense lawyer in one Texas case failed to introduce any evidence about his client at the penalty phase of the trial. The attorney's entire closing argument regarding sentencing was: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."¹⁴¹ A United States district court granted habeas corpus relief because of the lawyer's failure to present and argue evidence in mitigation, but the Fifth Circuit, characterizing counsel's nonargument as a "dramatic ploy," found that the attorney's performance satisfied *Strickland*.¹⁴² The lawyer was later suspended for other reasons.¹⁴³ The defendant was executed.

Numerous other cases in which executions have been carried out demonstrate that the minimal standard for attorney competence employed in death penalty cases provides little protection for most poor persons accused of capital crimes. The case of John Eldon Smith, the first person executed in Georgia since the death penalty was restored,¹⁴⁴ is not exceptional. Smith's sentence was upheld and he was killed despite a constitutional violation because of his lawyer's ignorance of the law, while his codefendant won a new trial due to the same constitutional violation and later received a life sentence. The *second* person executed in Georgia after Smith was a mentally retarded offender, convicted despite a jury instruction that unconstitutionally shifted the burden of proof on intent; he was denied relief because his attorney did not preserve the issue for review.¹⁴⁵ The

stated: "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so." *Id.* at 386 (emphasis added). Rejecting other decisions by other panels of the same court holding that strategic decisions must be based on investigation, the panel in *Rogers* concluded that "'strategy' can include a decision not to investigate" and that "once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced." *Id.* at 386-87, 388.

¹⁴⁰Klein, *supra* note 83, at 640-41.

¹⁴¹*Romero v. Lynaugh*, 884 F.2d 871, 875 (5th Cir. 1989).

¹⁴²*Id.* at 877.

¹⁴³*Suspensions*, 56 TEX. B.J., Jan. 1993, at 73.

¹⁴⁴*See supra* notes 34-39 and accompanying text.

¹⁴⁵*Stanley v. Kemp*, 737 F.2d 921 (11th Cir. 1984), *application*

more culpable codefendant was granted a new trial on the very same issue.¹⁴⁶ Again, as with Smith and Machetti, switching the lawyers would have reversed the outcomes of the case.

John Young was sentenced to death in the same county as Smith. Young was represented at his capital trial by an attorney who was dependent on amphetamines and other drugs which affected his ability to concentrate. At the same time, the lawyer was physically exhausted, suffering severe emotional strain, and distracted from his law practice because of marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business.¹⁴⁷ As a result, the lawyer made little preparation for Young's trial, where his performance was inept. Young was sentenced to death. A few weeks later, Young met his attorney at the prison yard in the county jail. The lawyer had been sent there after pleading guilty to state and federal drug charges.¹⁴⁸ Georgia executed John Young on March 20, 1985.

James Messer was "represented" at trial by an attorney who, at the guilt phase, gave no opening statement, presented no defense case, conducted cursory cross-examination, made no objections, and then emphasized the horror of the crime in some brief closing remarks that could not be fairly described as a "closing argument."¹⁴⁹ Even though severe mental impairment was important to issues of mitigation at both the guilt and penalty phases, the lawyer was unable to present any evidence of it because he failed to make an adequate showing to the judge that he needed a mental health expert.¹⁵⁰ He also failed to introduce Messer's steady employment record, military record, church attendance, and cooperation with police. In closing, the lawyer repeatedly hinted that death was the most appropriate punishment for his own client.¹⁵¹ This too was good enough for a capital case in Georgia. Messer was executed July 28, 1988.

for stay denied, 468 U.S. 1220 (1984).

¹⁴⁶Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986).

¹⁴⁷Affidavit of Charles Marchman, Jr. at 1-5, Young v. Kemp, No. 85-98-2-MAC (M.D. Ga. 1985).

¹⁴⁸*Id.* at 7.

¹⁴⁹Messer v. Kemp, 474 U.S. 1008, 1090 (1986) (Marshall, J., dissenting from denial of certiorari).

¹⁵⁰Messer v. Kemp, 831 F.2d 946, 951 (11th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 1029 (1988).

¹⁵¹Messer v. Kemp, 760 F.2d 1080, 1096 n.2 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088, 1090 (1986) (Marshall, J., dissenting from denial of certiorari).

In light of Messer's case, one cannot help but wonder what progress has been made since the Supreme Court held that there is a right to counsel in capital cases in *Powell v. Alabama*. The nine black youths tried in Scottsboro, Alabama, in 1931 for the rapes of two white girls were represented by a lawyer described as "an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases" who conducted "rigorous and rigid cross-examination" of the state's witnesses.¹⁵² That is more than James Messer received at his capital trial.

Another case in which the attorney did nothing was that of Billy Mitchell, executed by Georgia on September 1, 1987. Following a guilty plea, Mitchell was sentenced to death at a sentencing hearing at which defense counsel called no witnesses, presented no mitigating evidence, and made no inquiries into his client's academic, medical, or psychological history.¹⁵³ A great deal of information of this kind was available and, if presented, could well have reduced the sentence imposed on Mitchell. In postconviction proceedings, new counsel submitted 170 pages of affidavits summarizing the testimony of individuals who could have appeared on Mitchell's behalf. Among them were family members, a city council member, a former prosecutor, a professional football player, a bank vice president, and several teachers, coaches, and friends.¹⁵⁴

The same ineptitude is frequently tolerated on appeal. The brief on direct appeal to the Alabama Supreme Court in the case of Larry Gene Heath, executed by Alabama on March 20, 1992, consisted of only one page of argument and cited only one case, which it distinguished.¹⁵⁵ Counsel, who had filed a six-page brief on the

¹⁵²*Powell v. Alabama*, 287 U.S. 45, 75 (1932) (Butler, J., dissenting) (quoting decision of Alabama Supreme Court).

¹⁵³*Mitchell v. Kemp*, 483 U.S. 1026, 1026-27 (1987) (Marshall, J., dissenting from denial of certiorari.).

¹⁵⁴*Id.*

¹⁵⁵What follows is the brief in its entirety. The only parts of the brief not set out below are the cover page and certificate of service:

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLANT WAS CONVICTED OF THE SAME OFFENSE, WHICH IS PRECISELY THE SAME IN LAW AND FACT IN VIOLATION OF THE 5th AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the opinion of the Court of Criminal Appeals rendered on July 5, 1983, the Court failed to address the issue as to whether or not the Appellant was tried and convicted of the same offense, which is precisely the same in law and fact as the offense of which he was convicted in the State of Georgia.

As the Court pointed out on Page 3 of it's [sic] opinion, there were no cited cases to any Federal case

law involving jeopardy in multiple State prosecutions and because there are no Federal cases cited, the Court apparently ignored the law relative to multiple prosecutions for an offense, which are precisely the same in law and fact.

Apparently the Court relied on the case of *Hare v State*, 387 So. 2 d [sic] 299, 300 (Ala. Crim. App. 1980) in reaching it's [sic] decision in this case. The *Hare* case can be distinguished simply by looking at the facts in the *Hare* case, wherein the Court in Tennessee was dealing with the offense of possession of drugs in the State of Alabama, which are not precisely the same in law and fact.

The Appellant plead guilty to the offense of murder, which was a lesser included offense of the charge of murder caused and directed by the Appellant under the laws of the State of Georgia and received a life sentence. After the Appellant was sentenced in the State of Georgia to life imprisonment, he was returned to the State of Alabama and was prosecuted and convicted of the offense of murder during kidnapping, 1st degree in the State of Alabama for the murder of his wife, Rebecca Heath.

Apparently this case is one of first impression in the State of Alabama, and this Court has not ruled on a similar case involving the offense of murder where only one victim is involved.

CONCLUSION

Appellant contends that his constitutional rights guaranteed under the 5th Amendment of the United States Constitution and his rights guaranteed by Article I Section 9 of the Alabama Constitution prohibiting Double Jeopardy and Double Punishment have been violated. Further, Appellant contends that he relied upon his guaranteed Constitutional rights as set forth above in pleading guilty to a lesser included offense of murder of his wife, in the state of Georgia, and that the prosecution in the State of Alabama on the offense of murder during the course of kid napping [sic] of his wife, should be barred.

Therefore, after considering the facts, law and argument of Appellant, a Writ of Certiorari should be issued from this Court to the Court of Criminal Appeals correcting the errors complained of and reversing the judgment of the Court of Criminal Appeals and rendering such judgments as said Court have [sic] rendered in addition to such other relief as Petitioner may be entitled.

Respectfully submitted,
LARRY W. RONEY, ATTORNEY AT

LAW, P.C.

same issue in the Alabama Court of Criminal Appeals,¹⁵⁶ did not appear for oral argument in the case. Although the United States Court of Appeals later found counsel's performance deficient for failing to raise issues regarding denial of a change of venue, denial of sixty-seven challenges for cause of jurors who knew about the defendant's conviction in a neighboring state arising out of the same facts, and use of the defendant's assertion of his Fifth Amendment rights against him, it found no prejudice.¹⁵⁷

While such incompetence as has been described here passes muster as "effective assistance of counsel" under the Supreme Court's view of the Sixth Amendment, counsel's performance often fails to satisfy the increasingly strict procedural doctrines developed by the Supreme Court since 1977. Failure of counsel to recognize and preserve an issue, due to ignorance, neglect, or failure to discover and rely upon proper grounds or facts, even in the heat of trial, will bar federal review of that issue.¹⁵⁸ A lawyer whose total knowledge of criminal law is *Miranda* and *Dred Scott* may be "not legally-ineffective" counsel under *Strickland*,¹⁵⁹

Appellant's Brief and Argument in Support of Petition for Writ of Certiorari, at 1-2, *Heath v. Alabama*, 455 So. 2d. 905 (Ala. 1984). Alabama requires that the brief and petition for certiorari be submitted at the same time. ALA. R. CRIM. P. 32.2 (1990). Thus, the Alabama Supreme Court decided *Heath*'s case on the basis of this brief alone.

¹⁵⁶*Heath v. Jones*, 941 F.2d 1126, 1131 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 981 (1992).

¹⁵⁷*Id.* at 1131-37. However, Judge J.L. Edmondson, in concurring, disagreed even with the court's comment regarding counsel's performance. He stated, "I cannot agree that the quality of counsel's performance can be judged much by the length of brief or the number of issues raised. . . . Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly." *Id.* at 1141 (Edmondson, J., concurring). The brief in *Heath*, however, and counsel's failure to appear for oral argument hardly constitute sterling examples of such ability or courage.

¹⁵⁸See *Smith v. Murray*, 477 U.S. 527, 533-36 (1986); *Engle v. Isaacs*, 456 U.S. 107, 130-34 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977); see also Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 109-13 (1991); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989).

¹⁵⁹The lawyer who testified that those were the only two "criminal" cases he knew has twice been found to satisfy the *Strickland* standard. *Birt v. Montgomery*, 725 F.2d 587, 596-601

but such a lawyer will of course not recognize or preserve many constitutional issues. The result has been what Justice Thurgood Marshall described as an "increasingly pernicious vise-grip"¹⁶⁰ for the indigent accused: courts refuse to address constitutional violations because they were not preserved by counsel, but counsel's failure to recognize and raise those issues is not considered deficient legal assistance.¹⁶¹

Together, the lax standard of *Strickland* and the strict procedural default doctrines reward the provision of deficient representation. By assigning the indigent accused inadequate counsel, the state increases the likelihood of obtaining a conviction and death sentence at trial and reduces the scope of review. So long as counsel's performance passes muster under *Strickland*, those cases in which the accused received the poorest legal representation will receive the least scrutiny on appeal and in postconviction review because of failure of the lawyer to preserve issues.

In applying *Strickland*, courts indulge in presumptions and assumptions that have no relation to the reality of legal representation for the poor, particularly in capital cases. One scholar has aptly called the idea that bar membership

(11th Cir. 1984) (en banc), cert. denied, 469 U.S. 874 (1984); *Williams v. State*, 368 S.E.2d 742, 747-50 (Ga. 1988). See *supra* note 32.

¹⁶⁰Marshall, *supra* note 46, at 44 (footnotes omitted).

¹⁶¹Justice Robert Benham of the Georgia Supreme Court was "struck by the powerful irony" of the majority's refusal to consider an issue of "flagrantly improper" prosecutorial misconduct in one case because it was not preserved by counsel, but holding that counsel was not ineffective. *Todd v. State*, 410 S.E.2d 725, 735 n.1 (Ga. 1991) (Benham, J., dissenting). The majority disposed of the ineffective assistance claim in four sentences. *Id.* at 731. The Mississippi Supreme Court refused to consider two issues on direct appeal because they were not properly preserved by trial counsel in *Hill v. State*, 432 So. 2d 427, 438-40 (Miss. 1983), over a dissent which argued, "We can think of no more arbitrary factor than having nimbleness of counsel on points of procedure determine whether Alvin Hill lives or dies." *Id.* at 449 (Robertson, J., concurring in part and dissenting in part). The same court later rejected in a single paragraph an assertion that counsel was ineffective. *In re Hill*, 460 So. 2d 792 (Miss. 1984). The dissent argued: "Where two clear cut reversible errors were not available on direct appeal to a condemned defendant solely because his lawyer goofed, that would seem to make a prima facie case for ineffective assistance of counsel." *Id.* at 811 (Robertson, J., concurring in part and dissenting in part). Other examples are collected in Friedman & Stevenson, *supra* note 48, at 16-20.

automatically qualifies one to defend a capital case "lethal fiction."¹⁶² The reality is that most attorneys are not qualified to represent criminal defendants and certainly not those accused of capital crimes.¹⁶³

There is no basis for the presumption of competence in capital cases where the accused is represented by counsel who lacks the training, experience, skill, knowledge, inclination, time, and resources to provide adequate representation in a capital case. The presumption should be just the opposite—where one or more of these deficiencies exist, it is reasonable to conclude that the lawyer is not capable of rendering effective representation.¹⁶⁴ Indeed, the presumption of competence was adopted even though the Chief Justice of the Supreme Court, who joined in the majority in *Strickland*, had written and lectured about the lack of competence of trial attorneys.¹⁶⁵

Another premise underlying *Strickland* is that "[t]he government is not responsible for, and hence not able to prevent, attorney errors."¹⁶⁶ However, the notion of government innocence is simply not true in cases involving poor people accused of crimes. The poor person does not choose an attorney; one is assigned by a judge or some other government official. The government may well be responsible for attorney errors when it appoints a lawyer who lacks the experience and skill to handle the case, or when it denies the lawyer the time and resources necessary to do the job. In addition, as observed by Justice Blackmun:

¹⁶²Green, *supra* note 48, at 433, 454.

¹⁶³*Id.* at 476-89.

¹⁶⁴The Louisiana Supreme Court, relying upon its state constitution and laws, has adopted such a presumption where there is a likelihood of inadequate representation. Finding that the "provision of indigent defense services" in one section of court in Orleans Parish "is in many respects so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel," the court adopted a rebuttable presumption that indigents in that section were not receiving constitutionally required assistance. *State v. Peart*, 621 So. 2d 780, 791 (La. 1993). The court ordered pretrial hearings where there were questions of adequate representation and instructed the trial court "not [to] permit the prosecution to go forward until the defendant is provided with reasonably effective assistance of counsel." *Id.* at 792.

¹⁶⁵*See, e.g., Warren E. Burger, Remarks on Trial Advocacy: A Proposition*, 7 WASHBURN L.J. 15 (1967); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973).

¹⁶⁶*Strickland v. Washington*, 466 U.S. 688, 693 (1984).

The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to clients—is circumscribed to an extent not experienced by privately retained attorneys.¹⁶⁷

The assumption that deficient representation makes no difference,¹⁶⁸ which underlies a finding of lack of prejudice under *Strickland*, is also flawed.¹⁶⁹ In cases where constitutional violations were not preserved and the defendant was executed while an identically situated defendant received relief for the same constitutional violation, it is apparent that the ineptitude of the lawyer did make a difference in the outcome of the case. In other more subtle but equally determinative ways, competent legal assistance can make a difference in the outcome of legal proceedings, which may not be detectable by reviewing courts.¹⁷⁰

A lawyer may muddle through a case with little or no preparation, but it is impossible to determine how the case might have been handled differently if he had investigated and prepared. Other difficulties may be even more difficult to detect. Rapport

¹⁶⁷Polk County v. Dodson, 454 U.S. 312, 332 (1981) (Blackmun, J., dissenting).

¹⁶⁸"It is the belief—rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account." David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973).

¹⁶⁹"For a court to be required to engage in speculation about how the trial might have gone if counsel had been effective is to minimize the importance of the sixth amendment right to counsel" Klein, *supra*, note 83, at 641; see also Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 477-80 (1987).

¹⁷⁰For other shortcomings of the *Strickland* standard, see Gary Goodpaster, *The Adversary System, Advocacy and the Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE, 59, 83-85 (1986); Green, *supra* note, at 500-05; Paduano & Smith, *supra* note 101, at 326-31; Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction To Improve Indigent Defense Services*, 101 YALE L.J. 481, 486-88 (1991).

with the client and the family may lead to cooperation and the disclosure of compelling mitigating evidence that might not be found by a less skillful attorney.¹⁷¹ Good negotiating skills may bring about a plea offer to resolve the case with a sentence less than death, and a good relationship with the client may result in acceptance of an offer that might otherwise be rejected.¹⁷² Nor are reviewing courts able to determine after the fact the difference made by other skills that are often missing in the defense of criminal cases—such as conducting a good voir dire examination of jurors, effective examination and cross-examination of witnesses, and presenting well-reasoned and persuasive closing arguments.

The prejudice standard is particularly inappropriate for application to deficient representation at the penalty phase of a capital case. It is impossible for reviewing courts to assess the difference that investigation into mitigating circumstances and the effective presentation of mitigating evidence might make on a jury's sentencing decision.

The Supreme Court has consistently reaffirmed that in a capital case any aspect of the life and background of the accused offered by the defense must be considered as "mitigating circumstances" in determining punishment.¹⁷³ Those who have tried capital cases have found that the competent presentation of such evidence often results in sentences less than death.¹⁷⁴ But the right to have any of the "diverse frailties of humankind"¹⁷⁵ taken into account is meaningless if the accused is not provided with counsel capable of finding and effectively presenting mitigating circumstances.

A court-appointed defense lawyer's only reference to his client during the penalty phase of a Georgia capital case was: "You have got a little ole nigger man over there that doesn't

¹⁷¹See White, *supra* note 123, at 340-46.

¹⁷²*Id.*

¹⁷³*Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that sentencer must consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death"); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (mental retardation must be considered in mitigation); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (jury instructions may not limit the jury's consideration of mitigating circumstances); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (good behavior in prison must be considered as mitigating factor); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (troubled childhood must be considered as mitigating factor); *Bell v. Ohio*, 438 U.S. 637 (1978) (same holding as *Lockett*).

¹⁷⁴White, *supra* note 123, at 325-29, 340-42.

¹⁷⁵*Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer. . . . He is ignorant. I will venture to say he has an IQ of not over 80."¹⁷⁶ The defendant was sentenced to death.

Had that lawyer done any investigation into the life and background of his client, he would have found that his client was not simply "ignorant." Instead, he was mentally retarded. For that reason, he had been rejected from military service. And he had been unable to function in school or at any job except the most repetitive and menial ones. His actual IQ was far from 80; it was 68. He could not do such basic things as make change or drive an automobile. After his death sentence was set aside because of failure to grant a change of venue,¹⁷⁷ an investigation was conducted, these facts were documented, and the defendant received a life sentence.¹⁷⁸

In another case, an attorney, obviously under the influence of alcohol, came to the Southern Center for Human Rights, in Atlanta, after business hours on a Friday evening. He was clutching part of a trial transcript and said that he needed help preparing his brief to the Georgia Supreme Court for the direct appeal of a mentally retarded man he had represented at trial who had been sentenced to death. The brief was due the following Monday. Nothing had been written for the appeal. It was impossible even to assemble the entire record by Monday. Fortunately, an extension of time was obtained and eventually the case was remanded to the trial court. New counsel subsequently negotiated a life sentence.¹⁷⁹

In these and other cases previously discussed in Section I, once the facts were discovered and brought out, life sentences were obtained for people previously sentenced to death. But these were cases where by sheer luck the defendants later received adequate representation on appeal or in postconviction proceedings. Many of these cases were returned for retrials for reasons having nothing to do with the poor legal representation at

¹⁷⁶Transcript of Opening and Closing Arguments at 39, *State v. Dungee*, Record Excerpts at 102, (11th Cir.) (No. 85-8202), *decided sub nom. Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

¹⁷⁷*Id.* The court did not address the issue of ineffective assistance of counsel, which had been rejected by the district court.

¹⁷⁸*Dungee v. State*, No. 444 (Super. Ct. Seminole County, Ga.), *on change of venue*, No. 87CR-5345 (Super. Ct. Muscogee County, Ga. 1988).

¹⁷⁹See also Paduano & Smith, *supra* note 101, at 331-33 & n.201-03 (other examples where life sentences have been obtained for those previously sentenced to death at trials where they were represented by incompetent counsel).

the original trials. But, as shown by the many cases summarized here in which executions were carried out, many of those facing the death penalty never receive the representation that would make such a difference.

III. THE FAILURE TO KEEP THE PROMISE OF *GIDEON*

The right to counsel is essential to protect all other rights of the criminally accused. Yet this most fundamental right has received the least protection. Nevertheless, many members of the judiciary and the bar—who have a special responsibility to uphold the rule of law in the face of public outrage and revulsion—stand by year after year, case after case, looking the other way, pretending that nothing is amiss, or calling upon someone else to solve the problem, but never engaging in a concerted and effective effort to change the situation. The United States Department of Justice, the state District Attorneys, and state Attorneys General, all of whom should have some concern about the fairness and integrity of the judicial process, use their power and influence to make the situation even worse. As a result, although some solutions to the problem are apparent, the situation continues to deteriorate and, tragically, to be increasingly accepted as the inevitable lot of the poor.

A. *Minimal Reforms in Response to Major Crisis*

Over ten years ago, the ABA and the National Legal Aid and Defender Association found the funding for indigent defense inadequate and deemed the promise of *Gideon v. Wainwright* unrealized, stating: "we must be willing to put our money where our mouth is; we must be willing to make the constitutional mandate a reality."¹⁸⁰ However, despite many reports with similar warnings,¹⁸¹ another ABA report in 1993 still found that "long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country."¹⁸²

In Alabama, ten reports over eleven years pointed out the many defects in representation of indigent defendants.¹⁸³ Judges, court administrators, and the bar have recommended reform. A commission proposed in 1988 that the limits on attorneys fees in capital cases be eliminated or raised,¹⁸⁴ but the legislature has

¹⁸⁰AMERICAN BAR ASS'N & THE NAT'L LEGAL AID & DEFENDER ASS'N, *GIDEON UNDONE! THE CRISIS OF INDIGENT DEFENSE FUNDING* 3 (1982).

¹⁸¹Many of the reports are summarized in KLEIN & SPANGENBERG, *supra* note 82, at 10; Klein, *supra* note 80, at 393.

¹⁸²KLEIN & SPANGENBERG, *supra* note 82, at 25.

¹⁸³Klein, *supra* note 80, at 402-03; Friedman & Stevenson, *supra* note 48, at 23 n.112.

¹⁸⁴Friedman & Stevenson, *supra* note 48, at 40 n.201. The

done nothing to change the limit on compensation for out-of-court time expended by attorneys in capital cases.¹⁸⁵ As a result, and despite repeated acknowledgement of the problem, the quality of indigent defense in Alabama remains a disgrace.

Limits on compensation have been struck down by courts in a number of states.¹⁸⁶ However, even as courts have recognized the unreasonableness of the low fees, the adverse impact of such low fees on the right to counsel and a fair trial, and their own constitutional duty to do something about it,¹⁸⁷ they have often ordered only minimal, inadequate reforms.

Alabama Court of Appeals has also urged the Alabama Supreme Court to reconsider its decisions upholding the constitutionality of the \$1000 limit on attorney compensation in criminal cases, observing that "[t]he real value of \$1,000 is considerably less today" than when set in 1981 and is "certainly unreasonable." *May v. State*, No. CR-92-350, 1993 Ala. Crim. App. LEXIS 1076 (1993). However, one of the five members of the court disagreed, arguing that the question of adequate compensation was a matter for legislation. *Id.* (Montiel, J., dissenting). See also *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985), *cert. denied*, 474 U.S. 865 (1985) (upholding against due process and equal protection attacks Alabama's system for compensating appointed attorneys); *Sparks v. Parker*, 368 So. 2d 528 (Ala. 1979) (holding that the limit does not constitute unlawful taking of property), *appeal dismissed*, 444 U.S. 803 (1979).

¹⁸⁵"Many legislators seem to fear that support for funding for defense services in capital cases is somehow the same as support for violent crime." *Friedman & Stevenson, supra* note 48, at 41-42.

¹⁸⁶*DeLisio v. Alaska*, 740 P.2d 437, 443 (Alaska 1987); *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1379 (Fla. 1989); *Makemson v. Martin County*, 491 So. 2d 1109, 1112, 1114 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Jewell v. Maynard*, 383 S.E.2d 536, 547 (W. Va. 1989).

¹⁸⁷See, e.g., *Wilson v. State*, 574 So. 2d 1338, 1340 (Miss. 1990). There, in considering a challenge to the \$1000 limit on attorney compensation in capital cases, the Mississippi Supreme Court stated: "[I]f the legislative branch fails its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act. It is the absolute duty of a court in such latter circumstances to act and act promptly." *Id.* (quoting *Hosford v. State*, 525 So. 2d 789, 797-98 (Miss. 1988)). Nevertheless, the court refused to interfere with the legislature's right to expend public funds and allowed Mississippi's limit of \$1000 in compensation for the defense of capital cases to stand. *Id.*

A challenge to Mississippi's limit of \$1000 for compensation to lawyers appointed to defend capital cases was rejected by the state's supreme court.¹⁸⁸ The court held that lawyers were entitled to reimbursement for actual costs, including the overhead cost of operating a law office, so that "the attorney will not actually lose money,"¹⁸⁹ but characterized the \$1000 fee as "an 'honorarium' or pure profit."¹⁹⁰ One justice published a dissent, which had initially been prepared as the majority opinion, that carefully analyzed how the statutory limit on compensation adversely affected the right to counsel and the administration of justice in violation of the Constitution.¹⁹¹ However, because that opinion was not supported by a majority of the court, an attorney appointed to defend a capital case in Mississippi, while no longer required to lose money, may still make less than the minimum wage.¹⁹²

The Louisiana Supreme Court, considering a capital case in which assigned counsel was neither compensated nor reimbursed for expenses, held that counsel were entitled to reimbursement for out-of-pocket and overhead costs, overruling contrary state precedent,¹⁹³ but held that a "fee for service need not be paid" as long as the time required to defend the case does not reach "unreasonable levels."¹⁹⁴

The South Carolina Supreme Court struck down that state's statutory limitations on compensation of appointed counsel in capital cases.¹⁹⁵ The statutes provided for \$15 per hour of in-court time and \$10 per hour of out-of-court time for attorneys, with a limit of \$5000 per case for attorneys fees, expert and investigative services, and costs.¹⁹⁶ Even in doing so, however,

¹⁸⁸*Id.*; *Pruett v. State*, 574 So. 2d 1342 (Miss. 1990).

¹⁸⁹*Wilson*, 574 So. 2d at 1341.

¹⁹⁰*Id.*

¹⁹¹*Pruett*, 574 So. 2d at 1342, 1343-69 (Anderson, J., dissenting).

¹⁹²All of the attorneys in the *Wilson* and *Pruett* cases received less than the minimum wage. The two attorneys for *Wilson* documented 779.2 and 562 hours and the two attorneys for *Pruett* documented 449.5 and 482.5 hours. Each attorney was paid \$1000 for his time. Thus, the rates ranged from \$1.28 per hour to \$2.22 per hour. *Id.* at 1348 n.7 (Anderson, J., dissenting).

¹⁹³*State v. Wigley*, 624 So. 2d 425, 428-29 (La. 1993) (overruling in part *State v. Clifton*, 172 So. 2d 657 (La. 1965)).

¹⁹⁴*Id.* at 429.

¹⁹⁵*Bailey v. State*, 424 S.E.2d 503, 508 (S.C. 1992).

¹⁹⁶*Id.* at 505.

the court discussed the fee limitations in the context of "the legal profession's traditional and historic role in the general society. It is a role anchored to the postulate that the practice of law is not a marketplace business or commercial venture but, rather, a profession dedicated primarily to service."¹⁹⁷ The court accordingly held that "[t]he appointed attorney should not expect to be compensated at *market rate*, rather at a reasonable, but lesser rate" to be fixed in the court's discretion at the conclusion of the trial.¹⁹⁸

One would hope that such an undesirable assignment as defending a person in a capital case would be compensated at rates *greater* than market rates, not less. In civil rights cases, the undesirability of a case is a factor used to multiply or enhance an attorneys fee award.¹⁹⁹ For example, prison conditions cases have been found to be "undesirable" for purposes of determining whether to enhance attorneys fees.²⁰⁰ However, legislatures and courts have simply been unwilling to pay sufficient rates to attract lawyers to handle capital cases.

There have been few systematic challenges to the inadequacy of legal representation for the poor, and they have produced only limited results.²⁰¹ Some hope of reforming Georgia's indigent defense system appeared when a federal court of appeals held that a challenge to deficiencies in the system stated a claim and should not have been dismissed.²⁰² However, after a change in the

¹⁹⁷*Id.* at 504.

¹⁹⁸*Id.* at 508.

¹⁹⁹*See, e.g.,* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).

²⁰⁰*E.g.,* Alberti v. Sheriff of Harris County, 688 F. Supp. 1176, 1198-99 (S.D. Tex. 1987) (prison conditions litigation *per se* undesirable), *modified on other grounds*, 688 F. Supp. 1210 (S.D. Tex. 1987), *aff'd in part and rev'd in part sub nom.* Alberti v. Klevenhagen, 896 F.2d 927 (5th Cir. 1990), *opinion vacated in part on reh'g*, 903 F.2d 352 (5th Cir. 1990) (*per curiam*).

²⁰¹*See, e.g.,* Tucker v. Montgomery Bd. of Comm'rs, 410 F. Supp. 494 (M.D. Ala. 1976); Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y.), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); State v. Smith, 681 P.2d 1374 (Ariz. 1984). These and other efforts to bring deficient indigent defense systems into compliance with the Constitution are described in Klein, *supra* note 80, at 410-13, 417-18. *See also* Paul C. Drecksels, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 387-90 (1991); Caroline A. Pilch, Note, *State v. Smith: Placing a Limit on Lawyers' Caseloads*, 27 ARIZ. L. REV. 759 (1985).

²⁰²Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), *reh'g denied*, 896 F.2d 479 (1989), *cert. denied*, 495 U.S. 957

composition of the court, the case was dismissed on abstention grounds.²⁰³ The federal courts also refused on abstention grounds to examine Kentucky's limit on attorneys' compensation in capital cases.²⁰⁴

Despite abundant documentation of the enormity of the need for substantive changes, some continue to suggest that the burden of providing counsel to the poor—even in capital cases—may be satisfied by the conscription of members of the legal profession.²⁰⁵ However, it is the constitutional duty of the state,²⁰⁶ not of members of the legal profession, to provide indigent defendants with counsel. Responses to the problems posed by ineffective assistance of counsel should be conceived in a way that gives effect to this principle. Georgia, a state in which there have been numerous egregious examples of deficient representation, has no difficulty coming up with local, state, and federal money to prepare for the Olympic Games, but it does not secure or appropriate funding to assure competent representation and equal justice in its courts.²⁰⁷

Though it is desirable for more members of the legal profession to shoulder their ethical obligations to provide legal assistance for the poor, the defense of capital cases often requires more expertise, commitment, and resources than individual lawyers are able to offer. And there are too many cases for the

(1990).

²⁰³*Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992), *reh'g en banc denied*, 983 F.2d 1084 (11th Cir. 1993).

²⁰⁴*Foster v. Kassulke*, 898 F.2d 1144 (6th Cir. 1990).

²⁰⁵*Martin County v. Makemson*, 479 U.S. 1043, 1045 (1987) (White, J., dissenting from denial of certiorari) ("I discern nothing in the Sixth Amendment that would prohibit a State from requiring its lawyers to represent indigent criminal defendants without *any* compensation for their services at all."); *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990); *State v. Wigley*, 624 So. 2d 425, 427-29 (La. 1993).

²⁰⁶*State ex rel. Stephan v. Smith*, 747 P.2d 816, 835-37, 841-42 (Kan. 1987); *Wilson*, 574 So. 2d at 1342 (Robertson, J., concurring).

²⁰⁷Another example of the low priority that states give to their obligation to assure equal justice can be found in Kentucky, where the indigent defense budget for 1990 of \$11.4 million was four million less than the University of Kentucky's athletic department for the same year. Edward C. Monahan, *Who is Trying to Kill the Sixth Amendment?* A.B.A. CRIM. JUST., 24, 52 (Summer 1991). Kentucky's funding for indigent defense for one year would build but four miles of two-lane highway. *Id.* at 51-52.

lawyers who do respond. Moreover, the absence of indigent defense programs limits the opportunity for young, committed lawyers to enhance their skills and learn to do the job properly. Beyond these difficulties, even the most conscientious lawyer needs proper investigative and expert assistance to defend a capital case.

Moreover, to ask for such major sacrifices for such an overwhelming and thankless job as defending a capital case from a few members of the profession is unreasonable. Judges are not presiding without compensation, and district attorneys are not prosecuting without decent salaries. And most members of the legal profession—particularly those at the high income law firms which have the litigation skills and resources equal to the task—are not being asked to share the burden of defending the poor. The supply of lawyers who are willing to make the sacrifice has never come close to satisfying the desperate needs of the many poor who face the death penalty throughout the country today.

Georgia Chief Justice Harold Clarke's description of Georgia's response to the need for indigent defense applies to most other states as well: "[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."²⁰⁸

B. The Politics of Crime and the Lack of Leadership To Remedy the Situation

At this time, there appears to be little prospect of achieving even the level of mediocrity that Justice Clarke described. What is needed to provide competent legal representation to any litigant, rich or poor, is no secret. But significant improvement in the quality of representation for the poor is unlikely because of the unpopularity of those accused and the lack of leadership and commitment to fairness of those entrusted with responsibility for the justice system.

A properly working adversary system will never be achieved unless defender organizations are established and properly funded to employ lawyers at wages and benefits equal to what is spent on the prosecution, to retain expert and investigative assistance, to assign lawyers to capital cases, to recruit and support local lawyers, and to supervise the performance of counsel defending capital cases. Judges are not equipped to do this. Management of the defense is not a proper judicial function. And, as previously described, all too often political and other improper considerations influence elected state court judges in their appointment of lawyers to defend those facing the death penalty.

²⁰⁸Chief Justice Harold G. Clarke, Annual State of the Judiciary Address, *reprinted in* FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.

What is needed is a system in which defense counsel's loyalty is to the client and not the judge; and in which defense counsel, as well as the prosecutor, understands the scientific and legal issues in the case and has access to the investigative and expert assistance needed to prepare and present the case. The ABA has promulgated standards for the appointment and performance of counsel in capital cases,²⁰⁹ which are seldom followed today, but standards mean nothing without capable attorneys and well-funded defender organizations to implement them.²¹⁰

Moreover, it must be recognized that defending capital cases is a most unattractive responsibility for most members of the legal profession. With the increasing number of state and federal capital prosecutions, it will be more and more difficult to find enough capable lawyers willing to defend the cases. It should be recognized that, as in other difficult and undesirable areas of practice, a significant financial incentive, considerably beyond what lawyers receive for far less demanding legal work, will be required.

Such a system would require a substantial commitment of resources. The argument has been made that some jurisdictions do not have the money to attract qualified lawyers and that in some areas, particularly rural areas, qualified counsel is simply not available.²¹¹ But these considerations should not excuse the lack of adequate legal representation in capital cases. There are communities that have no pathologists, hair and fiber experts, evidence technicians, and others needed for the investigation and prosecution of homicide cases. However, when a murder occurs in those communities and is followed by a capital prosecution, the prosecution invariably brings in the experts needed and pays what it costs to do so.

²⁰⁹AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1990).

²¹⁰Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications. Such standards can actually be counterproductive because they may provide a basis for denying appointment to some of the most gifted and committed lawyers who lack the number of prior trials but would do a far better job in providing representation than the usual court-appointed hacks with years of experience providing deficient representation.

²¹¹See, e.g., *Report of Malcolm Lucas to ABA Task Force Report on the Death Penalty*, 40 AM. U. L. REV. 195, 197 (1990). The expense of providing more qualified counsel is repeatedly urged as a reason to defeat legislation aimed at improving representation in capital cases.

There was a time when many localities did not have capable law enforcement agencies or pathologists, fingerprint examiners, ballistics experts, serologists, and other forensic scientists needed to investigate and prosecute crime. These deficiencies were remedied in most places, often with funding from the Federal Law Enforcement Assistance Administration as well as state and local governments. Crime laboratories were built, local police officers were sent to FBI training programs, and pools of experts were developed who travel around states to investigate crime scenes and testify in local prosecutions.

These jurisdictions could also establish defender organizations to provide lawyers with the expertise required to defend capital cases, and the investigators and expert assistance needed to prepare the defense of these cases. What is lacking is not money, but the political will to provide adequate counsel for the poor in capital and other criminal cases. Adequate representation and fairness will never be achieved as long as it is accepted that states can pay to *prosecute* a capital case without paying to defend one. Adequate representation and fairness will never be achieved until ensuring justice in the courts becomes a priority equal to public concern for roads, bridges, schools, police protection, sports, and the arts.

But the leadership needed to help bring about justice is missing. There was a time when the Attorney General of the United States and the attorneys general in many of the states were concerned not just with getting convictions, but also with fairness, integrity, and the proper functioning of the adversary system.

In that spirit, Attorneys General Walter F. Mondale of Minnesota and Edward J. McCormack, Jr. of Massachusetts, and twenty-one of their fellow attorneys general filed a brief in *support* of Clarence Earl Gideon's right to counsel in *Gideon v. Wainwright*.²¹² It was out of that same concern that Attorney General Robert F. Kennedy helped secure passage of the federal Criminal Justice Act in 1963. But those days are gone.

Today, the United States Department of Justice, state district attorneys, and state attorneys general use their power and influence to make this shameful situation even worse. They take every advantage of the ignorant, incompetent lawyers foisted upon the poor.²¹³ They have defended in the courts even the most outra-

²¹²372 U.S. 335, 336 (1963).

²¹³At the urging of prosecutors, the federal courts and many state courts have increasingly refused to consider constitutional issues even where the failure to raise them was the result of ignorance, neglect, or inadvertent failure to raise and preserve an issue by a court-appointed lawyer. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991) ("[A]ttorney ignorance or inadvertence is not 'cause'" to excuse filing of notice of appeal three days late, as indigent prisoner "must bear the risk of attorney error") (quotation omitted); *Dugger v. Adams*, 489 U.S. 401, 406-08 (1989)

geous instances of incompetence on the part of defense counsel previously described and used the ineptness of counsel as a barrier to prevent courts from addressing constitutional violations in capital cases.

Despite abundant evidence of poor lawyering and egregious constitutional violations in capital cases, the Justice Department and many prosecutors have proposed shortcuts and procedural traps to paper over the problems and speed up the process of sending those sentenced to death at unconstitutional trials to their executions. In response to findings by federal courts of constitutional violations in state capital cases, prosecutors have urged stricter enforcement of procedural default rules to avoid dealing with the violations,²¹⁴ not better counsel to avoid those

(barring relief because trial lawyer did not object to jury instructions even though court of appeals had unanimously concluded that death penalty was unconstitutionally imposed due to those instructions); *Smith v. Murray*, 477 U.S. 527, 539 (1986) (Stevens, J., dissenting) (barring issue not properly raised on appeal even though "[t]he record . . . unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death because his constitutional rights were violated"); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that attorney "ignorance or inadvertence" does not constitute cause to excuse failure to raise Fourteenth Amendment claim in earlier proceeding). Three of these cases—all except *Murray v. Carrier*—were capital cases. In each of those cases, the defendant has been executed without a determination of the constitutional issue because of the attorney error.

As a result of the complexity of the procedural rules and the lack of familiarity with them by many of the lawyers appointed to defend the poor, executions are now routinely carried out without review by any court of significant constitutional issues because of errors by counsel. See, e.g., *Whitley v. Bair*, 802 F.2d 1487, 1496 n.17 (4th Cir. 1986) (finding that all 15 issues raised on behalf of Whitley were barred because they had not been properly raised by his trial lawyer), *cert. denied*, 480 U.S. 951 (1987). Today, it is unusual to see a capital case in which one or more issues presented in federal habeas corpus review is not found to be procedurally barred.

²¹⁴For example, the Mississippi Attorney General urged the state's supreme court to invoke procedural bars as means of preventing federal review—characterized by the Attorney General as "a Crash Upon the Rocky Shores of the Federal Judiciary"—following findings of constitutional violations in seven of the first eight Mississippi capital cases reviewed by the federal courts. *Wheat v. Thigpen*, 793 F.2d 626 n.5 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987) (quoting State's Response, *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983), *cert. denied*, 480 U.S. 930 (1987)). The Mississippi Supreme Court adopted the state's position. *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983).

unconstitutional trials in the first place. Justice James Robertson of the Mississippi Supreme Court described as "unseemly" the arguments of that state's attorney general that the court "should hold [the defendant's] claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under [him] when he ultimately seeks federal review of his case."²¹⁵ An accommodating Supreme Court has been willing to cut back drastically on the availability of the once great writ of habeas corpus,²¹⁶ and

Similarly, after federal habeas corpus relief was granted to a number of people in Georgia who had been sentenced to death, Georgia amended its state postconviction statute in 1982 to prohibit consideration in state habeas proceedings of issues not raised in compliance with Georgia's procedural rules at trial and on appeal. GA. CODE ANN. § 9-14-51(d) (1993). The statute had previously provided that "rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege . . . participated in by the party and . . . done voluntarily, knowingly, and intelligently." 1967 Ga. Laws 835, 836, § 3; 1975 Ga. Laws 1143-44, § 1.

²¹⁵*Evans v. State*, 441 So. 2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied*, 467 U.S. 1264 (1984); *see also* *Hill v. State*, 432 So. 2d 427, 444-51 (Miss. 1983) (Robertson, J., dissenting).

²¹⁶Justice Stevens has expressed the view that the Supreme Court has "grossly misevaluate[d] the requirements of 'law and justice' that are the federal court's statutory mission under the federal habeas corpus statute" and instead "lost its way in a procedural maze of its own creation." *Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting). Justice Blackmun, writing for four members of the Court in *Dugger v. Adams*, accused the majority of "arbitrarily impos[ing] procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim." *Dugger v. Adams*, 489 U.S. 401, 412-13 (1989).

In addition to the strict enforcement of procedural rules, the Supreme Court has limited the availability of the writ to vindicate constitutional rights by making it more difficult to obtain an evidentiary hearing to prove a constitutional violation, *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law, *Teague v. Lane*, 489 U.S. 288 (1989); James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1991); reducing the harmless error standard for constitutional violations recognized in federal habeas review, *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993); and restricting when a constitutional violation may be raised in a second habeas peti-

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prosecutors have supported even more drastic legislative proposals to restrict it further.²¹⁷

tion. *McCleskey v. Zant*, 499 U.S. 467 (1991).

²¹⁷The Justice Department and the associations of district attorneys and attorneys general have supported a statute of limitations for habeas corpus cases since one was proposed by a committee appointed by Chief Justice William Rehnquist and chaired by retired Justice Lewis Powell in 1989. *Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989). Senator Joseph Biden introduced a bill in 1993 containing a statute of limitations and other provisions regarding habeas corpus which had been drafted in sessions with representatives of the Justice Department, state attorneys general, and state district attorneys, all of whom were said to support the bill. 139 CONG. REC. S10925-27 (daily ed. Aug. 6, 1993). The bill appears *id.* at S10927-31.

Some prosecutors have even proposed the virtual elimination of habeas corpus review by extending to all issues the rule of *Stone v. Powell*, 428 U.S. 465 (1976), which bars federal habeas review of Fourth Amendment claims where there has been a "full and fair" hearing in the state courts. See, e.g., *Hearings Before the Senate Comm. on the Judiciary, on S. 88, S. 1757, and S. 1760*, 101st Cong., 1st & 2d Sess. 759, 784 (1990) (Testimony of Ala. Assistant Attorney General Ed Carnes, Feb. 21, 1990, urging passage of S. 1971 because that one provision "considered alone" makes it preferable to other legislation); Letter from Alabama Attorney General Don Siegelman and 22 Other State Attorneys General to Senator Joseph Biden (Mar. 12, 1990) (urging extension of "full and fair" rule to all claims to "accomplish true federal habeas reform") (on file with author); *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 172-82 (1991) (Statement of Andrew G. McBride, Associate Deputy Attorney General, Department of Justice).

The "full and fair" provision was included in Section 205 of the Bush Administration's Comprehensive Violent Crime Control Act of 1991, S. 635, 102d Cong., 1st Sess. (1991), sponsored by Senator Strom Thurmond, which was included in the crime bill passed by the Senate on July 17, 1991. S. 1241, 102d Cong., 1st Sess. (1991). However, the Senate and House were unable to agree on a crime bill in 1991 so the provision did not become law. Even Chief Justice Rehnquist, who has led the judicial and legislative efforts to restrict habeas corpus, opposed the "full and fair" proposal. Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1. And the Supreme Court, which has cut back repeatedly on the availability of habeas corpus since 1977, refused, in *Withrow v. Williams*, 113 S. Ct. 3066 (1993), to extend the "full and fair" standard to issues involving violations of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Many prosecutors have been unwilling to agree to even the most minor reforms to improve the quality of legal representation received by the poor. Federal legislation was proposed in 1990 that would have restricted imposition of the procedural default doctrines unless states improved the quality of defense counsel. One proposal would have required the establishment of an appointing authority for counsel in capital cases composed either of a statewide defender organization or of a death penalty resource center.²¹⁸ The appointing authority would have been responsible for securing qualified counsel and engaging in periodic review to ensure the competence of representation. The legislation would also have set standards for counsel and required payment for counsel "at a reasonable rate in light of the attorney's qualifications and experience and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases."²¹⁹

This modest proposal evoked vehement opposition from the U.S. Department of Justice and state prosecutors. William P. Barr, then-Deputy Attorney General and later Attorney General, characterized the counsel provisions as "an elaborate and expensive system for appointing counsel" that were "inimical to the principles of federalism inherent in our constitutional system, and to the need for reasonable finality of state criminal judgments."²²⁰ A letter signed by the attorneys general of twenty-three states which have the death penalty described the provisions as "so extreme as to be absurd."²²¹ The twenty-three attorneys general asserted: "The current problems which beset capital cases are not caused by the quality of representation they receive" and that "the focus in capital cases should be on the guilt or innocence of the defendant and the sentence he should receive" and not "how many seminars a defense attorney has attended, how well he is

²¹⁸H.R. 4737, § 8(b) (1990), reprinted in *Hearings Before Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Judiciary Comm. on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584, 101st Cong., 2d Sess. 3, 11 (1990)* [hereinafter *House Hearings*].

²¹⁹H.R. 4737, § 8(e)-(g) (1990), *House Hearings, supra* note 217, at 14-16; see also H.R. 5269, § 1307(e)-(g) (1990), *House Hearings, supra* note 217, at 486-91.

²²⁰Detailed Comments on H.R. 5269 Submitted with Letter from William P. Barr to Thomas S. Foley, Speaker of the U.S. House of Representatives (Sept. 10, 1990), reprinted in *House Hearings, supra* note 217, at 723, 746-47.

²²¹Letter from Don Siegelman, Attorney General of Alabama et al., to Jack Brooks, Chairman of the House Judiciary Committee (July 13, 1990), reprinted in *House Hearings, supra* note 217, at 654, 656.

paid, and other collateral matters."²²² The National Association of District Attorneys adopted a resolution opposing the legislation, reiterating its support for the procedural default doctrines and "strongly oppos[ing] any legislation" which would "create new requirements concerning the experience, competency, or performance of counsel" beyond *Strickland v. Washington*.²²³

A bill introduced in 1993 would have required only a "certifying" authority to identify lawyers to defend capital cases, allowing judges to continue to appoint counsel and setting only minimal standards measured in terms of years of practice and number of cases with no inquiry into quality of work.²²⁴ Although representatives of the state attorneys general and district attorneys associations were involved in drafting the legislation,²²⁵ which would, in fact, do little to improve the quality of representation and could even worsen the situation,²²⁶ it was opposed by many prosecutors.²²⁷ One letter circulated among Sena-

²²²*Id.* The letter suggests that "delay" and "relitigation" are the major problems.

²²³Resolution Opposing Habeas Reform Legislation, *reprinted in House Hearings, supra* note 217, at 649.

²²⁴The Habeas Corpus Reform Act of 1993, S. 1441, 103d Cong., 1st Sess. § 8 (1991) (introduced by Senator Biden on August 6, 1993, 139 CONG. REC. S10925-31 (daily ed. Aug. 6, 1993)). The bill also contained a statute of limitations and other restrictions on habeas corpus.

²²⁵139 CONG. REC. S10925-27 (daily ed. Aug. 6, 1993). No one involved in the defense of capital cases or representation of petitioners in habeas corpus actions was included by Senator Biden or his staff in the meetings which led to the bill.

²²⁶The bill did not remove the judge as the appointing authority. Most of the incompetent lawyers providing representation would still qualify under the bill's requirements of a certain number of years of practice or trials, but many conscientious and capable young lawyers would be excluded.

²²⁷California Attorney General Daniel E. Lungren asserted that the bill "could appropriately be called the 'Capital Defense Attorney Employment Act of 1993'" and urged its defeat because it would "raise the overall cost of capital litigation by imposing new federal standards" and result in additional litigation. Letter from Daniel E. Lungren to Senator Diane Feinstein (Aug. 13, 1993) at 15 (on file with author). The California District Attorneys Association adopted a resolution opposing any legislation which would:

[C]reate new requirements concerning the experience, competency, or performance of counsel beyond those required by the United States Constitution as

tors criticized its "expansive and costly appointment of counsel provisions" and quoted the Attorney General of Georgia as saying that, if enacted, the bill would "effectively repeal the death penalty."²²⁸

Such hyperbolic statements have repeatedly greeted other efforts to improve the quality of legal representation in capital cases. When the Georgia legislature, after years of refusing to appropriate any funds for indigent defense,²²⁹ finally responded grudgingly to the eloquent appeals of the chief justice of the state's supreme court²³⁰ by creating in 1992 a small capital defender program that employed only four attorneys,²³¹ one district

interpreted in *Strickland v. Washington*. . . .
[D]ictate new federal standards concerning the appointment of counsel for state court proceedings or take away the traditional authority to appoint counsel from state court judges. . . .
[E]stablish stringent federal qualifications for the appointment of counsel (including the appointment of at least two attorneys beginning at the state trial stage) which would delay death penalty cases by the inability to locate a sufficient number of attorneys who can meet all of the mandatory standards. . . .

California District Attorneys Association, Resolution Concerning Federal Habeas Corpus Reform Legislation (adopted Aug. 12, 1993) (on file with author).

²²⁸Letter from Senators Orin G. Hatch, Strom Thurmond, Diane Feinstein, and Richard Shelby to Colleagues (Nov. 2, 1993) (on file with author).

²²⁹Georgia State Senator Gary Parker explained to an American Bar Association committee: Although many of my colleagues in the legislature realize what is needed—a centralized, truly independent capital defender office staffed by experienced capital trial counsel—they are unquestionably unwilling, as they have demonstrated year after year, to appropriate the funds. . . . Quite to the contrary, support for indigent defense is viewed by many in this state as being soft on crime. Testimony of Gary Parker to the ABA Task Force on Death Penalty Habeas Corpus, *quoted in American Bar Association, supra* note 9, at 221 n.38.

²³⁰Harold G. Clarke, *Money v. Justice in Georgia* ("State of the Judiciary Address" to the Georgia General Assembly), *reprinted in FULTON COUNTY DAILY REP.*, Jan. 22, 1992, at 8; Harold G. Clarke, *State of the Judiciary* (Address to the State Bar of Georgia), *reprinted in GA. ST. B.J.*, Aug. 1991, at 70.

²³¹GA. CODE ANN. § 17-12-91 (1992). There are over 120 capital indictments pending in Georgia at any given time, so the program can handle only a small portion of the cases.

attorney criticized it as a step toward abolishing the death penalty in Georgia.²³² When a report to the Texas Bar described the serious deficiencies of the representation in capital cases in that state, the district attorney in Houston dismissed it as an argument against the death penalty.²³³

The enthusiasm of prosecutors to continue to take every advantage has not been tempered by the poverty and powerlessness of those accused of capital crimes. Nor has the situation motivated a new presidential administration or a new Attorney General to rein in the assaults on the Bill of Rights and habeas corpus or question the power that state courts should be allowed to exercise over the lives of persons who are not provided adequate representation.²³⁴ Instead, the country is engaged in a crime debate in which politicians try to outdo one another in proposing crime bills which simultaneously expand the use of the death penalty and other severe penalties while restricting or eliminating procedural protections. Those who are supposedly leaders dismiss the Bill of Rights as a mere collection of technicalities. The debate is exceptionally one-sided. For, as Robert F. Kennedy said long ago, the poor person accused of a crime has no lobby. No member of Congress or a state legislature is likely to receive complaints about the quality of counsel for poor people accused of crimes. But lost in the effort to get tough on crime is concern about the fairness and integrity of the criminal justice system.

Completely missing from the crime debate and from the courts is the notion that if it is too expensive or impractical for some jurisdictions to provide competent counsel and the fairness and reliability that should accompany a judicial decision to take a human life, their power should be limited. If a local trial court cannot comply with the most fundamental safeguard of the Constitution by providing a capable attorney to one whose life is at stake, it should not be authorized to extinguish life. The solu-

²³²Kimball Perry, *Poor People To Get Added Help in Courts*, COLUMBUS LEDGER-ENQUIRER, Oct. 6, 1992, at B1.

²³³Gary Taylor, *Texas Death-Penalty Study Hit*, NAT'L L.J., Apr. 26, 1993, at 3, 50. Taylor quoted Harris County District Attorney John B. Holmes, Jr., as saying: "If you're against the death penalty, argue against the issue. But don't come in the back door with so much financial baggage that the law can't work. That just promotes more disrespect for the law." *Id.* at 50. Holmes also said that there was "too much habeas." *Id.*

²³⁴President Clinton used the death penalty to establish his credentials as a "new Democrat" who was tough on crime by returning to Arkansas during the presidential campaign to deny clemency and allow the execution of a severely brain damaged man. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105. President Clinton has supported legislation to make over 50 federal crimes punishable by death.

tion is not to depreciate human life and the Bill of Rights by accepting what is available. Many small communities do not have surgeons, yet they do not rely on chiropractors to perform heart surgery.

Pronouncements about the importance of and the need for counsel do not make quality representation a reality. It has become apparent that the legislatures of most states, particularly those where the death penalty is frequently imposed, are not going to discharge their constitutional duty to appropriate funds and provide competent legal assistance for poor persons in criminal cases. It is also unlikely that the judiciary and bar, after years of neglect, punctuated by occasional moments of hand wringing, will respond effectively to this worsening situation.

IV. THE NEED FOR INDIVIDUAL RESPONSES AND LIMITS ON THE POWER OF THE COURTS

The quality of legal representation in capital cases in many states is a scandal. However, almost no one cares. Those facing the death penalty are generally poor, often members of racial minorities, often afflicted with substantial mental impairments, and always accused of serious, terrible crimes. The crimes of which they are accused bring out anger, hatred, and a quest for vengeance on the part of most people, including judges, prosecutors, and, quite often, even those appointed to represent the accused. All of this leads to, at best, indifference and, more often, hostility toward the plight of those accused. And many outside the criminal justice system are indifferent because they are unaware of what passes for justice in the courts. There is a growing cynicism about the importance of due process and the protections of the Bill of Rights. Many of those who hold or aspire to public office find it impossible to resist the temptation to resort to demagoguery to exploit these sentiments.

But this reality does not excuse the constitutional responsibility of the judiciary and members of the legal profession to ensure that even the most despised defendants still receive the highest quality legal representation in proceedings that will determine whether they live or die. Justice William Brennan, with his usual eloquence, once observed in another context,

It is tempting to pretend that [those] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.²³⁵

²³⁵McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

Unfortunately, what has been revealed about the depth of moral commitment among legislators, members of the bar, and the judiciary is very discouraging. It is unlikely that the promise of *Powell* and *Gideon* will ever be fulfilled for most of those accused of criminal violations. Legislatures are unwilling to pay the price for adequate representation, most courts are unwilling to order it, and most members of the bar are unwilling or unable to take on the awesome responsibility of providing a vigorous defense without adequate compensation.

The best hope for most of those facing the death penalty is that capable lawyers will volunteer to take their cases and provide proper representation regardless of whether they are paid adequately or at all. A member of the New York Court of Appeals, citing the ethical obligation of lawyers to recognize deficiencies in the legal system and initiate corrective measures,²³⁶ has urged lawyers to respond to the challenge of seeing that those who face the worst penalty receive the best representation.

During the civil rights movement of the fifties and especially the sixties, inspired attorneys, not all young neophytes, travelled often at great personal expense and real risk, including their own deaths, to make a difference. That spirit needs to be revived. Right now, it fuels only a few who are to be commended for what they are trying to do, but it has not motivated a sufficient number of people in our profession to do their needed parts, too. Until that conversion comes about, Lady Justice may as well keep her eyes blindfolded so as not to notice with shame the grotesque imbalance in the scales of justice that hang from her fingertips, because of the growing numbers of death penalty cases in this great country that are finally, really finally, resolved under such disproportionate odds and resources.²³⁷

²³⁶MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-25, 2-27, 2-29 (1980); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (1983).

²³⁷Joseph W. Bellacosa, Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession 29 (Dyson Distinguished Lecture, Oct. 26, 1993) (unpublished manuscript, on file with the Pace University School of Law).

Such spirit and commitment are desperately needed. When achieved, they will undoubtedly make a difference for those persons represented. Indeed it is hard to imagine how a member of the legal profession could make a greater difference than by saving a client from execution. But the response of individual lawyers will not be nearly enough to end the systemic problems previously described and provide adequate representation to the thousands of people facing the death penalty in this country.

Lawyers must not only respond, but in doing so they must litigate aggressively the right to adequate compensation, to the funds necessary to investigate, and for the experts needed to prepare and present a defense. Lawyers must also bring systemic challenges to indigent defense systems. Attorneys for the poor—whether in assigned counsel, contract, or public defender systems—must refuse unreasonable caseloads and insist upon the training and resources to do the job right. Where these problems make it impossible for attorneys to discharge their constitutional and ethical obligations, attorneys should frankly declare their inability to render effective assistance.

And lawyers must continue to bear witness to the shameful injustices which are all too routine in capital cases. The uninformed and the indifferent must be educated and reminded of what is passing for justice in the courts. The substandard quality of counsel for the poor and the lack of a structure and funding for indigent defense must become part of the debate on crime. The state and federal legislatures should not continue to enact capital crimes without considering the costs of adequate representation for the defendant and, even if the costs are met, whether there is anyone to defend those accused. Lawyers and law students need to be reminded that there continue to be people with

desperate, unmet needs for competent representation.²³⁸ They need to be informed that the protections of the Bill of Rights are often denied those most in need of them—poor, minority, and disadvantaged persons facing the death penalty. The danger of silence is not only that lawyers will be unaware of the need, but also that many in society will mistakenly assume that there is a properly working adversary system in the criminal courts.

It is only by the witness of those who observe the injustices in capital cases firsthand that others in society can be accurately informed. This knowledge may prompt questions about the system and its limits such as: whether the quest for vengeance receives too high a priority over the pursuit of justice in the courts; whether criminal courts should be allowed to dispatch people to their deaths without providing capable lawyers or even one penny for the investigators and experts necessary to present evidence that is constitutionally indispensable to the punishment decision; whether indigent and often mentally limited persons accused of crimes should continue to be denied the protections of the Bill of Rights under the procedural default doctrines because of the ineptness of lawyers they had no voice in choosing; whether the assignment of lawyers to defend the poor should be made by judges who must keep one eye on the next election and, with the other, often wink at the Constitution; and whether courts should continue to demean the Sixth Amendment by employing the *Strickland v. Washington* standard for "legally effective counsel."

These questions must be raised vigorously until courts and leaders of the bar realize that the judgments of the criminal courts cannot be seen as legitimate and entitled to respect so

²³⁸See, e.g., Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 Mo. L. REV. 849 (1992).

long as such poor quality of representation is tolerated. It is only by dealing squarely with these questions that there is hope that the courts will face reality and deliver on the promise of *Powell* and *Gideon* instead of indulging in wishful thinking and hollow pronouncements about the right to counsel. One must hope that a frank discussion of the deficiencies of the system will prompt courts to take their eyes off the embarrassing target of mediocrity and take aim at a full measure of justice for all citizens, especially those whose lives and freedom hang in the balance. One must also hope that some prosecutors, who recognize a higher calling in seeing that justice is done and making the adversary system work than in simply getting convictions and death sentences against inept lawyers, will add their voices regarding the need for adequate representation and limits on the power of the courts. And finally, some law schools must respond and prepare students better for defending criminal cases.

The Louisiana Supreme Court recently faced reality and created a presumption of incompetence of counsel where provision of indigent defense services are so lacking that defendants are not likely to be receiving effective representation.²³⁹ Unless the state is able to rebut the presumption at a pretrial hearing, a trial court is not to let the prosecution go forward until the defendant is provided with reasonably effective counsel.²⁴⁰ This approach responds much better to the reality of representation for indigents than *Strickland*. Nevertheless, Justice Dennis pointed out that the court could have done more:

This court should establish standards by setting limits

²³⁹State v. Peart, 621 So. 2d 780, 791 (La. 1993).

²⁴⁰*Id.* at 791-92.

on the number of cases handled by indigent defense attorneys, by requiring a minimum number of investigators to be assigned to each [public] defender, and by requiring specified support resources for each attorney. If a defendant demonstrates further error due to funding and resource deficiencies, the courts should be instructed to view the harm as state-imposed error, which would require reversal of the conviction unless the state demonstrates that the error was harmless.²⁴¹

If systemic reforms are not attainable, other state courts could follow the example of the Louisiana Supreme Court and prohibit the prosecution from going forward in the absence of competent counsel. In addition, as long as trial judges remain in the business of appointing defense counsel, conscientious judges who are concerned about fairness can order the appointment of experienced, competent lawyers, and just compensation at enhanced rates for those lawyers. Trial judges could obtain the services of the best members of the profession, those equal to the task of handling the highest stakes in our legal system, but whose time generally is spent in more lucrative pursuits. The appointment of the top litigators, managing partners, and bar leaders from firms in Atlanta, Birmingham, Jackson, New Orleans, Philadelphia, Houston, and Dallas to defend capital cases would undoubtedly change the quality of indigent defense representation in those areas. It is remarkable that courts do not call upon those lawyers to respond to the need.²⁴² In addition to introducing litigation

²⁴¹*Id.* at 795 (Dennis, J., dissenting); see also Citron, *supra* note 169, at 501-04.

²⁴²Judges in Knoxville, Tennessee, issued a decree mandating all of the licensed lawyers who reside there to be ready to accept appointment of indigent defendants; even the Knoxville mayor, who had not practiced law for years, was

skills to the cases, the involvement of such lawyers might also result in some of them bringing their considerable power and influence to bear upon the systemic problems, if for no other reason than to avoid future appointments.

Such efforts, while urgently needed, will assure competent representation to only a small percentage of those facing death and, at best, may prompt reforms that will take years to accomplish. In the meantime, many will continue to be sentenced to death at trials where they will receive only perfunctory representation by lawyers who are not equal to the task of defending a capital case and are denied the resources to do the job properly. It is those poor people who will suffer the consequences of the failure of the legislatures and the judiciary to discharge their constitutional responsibilities.

The death penalty will continue to be imposed and new capital statutes enacted with the continuing promise that efforts will be made to improve the quality of counsel *in the future*. But this is surely backwards. A very high quality of counsel—instead of minimal representation—should not only be the goal, but the reality *before* a jurisdiction is authorized to take life. Moreover, the promise of adequate counsel is continually broken. It has been over sixty years since the Supreme Court held in *Powell v. Alabama* that those accused in Scottsboro and all poor people were entitled to a higher level of representation in capital cases than merely being accompanied to their trials by a member of the bar. Yet the representation in many trials today is no better than that provided to the accused in Scottsboro in 1931.

This longstanding lack of commitment to counsel for the poor is one of the many reasons that the effort to achieve fairness and

assigned a case. Klein, *supra* note 80, at 420, 427, 427 n.420. However, it appears that no effort was made to see that those appointed had any litigation skills.

consistency in the administration of the death penalty is "doomed to failure."²⁴³

IV. CONCLUSION

Courts have issued many pronouncements about the importance of the guiding hand of counsel, but they have failed to acknowledge that most state governments are unwilling to pay for an adequate defense for the poor person accused of a crime. Unfortunately, the Supreme Court has not been vigilant in enforcing the promise of *Powell* and *Gideon*. Its acceptance of the current quality of representation in capital cases as inevitable or even acceptable demeans the Sixth Amendment. It undermines the

²⁴³*Callins v. Collins*, 62 U.S.L.W. 3546 (U.S. Feb. 22, 1994) (No. 93-7054) (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun concluded that 20 years of "tinker[ing] with the machinery of death" by the Supreme Court had failed to achieve "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death." He observed "a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution." As we have seen, all too often the accused does not receive the process that Justice Blackmun hoped would accompany a decision to impose death:

We hope, of course, that the defendant whose life is at risk will be represented by competent counsel—someone who is inspired by the awareness that a less-than-vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.

Id.

legitimacy of the criminal courts and the respect due their judgments. No poor person accused of any crime should receive the sort of representation that is found acceptable in the criminal courts of this nation today, but it is particularly indefensible in cases where life is at stake. Even one of the examples of deficient representation described in this Essay is one more than should have occurred in a system of true justice.

Providing the best quality representation to persons facing loss of life or imprisonment should be the highest priority of legislatures, the judiciary, and the bar. However, the reality is that it is not. So long as the substandard representation that is seen today is tolerated in the criminal courts, at the very least, this lack of commitment to equal justice should be acknowledged and the power of courts should be limited. So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.