

MINORITY VIEWS ON S. 486

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I. INTRODUCTION AND SUMMARY

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

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

Contrary to the Majority’s view, we submit that the death penalty system in our country is accurate. Suggestions to the contrary are contradicted by the fact that no credible evidence has been provided to suggest that a single innocent person has been executed since the Supreme Court imposed the heightened protections in 1976. The death penalty system now includes numerous layers of court review, which ensure that errors are identified and corrected. In fact, the death penalty system saves lives by incapacitating dangerous offenders who, if freed, would pose a significant risk that they will kill again. Moreover, there is substantial evidence that the death penalty is a significant deterrent; States that impose the death penalty have reduced murder

rates, while States that do not impose the death penalty have experienced increases in murder rates. For convicted murderers who are already serving life without parole sentences, the death penalty is a critical deterrent to the murder of prison guards, nurses, and other inmates. Moreover, the possibility of the death penalty has served a vital national security interest by encouraging those guilty of espionage against the United States, like Aldrich Ames and Robert Hanssen, to cooperate and provide full disclosure of the damage they caused.

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

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

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

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

Considered in this context, S. 486 is not limited to the creation of a reasonable post-conviction DNA testing system for certain defendants. If that were the case, legislation on the post-conviction DNA testing issue could have been worked out in short order and passed by a unanimous Judiciary Committee. Rather, S. 486 will remove the States and State courts from their traditional responsibility for appointing counsel to represent indigent capital defendants in State criminal cases. In its place, S. 486 seeks to resuscitate private organizations, *e.g.* capital resource litigation centers, which Congress defunded in the mid-1990s because of serious ethical, political and financial abuses.

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

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

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

II. CAPITAL PUNISHMENT IN AMERICA

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

The death penalty system in our country has been built on “super due process,” a term

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

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

Id. at 151.

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

Recent data concerning capital punishment during the period of 1973 to 2000 support the assertion that our death penalty system is accurate. A Department of Justice study, *Capital Punishment 2000*, sets out specific data which support our contention that the death penalty

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

system, far from broken, is indeed working well. See Tracy L. Snell, Bureau of Justice Statistics, *Capital Punishment 2000* (December 2001). Appendix 1 is a detailed table for the years 1973 to 2000 for prisoners sentenced to death and the outcome sentence. Between the years 1973 and 2000, a total of 6,930 prisoners were sentenced to death; of these, 1,970, or 28 percent, were removed from death row upon appellate reversal of a defendant's conviction (681), or sentence (1,102), commutation or other reason (187).² Thus, less than 10 percent of all defendants sentenced to death during the period of 1973 to 2000 had their underlying conviction reversed (681 of 6,930 or 9.82 percent). This data suggests that the amount of error in our capital punishment justice system is far less than death penalty opponents claim. In fact, such data suggests that our appellate and habeas system for review has been effective in identifying and ultimately rectifying errors at the trial and appellate levels.

A. The Death Penalty: An Effective Deterrent

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

All of the scientifically valid statistical studies – those that examine a period of years, and control for national trends – consistently show that capital punishment is a substantial deterrent. The most up-to-date and exhaustive study, produced by researchers at Emory University in 2002, concludes that each execution prevents, on average, about 18 murders. The academic studies' findings are confirmed by the recent experience of those States that actively enforce the death penalty and those States that do not allow capital punishment. As one journalist reviewing the data has pointed out, “[a]lmost the entire drop in murder rates over the past decade has occurred in States with capital punishment, with the biggest decrease seen in States that are executing people.”³ Felons themselves have repeatedly explained why this is so: a robber, rapist, or

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

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

surprised burglar already knows that he is risking a long prison term before he decides to commit his crime. If there is no death penalty, killing the victim simply means more jail time – and eliminates a witness, reducing the risk that he will ever be caught. It is only the additional risk of execution that provides an effective deterrent to murder.

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

(i) The Deterrence Studies

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

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

The most recent and comprehensive studies of the death penalty have confirmed Ehrlich and Lawson's findings. A May 2002 study by the University of Colorado at Denver used “a data set that consists of the entire history of 6,143 death sentences between 1977 and 1997 in the United States to investigate the impact of capital punishment on homicide.” H. Naci Mocan, R. Kaj Gittings, *Removals from Death Row, Executions, and Homicide*, University of Colorado at Denver, Dep't of Economics, at 21 (available on the internet at:

<http://econ.cudenver.edu/gittings/KajPaperJune.pdf>). Comparing changes in states' murder rates to the probability of being executed for murder, the authors found not only that each execution has a significant deterrent effect, but that each commutation of a death sentence increases homicides by between four and five.⁴

The most comprehensive death-penalty study ever conducted has also been released this year. Researchers at Emory University used "a panel data set covering 3054 counties [in the United States] over the period 1977 through 1996 to examine the deterrent effect of capital punishment."⁵ Hashem Dezhbaksh, Paul H. Rubin, Joanna Mehlhop Shepherd, *Does Capital Punishment Have A Deterrent Effect? New Evidence from Post-moratorium Panel Data*, Emory University (January 2002), at 27 (study available on the internet at: http://userwww.service.emory.edu/~cozden/Dezhbaksh_01_01_paper.pdf). While past studies examined only national or statewide data, the Emory group tracked changes in murder rates and other data down to the county level. According to the study's authors, "[t]his is the most disaggregate and detailed data used in [the death-penalty deterrence] literature." The Emory study also controlled for the effect of other factors on murder rates, including age, race, unemployment, population density, other crime rates, and police- and prison-related variables. The results are impressive. Comparing changes in murder rates to the probability of execution, the Emory group's findings "suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide." Specifically, the study's "most conservative estimate is that the execution of each offender seems to save, on average, the lives of 18 potential victims."

Finally, another recent study raises disturbing questions about the impact of the various "execution moratoria" that have been imposed or are being contemplated by several states' governors. Professors Dale Cloninger and Roberto Marchesini of the University of Houston have examined the effects of a *de facto* moratorium recently applied by the Texas Court of Criminal Appeals. Cloninger & Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 *Applied Economics* 569 (2001).⁶ That court delayed virtually all

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

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

⁶ See also, *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong. (June

executions in Texas for over a year while it reviewed a legal question that affected all cases. *Ex parte Davis*, 947 S.W.2d 216 (Tex. Crim. App. 1996). Cloninger and Marchesini developed a statistical model that linked changes in the Texas homicide rate with corresponding changes in the national murder rate over the five years preceding the moratorium. They then used that model to predict Texas homicide rates for each month of the effective moratorium – from early 1996 to early 1997.

Cloninger and Marchesini concluded that “[s]ignificant changes in the number of homicides appear associated with sudden changes in the number of executions in a manner consistent with the deterrence hypothesis.” Specifically, they found that “the number of additional (unexpected) homicides that occurred over the approximate 12-month *de facto* moratorium in Texas ranged from 150 to 250.” As Cloninger has since noted,

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

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

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

Any single empirical study, including the present one, is subject to honest criticism. * * * * [Moreover,] a morally contested issue like the deterrence effect of capital punishment attracts criticism that other less contested issues elude.

* * * *

If this were the only study to find evidence of deterrence, then the scrutiny that it will undoubtedly attract could cast some doubt upon its conclusions. However, this study is but another on a growing list of empirical works that finds evidence consistent with the deterrence hypothesis. These studies as a whole provide robust evidence – evidence obtained from a variety of different models,

27, 2001)(statement of Alabama Attorney General William Pryor).

data sets and methodologies that yield the same conclusion. It is the cumulative effect of these studies that causes any neutral observer pause.

(ii) The Verdict of Recent History

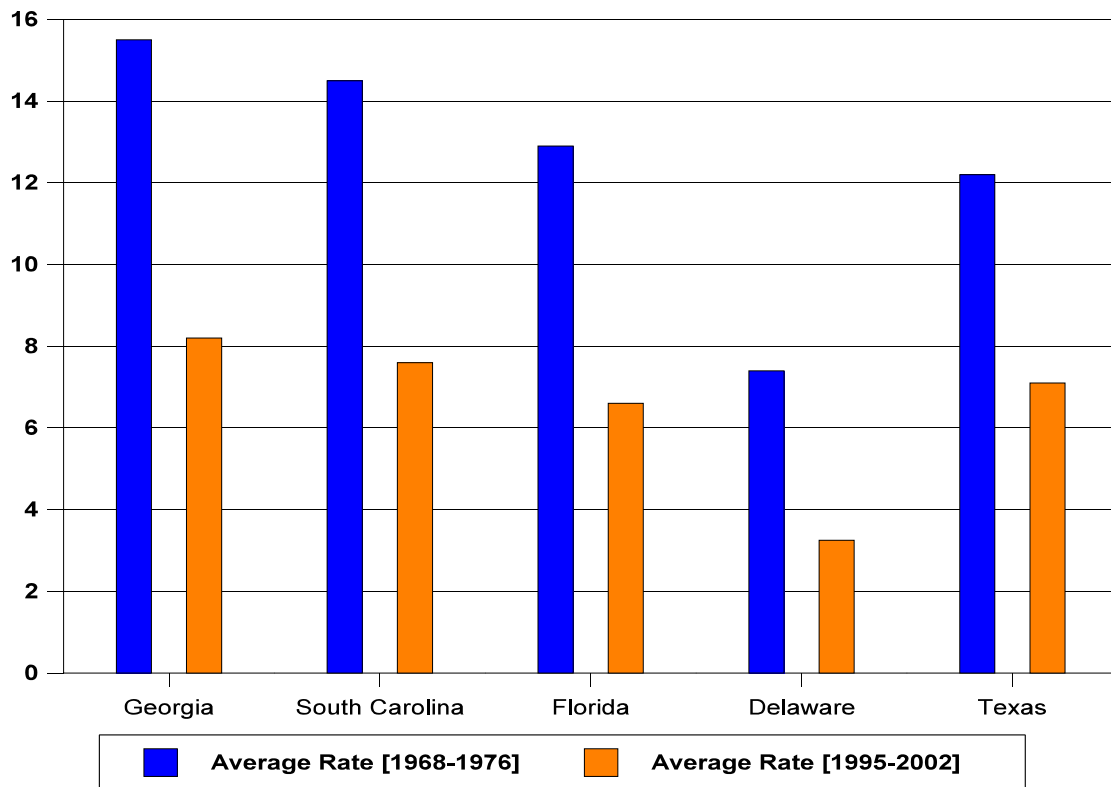
Those who are not persuaded by statistical evidence and regression analysis may yet find evidence of the death penalty's deterrent effect in another area: the recent experience of individual States. To the citizens of those States that have been able to implement an effective death penalty since *Furman*,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

A favorite tactic of death-penalty opponents is to argue that the death penalty must not deter criminals because the 38 States that allow capital punishment still have higher murder rates than most non-death penalty States. What this simply reflects, of course, is that death-penalty laws largely have been enacted in those States where they are most needed. Non-death penalty North Dakota, for example, had only one murder in all of 1969, and one again in 1994, for a murder rate of 0.2 per 100,000 in those years. That State may be less concerned about deterring homicide than would be California, which saw 3,411 murders in 1980 – a state record rate of 14.5 victims per 100,000 people.⁷

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

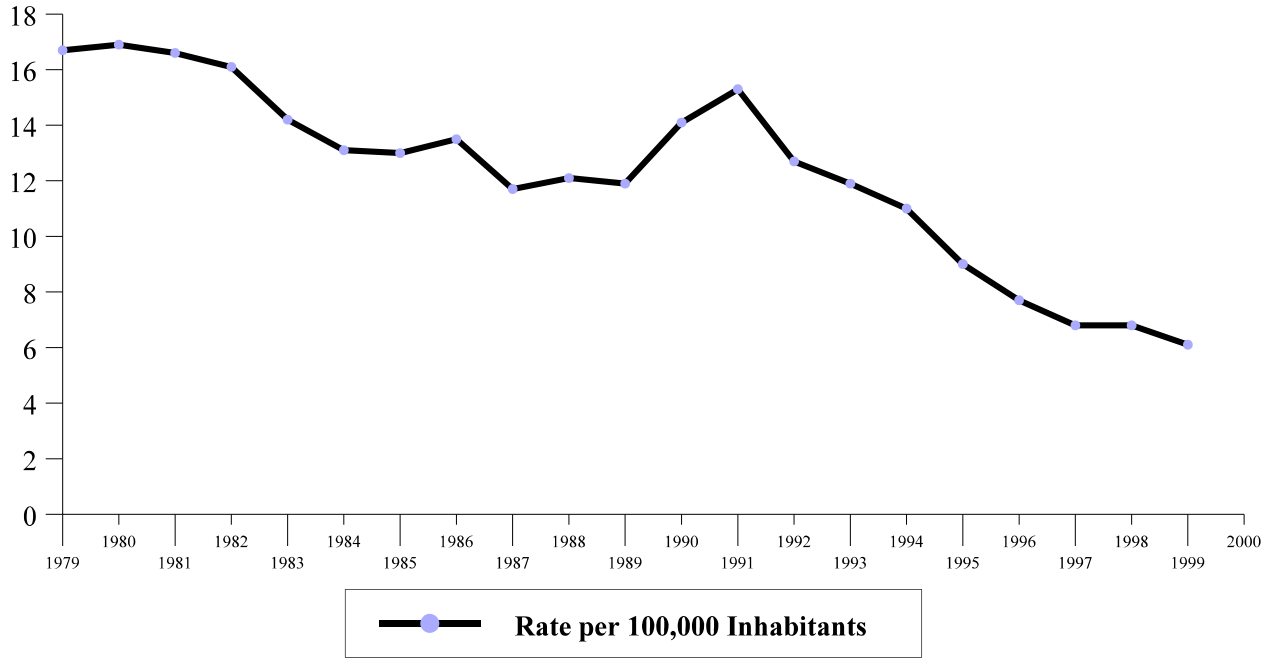
⁷ The data cited in this section were obtained from the FBI website. See www.fbi.gov/ucr/ucr.htm.

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

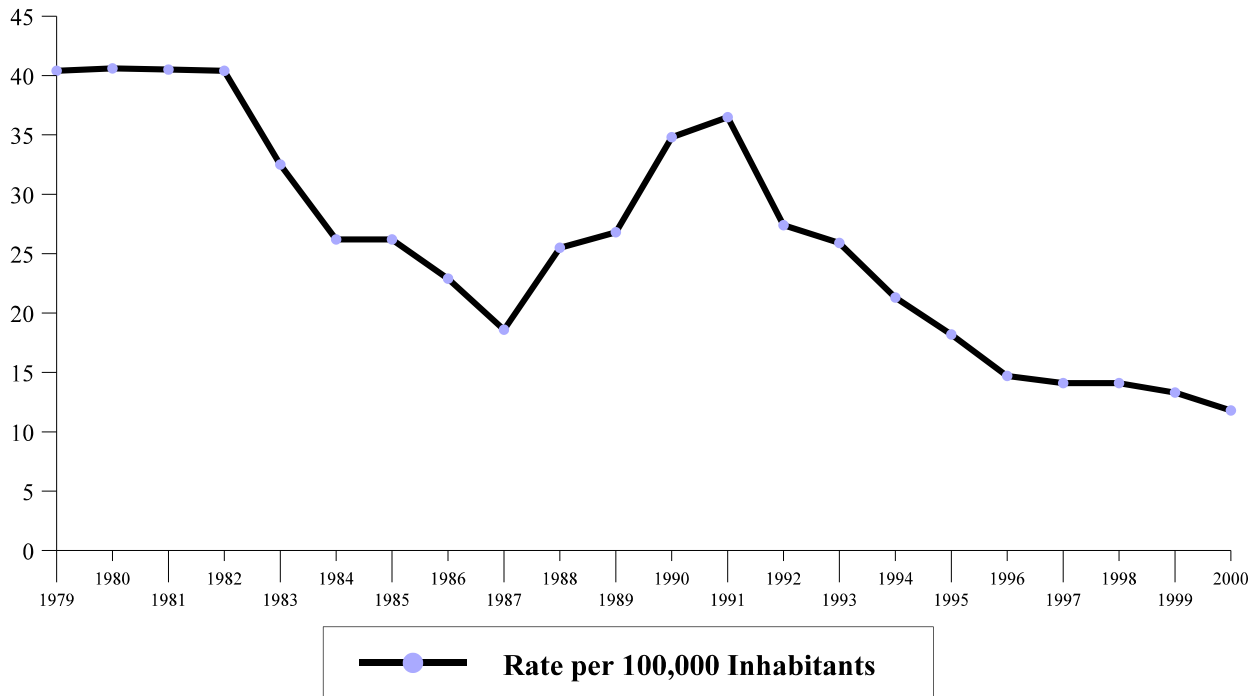


Texas, for example, carried out its first post-*Furman* execution in 1982. Its murder rate that year was 16.1 per 100,000, for a total of 2,466 murders in that State. Since then, Texas has led the nation in executions. By 1999, its murder rate had fallen to 6.1 per 100,000 – a total of 1,217 murders,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

State of Texas Murder Rate from 1979 - 2000



Houston Murder Rate from 1979 - 2000



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

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

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

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

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

Among non-death penalty jurisdictions, nine are large enough to have at least two

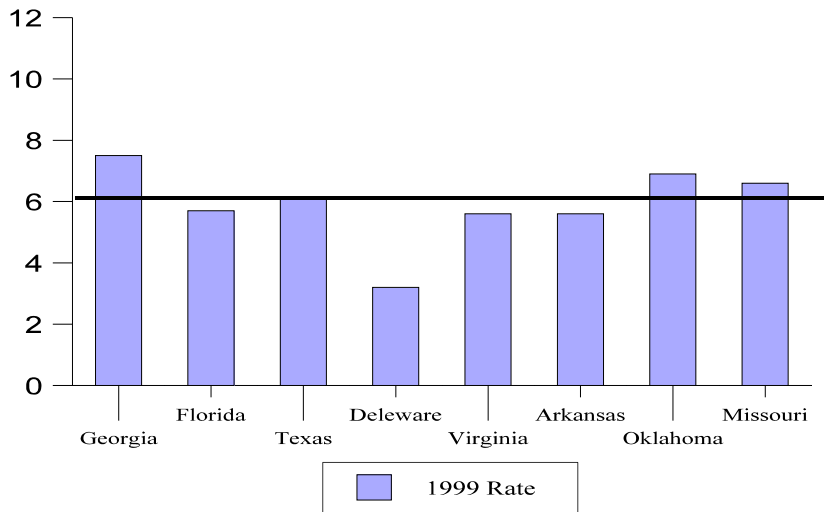
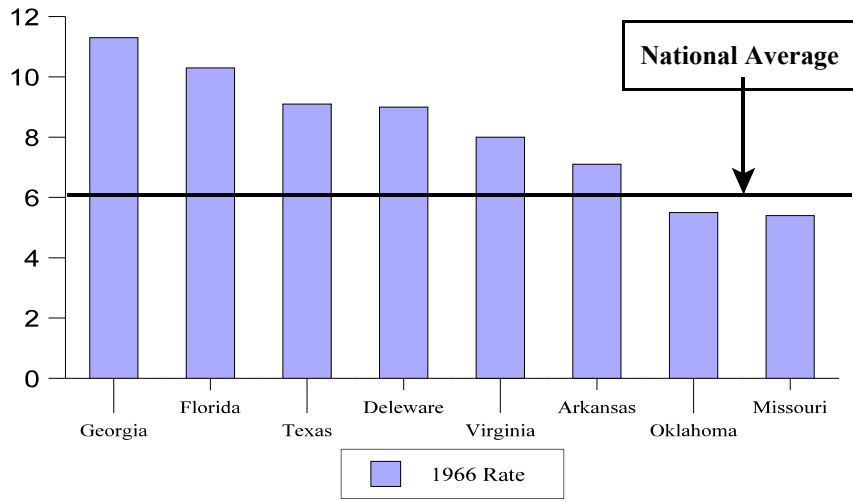
congressmen, and no wild swings in murder rates from year to year. These States are Wisconsin, Minnesota, Massachusetts, Iowa, Michigan, West Virginia, Rhode Island, and Hawaii.⁸

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

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

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

Death Penalty Rate Comparison Chart 1966 & 1999⁹



⁹ Rate per 100,000 Inhabitants

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

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

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

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

(iii) In Their Own Words

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

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

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

and burglars are deterred from taking weapons in the course of robberies and burglaries because of the fear that a killing will result, and that would be murder in the first degree.” 141 Cong. Rec. S7893 (June 7, 1995). Senator Specter has described a case in which three criminals

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

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

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

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

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

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

Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stanford L. Rev. 121, 154 n.205 (1988) (citing Report of the Royal Commission on Capital Punishment 1949-53, at 275 in 7 Reports of Commissioners, Inspectors, and Others 677 (1952-1953)).¹⁰

(iv) The Innocence Tactic: Unreliable Studies and Disinformation

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

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

Death penalty opponents have decided that, if a large enough risk of mistaken executions does not exist, they will invent it. The Majority has fully embraced this position. In particular, the Majority cites several cases from the Death Penalty Information Center's Innocence List to suggest that "innocent" individuals were convicted of crimes that they did not commit.¹¹

¹⁰ The highest rates of on-the-job murder are experienced by taxicab drivers, gas-station attendants, and convenience-store clerks. Murder rates for these workers are so high that the FBI separately tracks work-related homicide rates for these job categories. All of these workers serve the general public in commercial settings with little or no protection, and often work alone or at night. All are frequent targets of robberies. It is these providers of basic public accommodations who most depend on society to enforce capital punishment for felony murder. Criminals know that they already face substantial prison time for robbing a cab driver or a cashier. If the only possible penalty for killing the victim – and thereby eliminating the only likely witness to the crime – is additional prison time, the restraints on the armed robber amount to little more than his own scruples. In too many cases, this is not enough. For too many criminals, the prospect of increasing one's odds of never being caught by killing the witness will outweigh the threat of a longer prison term. For these felons, only the death penalty is an effective deterrent to committing felony murder.

¹¹ During hearings on S. 486, members referred to the Death Penalty Information Center Innocence List.

Majority Report at 9, 11-12, 15, 19-20. The Majority relies on the Liebman study of the capital punishment system to suggest that there is significant “error” and risk of executing the innocent in our capital punishment system (Majority Report at 8, 20). Of the several cases discussed in the Majority Report, most do not even clearly involve defendants who are factually innocent. As for the Death Penalty Information Center (“DPIC”), recent news stories and analyses of its list of 102 claimed “innocent” people who have been sentenced to death reveal that this list is far from trustworthy. The Minority's own examination of cases on DPIC’s list, as well as recent admissions by DPIC's director in response to press scrutiny, indicate that DPIC has been misleading the public with its claims about the number of innocent people on death row. The Liebman study has suffered a similar fate. When subjected to close scrutiny, the Liebman study’s flawed assumptions, unreliable data and unsupported conclusions are revealed. We submit that the DPIC’s list and the Liebman study should no longer be cited or relied on as a source of probative factual information about the death penalty.

(a) The DPIC List: False Claims of Innocence

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

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

Ramesh Ponnuru, *Not So Innocent*, NATIONAL REVIEW ONLINE, October 1, 2002 (available at www.nationalreview.com). *See also* Ponnuru, *Bad List*, NATIONAL REVIEW, September 16, 2002, at 27.

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

Several of the DPIC-list so-called exonerations clearly involve defendants who appear to

be guilty of murder. These include:

[Jonathan] Treadaway, [who] was convicted in 1975 for sodomizing and murdering a six-year-old boy. His palm prints were found outside the victim's bedroom window, and he said that he could not explain their presence. Pubic hairs on the victim's body were similar to his.

But the Arizona supreme court reversed his conviction. The trial court had admitted evidence that Treadaway had committed sexual acts with a 13-year-old boy three years before the murder. The court held that to be irrelevant without "expert medical testimony" that this act demonstrated a continuing propensity to commit such acts. The court also ordered that at Treadaway's retrial, his statements about the palm prints not be admitted. Treadaway had made those statements voluntarily, but without being advised of his Miranda rights or waiving those rights. Finally, the court excluded some evidence that three months before the murder, Treadaway had been found naked in a young boy's bedroom trying to strangle the boy.

Treadaway didn't get off Death Row because it was proven that the cops had the wrong man. Technicalities spared him.

Ponnuru, *Bad List, supra*.

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

The lead police investigator in the case called the result a "travesty," but it was probably the right legal call. What it wasn't was an "exoneration" of Sheets.

Id.

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

Ponnuru, *Not So Innocent, supra*.

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

Ponnuru, *Bad List, supra*.¹²

The newest cases on the innocence list also raise serious doubts about DPIC's credibility. The last two “innocent” defendants on the list are Thomas H. Kimbell and Larry Osborne. Kimbell's initial conviction for killing a woman and three children was reversed because he was

¹² In an effort to confirm Campbell and Ponnuru's findings, the Minority staff has reviewed several cases on DPIC's innocence list. For many of the older cases on the list, very little information is publicly available. Nevertheless, we have been able to confirm Ponnuru's account of the 1974 Treadaway case. DPIC makes the somewhat implausible claim that the six-year-old victim involved in that case had actually died of natural causes. Minority staff, through contacts in Arizona, have been able to locate John Todd, the lead prosecutor at Treadaway's second trial. Todd affirmed to the Minority staff that the theory that the victim died of pneumonia was totally inconsistent with the damage to private areas of the victim's body. Nor had the victim shown any symptoms of pneumonia prior to his death. Todd also affirmed that the identity of the killer was the principle issue at trial – and that Treadaway won an acquittal by successfully moving to suppress evidence linking him both to the crime scene and to a near-identical crime that had occurred nearby several months earlier. In sum, the full available evidence strongly indicates that Treadaway broke into the Jordan family's home, sodomized their six-year-old boy, and strangled him to death. Yet, but for the fortuity that the Minority staff was able to locate John Todd, it would be impossible today to rebut DPIC's assertions that Treadaway is innocent. In this case, however, although Treadaway may have gotten away, DPIC has not. DPIC's misrepresentations regarding Treadaway also raise doubts about what really happened in other old, unverifiable cases on the DPIC list.

not allowed to cross-examine a key witness. *See Commonwealth v. Kimbell*, 759 A.2d 1273 (Pa. 2000). Kimbell knew unique facts about the case: that the mother was killed first, that the children's bodies had been stacked in the bathroom, and that the backdoor of the house where the killings occurred was inoperable. *See* Todd Spangler, "In New Trial, Pennsylvania Man Acquitted of Murdering Four", Associated Press Newswires, May 4, 2002. Kimbell had a history of violence, and had been seen near the scene of the murders. Spangler, "Family Slayings", Associated Press Newswires, July 7, 2002. Finally, Kimbell's first trial included testimony from a former friend and houseguest that he had heard Kimbell admit to the killing. This witness died prior to Kimbell's second trial. Cindi Lash, "From Death Row to Acquittal – Retrial Frees Suspect Convicted in '94 Murders", PITTSBURGH POST-GAZETTE, May 4, 2002, at A1.

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

The Campbell analysis of the DPIC list indicates that many other cases on that list are of the same nature as the Treadaway, Kimbell, and Osborne cases. The frequency with which such cases appear on the list is too great to allow the possibility that their inclusion was an accident or an honest mistake. Instead, it appears that DPIC simply includes on its list any capital case that was reversed and in which either the defendant was acquitted at retrial or prosecutors declined to bring new charges – regardless of the reason for these results. DPIC apparently makes no inquiry into whether the people included on its list are, in fact, innocent.¹³

¹³ These conclusions about DPIC's list have been confirmed by DPIC itself. After the first Ponnuru critique of DPIC was published in National Review, DPIC's executive director wrote a letter to the editor of that magazine. He protested that "[p]eople accused of a crime have every right to claim innocence if they have been acquitted at trial or if the prosecution has decided to drop charges." NATIONAL REVIEW, September 30, 2002, at 2. Of course, this defense of DPIC's actions simply confirms that DPIC is using a standard of legal innocence, not actual innocence. As was noted in reply to DPIC's letter, O.J. Simpson qualifies as legally innocent, but few would mistake him for actually innocent. *See id.* Moreover, it is highly disingenuous for DPIC to now claim that it meant all along only to highlight cases of legal innocence. As Ponnuru notes, DPIC "has done everything in its power to lead people to believe that the modern death penalty has put over 100 people on Death Row who did not commit the crimes with which they were charged." *Id.* Ponnuru also elsewhere properly points out that "DPIC's critique would have no political force if it were not misleading. The over-100 claim shocks people's

More generally, the DPIC list inaccurately includes so-called exonerees who were not sentenced to death, did not establish their factual innocence, or resolved their cases by pleading guilty to lesser charges. See Ward A. Campbell, Supervising Deputy Attorney General, California Department of Justice, *The Truth About Innocence*, pp. 8 - 24.¹⁴ For example, the DPIC list claimed that Florida has released 23 inmates from death row because of evidence of innocence. In fact, the Florida Commission on Capital Cases disputed that finding and specifically determined that only 4 out of the 23 inmates *may* actually be innocent. Florida Commission on Capital Cases, Case Histories: Review of 23 Individuals Released from Death Row, (June 20, 2002) (available at www.floridacapitalcases.state.fl.us/OPPAGA/Deathrow.pdf).

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

consciences because they think that it represents death-row inmates who were innocent or may well have been." See *Not So Innocent*, *supra*.

¹⁴ See e.g., James Cremer, *Cremer v. State*, 205 S.E.2d 240, 241 (Ga. 1974) (included in DPIC list but was convicted of murder and not sentenced to death); Jay C. Smith, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) (reversal based on prosecutor's withholding of exculpatory evidence and retrial barred by Pennsylvania double jeopardy clause); Thomas H. Kimbell, Jr., *Commonwealth v. Kimbell*, 759 A.2d 1273 (Pa. 2000) (no showing of "actual innocence" but included on list since he was acquitted on retrial); Muneer Deeb, *Deeb v. Texas*, 815 S.W.2d 692 (1991)(no showing of "actual innocence" but included on list since he was acquitted on retrial); Delbert Tibbs, *State v. Tibbs*, 337 S.2d 788, 790 (1976)(no showing of "actual innocence"); Richard Neal Jones, *Jones v. State*, 738 P.2d 525 (Okla.Crim. 1987) (Jones death sentence and conviction reversed where trial court erred in admitting statements made by defendant to co-conspirators); Jerry Bigelow, *Bigelow v. Superior Court (People)*, 204 Cal.App.3d 1127 (1988) (death sentence reversed where jury returned inconsistent verdicts which suggested that Bigelow was accomplice to (and fully liable for) murder); see also, William Jent and Ernest Miller, *Jent v. State*, 408 So.2d 1024 (Fl. 1981) (both plead guilty to lesser offenses after convictions were vacated for prosecutor's failure to disclose exculpatory evidence); John Henry Knapp, *Knapp v. Cardwell*, 513 F.Supp. 4 (1980) (plead no contest to second degree murder after reversal of conviction and death sentence after second trial). See Campbell, *The Truth About Innocence*, *supra*, at 8-24.

The list also includes defendants who were convicted of murder but who had their sentences reversed when the State capital sentencing statutes were later struck down. *E.g.*, Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith (sentenced to death under a New Mexico statute later ruled invalid), *see State v. Beaty*, 553 P.2d 688 (Nev. 1976); Gary Beeman (Supreme Court reversed capital sentence in 1976 holding that Ohio’s death penalty statute was unconstitutional because of limitations on presentation of mitigation evidence); James Richardson (convicted and sentenced under invalid Louisiana pre-1972 mandatory statute). *See Campbell, The Truth About Innocence, supra*, at 8-24.

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

(b) The Liebman Study

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

First, the 68 percent “error rate” cited in the Liebman study is misleading. The 68 percent “error rate” does not represent errors in findings of guilt – that is convictions of individuals who did not commit the specific crime. Under the score keeping system applied in the Liebman study, the error rates included any reversal of a capital sentence at any stage by any court, even if the courts ultimately upheld the sentence.¹⁵

¹⁵ As an example, the Liebman study counted as “error” cases in which an appellate court reversed a capital sentence, remanded the case to a trial judge for additional findings on an issue, the trial court complied, and the appellate court affirmed the capital sentence. This example does not show that the defendant was innocent of the crime; rather, this example only reveals that there was a potential error committed by the trial court which was clarified (e.g. through further findings or explication of the trial record) which did not undermine the guilt of the defendant nor his responsibility for committing the charged crime.

For example, the Liebman report identified 64 cases in Florida which were reversed, even though over one-third of those cases ultimately resulted in a reimposed death sentence, and not one of the cases resulted in the dismissal of the murder charges. See Paul G. Cassell, *We're Not Executing the Innocent*, Wall Street Journal (June 16, 2000). By broadly defining "error rates" and failing to tailor the identification of cases to a more accurate measure of death penalty review, it appears that the study was designed not in the interest of true fact-finding but to support a disingenuous suggestion – that the death penalty system is so flawed as to call into question the reliability of the ultimate finding of guilt and sentence of death. Even assuming that the 68 percent rate of error in capital convictions and sentences for the period of 1973 to 1995 is correct, which we do not concede, the Liebman data shows that the judicial system vigorously corrects any error in capital cases, and does not establish that any defendants were wrongly executed, or even actually innocent of the charged crime. The study and the obvious desire to trumpet claims of high error rates suggests that the agenda is one more of politics rather than accurate investigation of an important public policy issue.¹⁶

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

¹⁶ We would note that Liebman is a "long-time opponent of capital punishment." See *Death Penalty Study Called Biased, Dishonest*, Criminal Justice Legal Foundation, February 8, 2002; Bennett A. Barylyn, Deputy Attorney General, New Jersey, *A Response to Professor Liebman's "A Broken System,"* Division of the Criminal Justice Appellate Bureau, Nov. 2000, available at www.prodeathpenalty.com/Liebman/LIEBMAN2.htm.

Liebman study for Alabama). To cite a specific example, the study claims that William Thomson's death sentence was set aside and a sentence less than death was imposed. That is not true. See Paul Cassell, *We're Not Executing the Innocent*, *supra*.

Third, despite assertions to the contrary, the Liebman Study counted as serious error trial cases that were conducted in accordance with the procedures existing at the time of trial, but were later reversed on appeal when new procedural rules were announced and applied retroactively. For example, the Liebman Study cites *Ex parte Floyd*, 571 So. 2d 1234 (Ala. 1990), as a reversal based on serious trial error. See Liebman Study, Appendix C, pp. C-5 to -6. An actual reading of that case, however, demonstrates that the trial was completed without error in 1983, but was later reversed after the 1986 Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), imposed a new procedural rule for trials that was applied retroactively to all trials still on appeal. See also Barylyn, *supra*, (stating that the Liebman Study included reversals of death sentences based on retroactive application of new court-imposed procedural rules and noting that 27 percent of New Jersey's reversals were caused by retroactive application of a singled decision).¹⁷ It is simply misleading to assert that trial courts committed serious errors based on subsequently announced procedural rules that did not exist when the trial court tried the case. Indeed, the Liebman Study tracks the most volatile period in the history of capital criminal procedure. Once the Supreme Court rules became more settled, States adjusted their procedural rules, and trial courts knew what rules to use in conducting capital trials, these types of procedural errors should substantially decline in the post-1995 time period.

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

¹⁷ See Criminal Justice Legal Foundation, *Death Penalty "Error" Study Has Errors of its Own*, June 19, 2000, available at www.prodeathpenalty.com/Liebman/LiebmanCJLF.htm). At the June 18, 2002 hearing, Professor Liebman himself suggested that none of the broadly-applied Supreme Court cases (e.g. *Batson v. Kentucky*, 476 U.S. 79 (1986)) or others were included in his calculation of the error rate. See *Protecting the Innocent: Proposals to Reform the Death Penalty*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong. (June 18, 2002) (testimony of Professor Liebman in response to questions of Senator Sessions).

Further, Latzer and Cauthen point out that the Liebman study made no attempt to distinguish between reversed convictions and reversed sentences. This distinction reveals that only 20 percent of the “prejudicial errors” noted in the Liebman study were reversed guilty convictions. *Id.* Further, after retrials or resentences are considered, in only 4 percent of the cases contained in the Liebman study were defendants ultimately found not guilty of murder after a previous conviction for capital murder. *Id.* Significantly, there is no analysis at all in the Liebman study of whether the defendants in capital cases were “actually innocent” of the charged crimes, even in the instances where the defendants were ultimately found not guilty. As Latzer & Cauthen conclude, “the [Liebman study] appellate reversal rate tells us nothing about the likelihood of an erroneous execution.” *Id.* at 27.

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

To the extent that the Liebman study counts appellate reversals in cases decided in the Ninth Circuit, the reversal rate that he found may say less about the death penalty than the fact that the Ninth Circuit may be unique among the circuits in how it decides death penalty cases. The attached tables and graph compare the U.S. Court of Appeals for the Ninth Circuit’s rate of reversing death sentences with reversal rates on other circuits.¹⁹ See Attachment D. Data for the

¹⁸ During Rose Bird’s tenure as Chief Justice, the California Supreme Court voted to reverse 64 of the 68 death-sentences that it reviewed – with Bird voting to reverse in every single case. See Philip Hager, “Justice Prevails – Cruz Reynoso Was Swept Off the State Supreme Court With Rose Bird, but Now He’s Found New Causes and a New Career”, LOS ANGELES TIMES MAGAZINE, August 13, 1989, at 18; Cynthia Gorney, “Rose Bird and the Court of Conflict”, WASHINGTON POST, April 8, 1986, at C1. All of these reversals are included in Liebman’s study. Chief Justice Bird and Justices Reynoso and Grodin – all of whom had similar voting records in death-penalty cases – were removed from the California Supreme Court by an overwhelming majority of California voters in a 1986 retention election. Following this change in its membership, the California Supreme Court ended its roadblock of capital punishment in that State. See Jess Bravin, “Death Rare for Killers, Study Says”, THE WALL STREET JOURNAL, November 11, 1998, at CA1.

¹⁹ As one scholar has noted, “the Ninth Circuit’s reputation as a liberal court began during the presidential term of Jimmy Carter. The court expanded from thirteen to twenty-three judges, allowing Carter ten additional appointments plus five more due to normal vacancies.” Marybeth Herald, “Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and Congress”, 77 Or. L. Rev. 405, 457 (1998). (By contrast, President Reagan, despite serving two

last ten years show that outside of the Ninth Circuit, usually 70 to 80 percent of death sentences are affirmed by a Court of Appeals on collateral review. In almost every year, however, the Ninth Circuit has reversed the majority of death sentences that it reviews.²⁰ Moreover, this percentage has climbed sharply in recent years, as a number of Clinton appointees were confirmed to that court. In the last three years, the Ninth Circuit has reversed 88 percent, 80 percent, and 86 percent of the death sentences that it has reviewed.

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

terms, was only able to appoint ten judges to the Ninth Circuit.) As early as 1983, the Supreme Court felt compelled to review 27 Ninth Circuit decisions in one year, and reverse 24. *See* Robert Marquand, “Reinhardt Versus Rehnquist: A War Between Two Courts”, *CHRISTIAN SCIENCE MONITOR*, March 6, 1997, at 1. But the Ninth Circuit’s most dramatic and embarrassing year before the Supreme Court came just recently, during the 1996-97 term. Professor Herald has summarized the results of that year:

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

Herald, *supra*, at 407.

²⁰ Unfortunately, there is no source that collects all capital cases decided in the federal courts. Capital cases reviewed here were collected by searching on a computer-based legal research site for all cases that include the headnote “350HVIII” – the headnote for all capital sentencing issues – or that include the word “death” preceded within at least three words by the word “sentence” with a root expander. Although this proved to be the most reliable of several methods tested for finding capital cases in the courts of appeals, there can be no guarantee that this or any other search term will retrieve every relevant case. There is no reason to believe, however, that this search method would bias relative results for different courts of appeals or judges.

sentences.²¹

These numbers suggest a complete breakdown of objective decision-making in death-penalty cases on the Ninth Circuit. A judge who votes to reverse nearly every death sentence that he reviews is not applying the law to facts, but would instead appear to be legislating his anti-death penalty views from the bench.²²

Given the current composition of the Ninth Circuit – 17 Democratic appointees, 7 Republican appointees – it is likely that at least for the next decade, the seven death-penalty States under the Ninth Circuit’s jurisdiction will be unable to enforce their capital-sentencing laws. For the people of these States, the deterrence and incapacitation effects of capital punishment – and even the right to decide for themselves whether or not to allow the death penalty – is being denied by a court that in practice appears to be imposing a *de facto*

²¹ Total votes since 1992 among Democratic appointees in death-penalty cases include 194 votes to reverse or remand for evidentiary hearings, and just 64 votes to affirm. *See* tables in Attachment D. This pattern is particularly marked in several judges. Based on cases that were retrieved, for example, Judge Ferguson apparently has sat on 17 death penalty cases and only voted to affirm one. Judge Betty Fletcher has decided 22 cases, affirming 2. Judge Pregerson has voted in 28 cases, and also affirmed only 2. And Judge Reinhardt apparently has voted to reverse every single one of the 31 death sentences that he has reviewed. Interestingly, one scholar who reviewed all of Judge Reinhardt’s judicial decisions during a four-year period has discovered that when the losing party has requested Supreme Court review of a Reinhardt opinion, *certiorari* has been granted in over 30% of the cases. Marybeth Herald, *supra*, at 469 n.339. And for Judge Reinhardt, *certiorari* invariably means reversal. *See id.*

²² Unfortunately, although Carter appointees have amassed the most extreme anti-death penalty records on the Ninth Circuit, it appears that the Clinton appointees – who now hold 14 of the 28 seats on that court – will soon catch up. Although all of the Clinton appointees have now sat on death-penalty panels, half have never voted to affirm a death sentence. Judge Tashima, a 1996 Clinton appointee, has voted to reverse 9 death sentences in a row. Judge William Fletcher, a 1998 Clinton appointee, has voted to reverse 6 capital sentences, remand 2 for evidentiary hearings, and affirm zero. Judge Berzon, though only a member of that court since 2000, has already voted to reverse 4 death sentences, remand 2 for evidentiary hearings, and affirm zero. Another Clinton appointee who joined the court that year, Richard Paez, has voted to reverse 2 death sentences, remand 2 for evidentiary hearings, and affirm zero. Judge Paez also recently wrote an opinion for a 6-5 *en banc* panel majority striking down California’s 1978 death-penalty statute as unconstitutional as applied to post-crime mitigation evidence – a decision with the potential to invalidate the capital sentences of almost all of the 609 convicted murderers on California’s death row. *See Payton v. Woodford*, 299 F.3d 815 (9th Cir. 1992). And even among the Clinton appointees who have on occasion voted to affirm capital sentences, individual records are not encouraging. Judge Thomas, for example, has voted to reverse 8 death sentences, remand 3 for evidentiary hearings, and affirm 2. Only one Clinton appointee has voted to affirm even half of the capital sentences that he has reviewed.

moratorium on the death penalty.

III. ACCESS TO DNA TESTING

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

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

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

With respect to the states, we believe that the Majority has failed to establish that there is a significant need for legislation to ensure that States provide access to DNA testing for state convicts. More importantly, to the extent that S. 486 relies on the 14th Amendment to impose

DNA testing requirements on the states, it is unconstitutional. Aside from these significant infirmities, S. 486 inexplicably conditions existing DNA testing funds on States enacting statutes in compliance with federal mandates contained in S. 486, and fails to provide additional funding required for compliance with those costly mandates.

A. Need for Legislation to Ensure Access to DNA Testing in the States

While recognizing the scientific value of DNA testing to exonerate defendants, the Majority paints a picture in which states are allegedly denying or frustrating access to DNA testing for convicted state convicts, and suggests that there are numerous “innocent” defendants either on death row or serving lengthy sentences without access to DNA testing. The Majority’s picture, while compelling at first glance, is contradicted by the evidence. In fact, a close examination of the facts shows that the majority has little beyond anecdotal descriptions of instances where DNA testing was, in fact, instrumental in demonstrating a defendant’s innocence.²³ We do not mean to diminish the importance of the few cases where DNA testing has established the factual innocence of a convicted defendant. Our system should not tolerate any injustice, be it a small number or even one case, where someone innocent is unjustly convicted. However, we contend that the majority’s attempt to take these isolated instances of error to condemn the entire criminal justice system and impose an ill-designed legislative response on the States is unwarranted.

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

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

²³ In order to bolster its argument, the Majority contends that some of the 12 death row inmates who were exonerated by DNA testing “came within days of being executed.” Majority Report at 9. The suggestion that a death row inmate was in grave danger of execution and saved at the least second is misleading. It is common in capital cases for an execution date to be set in order to complete further appeals. Stays of the execution date are routinely granted to ensure consideration of all appeals. Defense counsel are well aware that the execution date is routinely stayed pending any further appeals. *See, e.g.*, 28 U.S.C. Section 2262. None of the 28 cases cited by the Majority (report at 9) involved a defendant who was in imminent danger of execution.

case-by-case basis. The latter 2 states, Alabama and Ohio, have pending legislative proposals to create a specific right to post-conviction DNA testing.

Of the 12 States which do not have the death penalty, 5 States have specific statutes which provide for post-conviction DNA testing; and 7 States have general post-conviction statutes and/or caselaw which allows the defendant to make a claim in support of a request for DNA testing. Legislative proposals to create a specific DNA testing procedure are pending in 2 of the 12 states.

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

Second, the majority's description of DNA access in the States suggests that there are a number of innocent defendants on death row awaiting execution, who desperately need access to DNA testing to demonstrate their factual innocence. That broad generalization is simply not true. Attached to our report is a detailed chart which lists the number of defendants in each State currently on death row and the number of those defendants who have requested DNA testing and been denied. *See* Attachment D. The chart shows that of the 3554 defendants on death row in the states, a total of only 18 have requested and been denied DNA testing, or .51 percent of all death row state convicts.²⁴ Even in these 18 cases, the denials were generally based on strong substantive reasons.

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

In South Dakota, Donald Moeller was convicted of the rape and murder of a nine year old girl who lived in his neighborhood. At his trial, Moeller was given the opportunity to have DNA

²⁴ There are also 23 federal defendants currently on death row. None of those defendants has sought a DNA test claiming that such a test will exonerate them.

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

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

And finally in Idaho, George Porter was convicted of the first-degree, brutal beating murder of his ex-girlfriend. The manner of the beating, in which Porter pulled clumps of his girlfriend's hair out of her head was strikingly similar to previous beatings he had inflicted on his prior girlfriends in which he pulled clumps of hair out of their heads. In a post-conviction petition, Porter asked for DNA testing on some of the evidence introduced at his trial, including fingernail scrapings taken from the victim. The judge denied the petition using the post-conviction testing statute which was then in existence. Committee Telephone Interview with Lamont Anderson, Assistant Attorney General in the Idaho Attorney General's Office (Oct. 8, 2002). The Idaho legislature, like the legislatures of most capital punishment States, subsequently enacted a more lenient post-conviction testing statute, and the state court is now reconsidering Porter's request under the more lenient standard. *See Idaho Stat. 1949.02 &*

1927.19 (2002). Accordingly, one of the key premises of S. 486 – that hundreds of death row inmates are being denied DNA testing, thus risking the execution of innocents – is simply unfounded in fact.

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

B. Trampling Federalism

In Section 103, S. 486 relies on Congress’ power under Section 5 of the 14th Amendment to require States to implement post-conviction DNA testing procedures under the standards set forth in Section 2291.²⁵ In support of this constitutional assertion of power under Section 5 of the 14th Amendment, Section 103 contains a number of “findings,” many of which are incorrect or without evidentiary foundation. By stretching Section 5 of the 14th Amendment to encompass DNA testing for state inmates, and by failing to cite any reliable factual basis for such a measure, Section 103 is unconstitutional.

The Fourteenth Amendment provides, in relevant part:

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

As the Supreme Court has recognized, *see City of Boerne v. Flores*, 521 U.S. 507, 517, 117 S.Ct. 2157 (1997), Section 5 is an affirmative grant of power to Congress. *See Board of Trustees of the University of Alabama, et al. v. Patricia Garrett, et al.*, 531 U.S. 356, 365, 121 S.Ct. 955 (2001). Congress’ power under Section 5 extends only to “enforcing” the provisions of the Fourteenth Amendment, and does not include the power to determine what constitutes a violation of the 14th Amendment. The Court has described Congress’ Section 5 power as

²⁵ Section 103 (c) gives state prisoners the right to enforce this requirement in a civil action for declaratory or injunctive relief against the states.

“remedial.” See *City of Boerne*, 521 U.S. at 519-24; *Board of Trustees*, 531 U.S. at 365. In distinguishing between the exercise of authorized “remedial” powers and prohibited enactments defining Fourteenth Amendment violations, the Supreme Court has looked to whether there is a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne*, 521 U.S. at 526; see *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 639, 119 S.Ct. 2199 (1999). The appropriateness of remedial measures must be considered in light of the evil presented. See *United States v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803 (1966) (“the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects”).²⁶

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

Applying these principles here, Section 103's reliance on Section 5 of the Fourteenth Amendment to require States to implement post-conviction DNA testing for state inmates cannot pass constitutional muster. Significantly, the majority does not – and indeed could not – cite any credible record material to demonstrate the existence of a pervasive or widespread denial of

²⁶ Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. See *City of Boerne*, 521 U.S. at 530; *South Carolina v. Katzenbach*, 383 U.S. at 308.

access to DNA testing to state inmates. To the contrary, as detailed above, the record evidence shows that many States already have enacted post-conviction DNA testing programs – in fact, of the 38 States which have the death penalty, 26 have specific post-conviction DNA testing statutes; 8 States have general post-conviction statutes and/or caselaw which would permit the defendant to seek post-conviction relief based on DNA testing; and 2 States have administrative policies which permit such testing where appropriate, and legislative proposals to enact DNA testing are pending in these 2 states. Several States already provide DNA testing on an informal basis, and even where there is a statutory requirement, testing may be conducted on an informal basis, short of any litigation requirement. In the absence of a true factual basis and need for remedial measures, relying on Section 5 of the 14th Amendment to impose such a requirement on the States is plainly unconstitutional. *See Board of Trustees*, 531 U.S. at 368-69; *Kimel*, 528 U.S. at 82-83, 89-90; *Florida Prepaid*, 527 U.S. at 640, 647; *City of Boerne*, 521 U.S. at 530; *Cf. South Carolina v. Katzenbach*, 383 U.S. at 308.

In an attempt to create a constitutional basis for Congress to impose such DNA testing requirements on the states, Section 103 includes several “findings,” which fail to justify use of the 14th Amendment to impose DNA testing requirements on the states. Section 103(a)(1)(J) attempts to identify a constitutional right under the Fourteenth Amendment based on the fact that five members of the Supreme Court “suggested” in *Herrera v. Collins*, 506 U.S. 390 (1993), that “a persuasive showing of innocence made after trial would render the execution of an inmate unconstitutional.” While the language of the Court’s opinion in *Herrera* is subject to differing interpretations, Chief Justice Rehnquist’s plurality opinion stated that, even “assum[ing] for the sake of argument” that a “truly persuasive demonstration of “actual innocence” would render the execution of a defendant unconstitutional, the petitioner in that case had failed to make the “threshold showing for such an assumed right.” *Herrera*, 506 U.S. at 417 (emphasis added); *see Id.* at 427 (O’Connor, J., concurring). A more persuasive interpretation of Chief Justice Rehnquist’s plurality opinion (along with Justice O’Connor’s concurring opinion) is that, in reviewing the evidentiary record, the Court assumed the existence of such a constitutional right “for the sake of the argument,” and disposed of the case based on the failure to meet the required threshold showing without specifically finding that such a constitutional right existed. Under these circumstances, Section 103(a)(1)(J)s “finding” of a constitutional injury – which embraces both capital and noncapital defendants – is simply unsupported by the *Herrera* decision.²⁷

Section 103(a)(1)(H) and (I) assert generally without specific support that “it is difficult” to obtain DNA testing in “many” states, and that “a number of states have adopted post-conviction DNA testing procedures, but some of these procedures are unduly restrictive, and many states have not adopted such procedures.” These general characterizations, which are contrary to the record evidence, cannot supply the constitutional basis for Congress to assert its Section 5 power. Moreover, such a general and conclusory showing, without more, cannot

²⁷ Section 103(a)(1)(E) provides that DNA evidence has led to the “exoneration” of “innocent” defendants in over 100 cases. This finding inaccurately characterizes these cases as determinations of “actual innocence” (factual innocence), as opposed to “legal innocence” (insufficient evidence to meet government’s burden of prove beyond a reasonable doubt).

satisfy the requirement of a showing of a “pattern of unconstitutional” actions by States to justify “remedial” legislation requiring *every* State to implement DNA testing requirements, particularly where many States already provide for such testing and where others are currently considering proposals to do so. See *Board of Trustees*, 531 U.S. at 368-69; *Kimel*, 528 U.S. at 82-83, 89-90; *Florida Prepaid*, 527 U.S. at 640, 647; *City of Boerne*, 521 U.S. at 530; Cf. *South Carolina v. Katzenbach*, 383 U.S. at 308. In the absence of a showing of a pattern of State transgressions with respect to denial of access to DNA testing, which has led to execution (or incarceration) of actually innocent defendants, and assuming that such a pattern would constitute a constitutional injury protected by the Fourteenth Amendment, Congress’ exercise of legislative authority in this area lacks a sufficient legislative record to justify imposition of detailed DNA testing requirement on each state. See *Board of Trustees*, 531 U.S. at 365; *Florida Prepaid*, 527 U.S. at 640; *Kimel*, 528 U.S. at 89.

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

The implications of S. 486’s unconstitutional reliance on the 14th Amendment is significant for future Supreme Court review of Congress’ legislative authority. By stretching the 14th Amendment to address yet another perceived constitutional injury covered by the 14th Amendment, and by doing so with no legislative record to justify such an action, S. 486 provides the Supreme Court with one more instance to justify a future denial of Congress’ entitlement to a presumption of constitutionality when enacting legislation. As Justice Antonin Scalia pointed out:

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

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

S. 2739 offers a constitutional alternative to that set forth in Section 103 of S. 486. Congress has the ability to encourage States to establish DNA testing procedures for post-conviction defendants, and a responsibility to provide increased funds to support timely DNA testing for certain defendants. S.2739 adopts such an approach. By contrast, S. 486 conditions receipt of federal grants for DNA-related programs (DNA Analysis Backlog Elimination Grants, Paul Coverdell National Forensic Sciences Improvement Grants, DNA Identification Grants, Drug Control and System Improvement Grants, and Public Safety And Community Policing Grants) on State adoption and implementation of procedures for preserving DNA evidence and making DNA testing available to state inmates.²⁸ These grant programs are critical to ongoing state efforts to implement DNA testing programs at the investigative and pretrial stages, as well as providing post-conviction testing. Strengthening the DNA testing system at every stage is critical for the effective protection of the innocent and the prosecution of the guilty. The funding eligibility conditions contained in S. 486 would deny States the very federal funding which is provided for that purpose, unless and until they were willing to adopt specific federally-mandated standards for post-conviction DNA testing. Such an approach could perversely create serious risks to the innocent as well as shielding the guilty in cases where DNA testing is used in the investigative or pretrial stage. This amounts to nothing more than an unfunded federal mandate on the states, because States will be compelled to conform to the new federal requirements in order to maintain their current eligibility for DNA grant funding, with no additional federal funds to help defray costs from the expanded post-conviction DNA testing requirements.

Moreover, this heavy-handed approach does nothing to further the dual – and equally important – purposes of DNA testing: exonerating those defendants who are actually innocent of a crime and inculcating those defendants who may have committed previously unsolved crimes. States are not seeking to avoid their responsibilities in this area; they recognize the value and importance of providing DNA testing where appropriate. Rather than threatening States to implement a federally-mandated DNA testing program or face significant DNA funding reductions, States should be provided with additional funding grants needed to implement DNA testing programs.

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

As attorneys general of our respective states, we urge you to be cautious in enacting federal legislation to address the use of DNA identification technology in state proceedings. In our role as

²⁸ The Majority's attempt to minimize S. 486's direction to the States to provide access to DNA testing or lose important federal funding is unpersuasive. Majority Report at 16. The Majority suggests that the States have "some flexibility" to design and implement such programs, but provides only specific examples where state DNA testing programs would not comply with the federal mandates set forth in S. 486.

prosecutors and appellate advocates, we believe in our ethical obligation to ensure that no person is ever unjustly charged, convicted or condemned. DNA identification technology is an invaluable tool for fulfilling this obligation and we support a thoughtful effort in the states to refine actions already taken or to take action to sensibly and fairly utilize the opportunity for justice presented in those cases where DNA evidence is available, and relevant to guilt or innocence.

We ask that Congress not preemptively short-circuit this process with legislation that imposes mandatory obligations on the states.

We have serious concerns about federalism, and about Congress prematurely intruding into and trying to displace an ongoing process in our states through enactment of the "Innocence Protection Act of 2000".

While we have reservations about certain specific features of the bill, our overarching concern is the extent to which this bill intrudes on the responsibility of the states to define crimes, their punishment and the procedures to be followed in their courts. At the same time, the proposed legislation fails to provide what the states need to ensure the protection of innocent people – support for laboratory and prosecutorial resources dedicated to DNA testing.

C. Frustrating Justice by Promoting Gamesmanship

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

We submit that convicted offenders serving lengthy sentences will exploit the provisions of S. 486 to file frivolous motions that could squander the resources of courts, prosecutors and law enforcement. Each of these entities has limited resources and those valuable resources will be committed to resolving motions from defendants who have no reasonable chance of demonstrating their factual innocence through DNA testing. We are also concerned that the post-conviction remedy provided by this bill could be used by convicted criminal defendants not

merely as a means to correct a false conviction, but as a way to establish another layer of criminal litigation beyond trial and appeal that simply gives them a third “bite at the apple.”

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

(i) Section 2291

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

Section 2291 skews this balance between finality and post-conviction motions for DNA testing by ignoring the fundamental distinction between a charged defendant who is entitled to a presumption of innocence and a convicted defendant who is not entitled to such protections. As an example, we submit that a defendant should not be able to obtain DNA testing where such a test was available at the time of the trial, but the defense declined to seek it. S. 486 authorizes defendants in this situation to obtain such testing notwithstanding an earlier decision not to seek such evidence.²⁹

Moreover, Section 2291 places onerous burdens on the government when opposing a defendant’s post-conviction motion for DNA testing, while broadly affording convicted defendants access to DNA testing with little justification, and without any meaningful disincentives to filing frivolous or false claims. This is simply contrary to any notion of finality

²⁹ See Section 2291(d)(1)(B). We note that many States require a petitioner to show that the technology for the DNA testing was not available at the time of trial. See Ark. Code § 16-112-125(a)(1)(B); Conn. Gen. Stat. § 52-582; Del. Code tit. 11 § 4504(a)(2); Idaho Code § 19-4902(b); Ill. Stat. ch. 725 § 5/116-3(a); Md. § 8-201(C), added by Senate Bill No. 694 (enacted May 15, 2001); Minn. Stat. § 590.01(1a)(a)(2); Mo. R. Crim. P. 29.17(b)(3); Neb. Senate Bill No. 659 § 5(5) (enacted May 25, 2001); N.M. Senate Bill No. 337 (enacted March 14, 2001); N.Y. Crim. Proc. Law § 440.30(1-a); Tenn. Code § 40-26-106(a); Utah Code § 78-35a-301(4); Wash. Rev. Code § 10.73.170(1).

and fundamentally unfair to law enforcement, prosecutors, and most importantly, victims and their families.

For example, Section 2291(a) does not require a convicted defendant seeking DNA testing: to specifically assert under oath that he or she is “actually innocent” of the crime; to identify the specific evidence which he or she is requesting to be tested; to identify a theory of defense, which is not inconsistent with previously asserted theories, that the testing will support; and to specify how the DNA test would substantiate the defendant’s claim of innocence. Instead, Section 2291 stands the presumption of innocence on its head by placing various burdens on the government to establish why the defendant is not entitled to DNA testing, and specifically limits the court’s authority to deny an offender’s request for DNA testing only where the government shows by a preponderance of the evidence that the defendant’s application was made to interfere with the administration of justice.³⁰

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

Consistent with the principles explained above, we believe that the defendant should have to assert under oath his “actual innocence” of the crime for which he was convicted, and that the burden should rest squarely on the convicted offender to show how the DNA testing will prove his or her innocence. Rather than placing the burden on the government to disprove the value of a DNA test, we submit that a convicted defendant should simply be ineligible for DNA testing unless the defendant: (1) asserts in a sworn affidavit under penalty of perjury that he or she is actually innocent of the crime;³¹ (2) identifies the exact piece of evidence that he is

³⁰ See Section 2291(d)(2).

³¹ Various existing State provisions explicitly require that a post-conviction DNA testing application include a claim of actual innocence. See Ark. Code § 16-112-125 (motion to demonstrate actual innocence); Del. Code tit. 11 § 4504 (same); Ill. Stat. ch. 725 § 5/116-3(c)(1) (assertion of actual innocence); La. Code Crim. Proc. art. 926.1(B)(4) (affidavit of factual innocence); Minn. Stat. § 590.01(1a)(c)(2) (assertion of actual innocence); Mo. R. Crim. P. 29.17 (motion to demonstrate innocence); New Mexico Senate Bill No. 337 (enacted March 14, 2001) (claim that DNA evidence will establish innocence); Okla. Stat. tit. 22 § 1371.1 (presentation of claims to prosecutorial agency that DNA evidence will demonstrate factual innocence); Tenn. Code § 40-26-106(c)(1) (assertion of actual innocence); Utah Code § 78-35a-301 (assertion of actual innocence under oath).

requesting to be tested and how such testing will demonstrate his actual innocence,³² and (3) establishes that he or she did not rely at trial on a defense (through testimony or defense counsel) such as consent, insanity, intoxication, self-defense or some other defense that conceded the issue of identity. By placing the burden on the government, Section 2291 will have the unintended consequence of permitting a defendant to raise one defense at trial and then assert an inconsistent theory of defense in post-conviction litigation in the hope that the government will not successfully meet its burden for opposing a defendant's DNA testing request.³³ Defendants will have every incentive to game the system through the filing of frivolous post-conviction motions where the government cannot meet its burden and where defendants are hopeful that they can succeed in winning at a new trial.

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

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

³² See, e.g., La. Code Crim. Proc. art. 926.1(B)(3) (“particular evidence”); Or. Senate Bill No. 667 (enacted July 2, 2001) (“specific evidence”); Utah Code § 78-35a-301(2)(c) (“specific evidence”).

³³ Several States require a petitioner to demonstrate that identity was at issue at trial. See Ark. Code § 16-112-125(b)(1); Idaho Code § 19-4902(c)(1); Ill. Stat. ch. 725 § 5/116-3(b)(1); Me. Rev. Stat. tit. 15 § 2138(4) (E); Md. § 8-201(C)(4), added by Senate Bill No. 694 (enacted May 15, 2001); Minn. Stat. § 590.01(1a)(b)(1); Mo. R. Crim. P. 29.17(b)(4); N.M. Senate Bill No. 337 (enacted March 14, 2001); Tenn. Code § 40-26-106(b)(1); see also Utah Code § 78-35a-301(2)(c), (4) (prohibiting defense switching).

cases. Section 2291 only promotes more delay and gamesmanship, and does so at the expense of public safety and the rights of victims.³⁴

The capital murder case of Loyd Winford Lafevers in Oklahoma illustrates the dangers of gamesmanship and delay using DNA testing. Lafevers and co-defendant Cannon burglarized, beat, kidnaped and doused with gasoline and set on fire, an 84 year old woman in Oklahoma City. They were tried together, convicted and sentenced to death. The appeals court reversed and ordered they be tried separately, which was done in 1993. At the 1993 retrial, the defense chose not to conduct DNA tests of blood on two pairs of pants with type A blood (matching Canon and the victim) seized from the Canon's house. Each was convicted and sentenced to death again. Once his State and federal appeals were exhausted, Lafever sought DNA testing of the blood on the pants, despite the fact that, if excluded, the results would not establish his innocence, and that he specifically declined to request such testing at his 1993 retrial. Given the strength of the evidence in the case against Lafevers, the minuscule probative value of DNA testing results, and the suffering to the victim's family, authorizing DNA testing, as would be required under S. 486, would frustrate, not further, justice. *See Post-Conviction Testing: When is Justice Served?:* Hearing Before United States Senate Committee on the Judiciary, June 13, 2000 (W.A. Drew Edmondson).³⁵

The Majority pays lip service to the fact that DNA testing can help solve crimes and lead to the incarceration of dangerous defendants. Majority Report at 1, 9-10. Its pro-law

³⁴ A number of existing State provisions impose time limits on the duration and availability of their post-conviction DNA testing remedies. *See* Del. Code tit. 11 § 4504(a) and Del. Senate Bill No. 329 § 4 (enacted June 20, 2000) (until September 1, 2002, or within three years of final judgment); Idaho Code § 19-4902(b) (by July 1, 2002, or within one year of conviction); La. Code Crim. Proc. art. 926.1(A)(1) (until August 31, 2005, and thereafter subject to normal limits on post-conviction relief applications); N.M. Senate Bill No. 337 (enacted March 14, 2001) (DNA testing application must be filed before July 1, 2002); Okla. Stat. tit. 22 §§ 1371, 1371.1 (provision until July 1, 2005, for investigation and presentation to prosecutorial agencies of DNA claims); Or. Senate Bill No. 667 § 1(2) (enacted July 2, 2001) (motion for DNA testing must be filed within 48 months of effective date of act); Wash. Rev. Code § 10.73.170 (DNA testing requests may be presented to prosecutors until December 31, 2002).

³⁵ The Majority cites three specific cases where DNA exonerations occurred years after the defendants were convicted as support for its contention that no time limits should be imposed. Majority Report at 14. In fact, the three cases underscore the need for encouraging prompt testing and time limits to encourage such requests. By citing these older cases, the Majority ignores the fact that DNA technology was not available at the time the defendants were convicted; indeed, the Majority does not specifically identify when the defendants first made their requests for DNA testing.

enforcement statements are contradicted by the details of S. 486.³⁶ Specifically, Section 2291(d) unreasonably restricts the government's use of DNA test results. First, if the test results are exculpatory to the defendant, Section 2291 does not authorize the government to use the results of the DNA test for any other investigative purposes, including connecting the defendant to other crimes for which he could be prosecuted through the national CODIS system.³⁷ Further, if a defendant successfully moves for DNA testing and is identified as the source of biological evidence in any other case, Section 2291 includes no provision waiving the statute of limitations for subsequent prosecution of the defendant.³⁸ If Rule 33's normal time limit for filing of new trial motions is waived in light of the exculpatory results of a DNA test, the same principle should apply to the inculpatory use of DNA evidence, notwithstanding the normal time limit for prosecution.³⁹

³⁶ The Majority incorrectly describes the facts involved in the case of Jerry Frank Townsend and Eddie Lee Mosley by suggesting that prosecutors would not accede to a request for DNA testing to confirm Townsend's guilt. Majority Report at 9. In fact, the Florida prosecutors agreed to such testing but the testing was delayed by Smith's defense counsels' demand that the result only be given to them and concealed from the state. *See* Jackie Halifax, *Evidence Comes Too Late*, Associated Press, December 14, 2000, <http://abcnews.go.com/sections/us/DailyNews/dna001214.html>.

³⁷ *Cf.* La. Code Crim. Proc. art. 926.1(I) (DNA profile of petitioner to be sent to state police for inclusion in DNA database); New Mexico Senate Bill No. 337 (enacted March 14, 2001) (district attorney may use result of DNA testing of petitioner to investigate or prosecute any case); Tex. Gov't Code § 411.142(g) (4) (results of post-conviction DNA testing may be included in DNA database); Utah Code § 78-35a-302 (2) (data from DNA samples or test results may be entered into law enforcement DNA databases).

³⁸ *Cf.* Utah Code §§ 78-35a-301(2)(f), 78-35a-302(3) (similar waiver provisions for statute of limitations).

³⁹ Some States have extended or eliminated the limitation periods for the prosecution of certain offenses, such as rapes, which are likely to be solved through DNA matching. *See, e.g.*, Ga. Code § 17-3-1(b); Idaho Code § 19-401; La. Code Crim. Proc. art. 571. A number of States have adopted provisions which toll, extend or eliminate limitation periods for prosecution in cases involving identification through DNA evidence. *See* Ark. Code § 5-1-109(b)(1); Conn. House Bill No. 5903 § 1 (enacted May 16, 2000); Del. Code tit. 11 § 205(i); Ind. Code § 35-41-4-2(b); Kan. Stat. § 21-3106(7); Mich. Comp. Laws § 767.24(2)(b); Minn. Stat. § 628.26(m); Or. Rev. Stat. § 131.125(8); Tex. Crim. Proc. Code art. 12.01(1)(B). Some States have no limitation period for the prosecution of certain felonies. *See, e.g.*, Ala. Code § 15-3-5 (no limitation period for prosecution of felonies involving violence, drug trafficking, or other specified conduct); Ariz. Rev. Stat. § 13-107(E) (limitation period for prosecution of a serious offense tolled during any time when identity of perpetrator is unknown); Ky. Rev. Stat. § 500.050 (generally no limitation period for prosecution of felonies); Md. Cts. & Jud. Proc. Code § 5-106 (same); N.C. Gen. Stat. § 15-1 (same); Va. Code § 19.2-8 (same).

Section 2291(a)(2) authorizes a defendant to request DNA testing for “any other offense” which was relied upon by the sentencing court to make a defendant eligible for the federal death penalty or sentencing as a career offender or armed career criminal.⁴⁰ This provision will allow federal defendants to obtain DNA testing in federal court relating to prior state convictions used to enhance their federal sentence, even though the federal judge knows nothing about the state case, has no access to the state trial record or the evidence maintained by the state.⁴¹ Federal courts are not the proper forum to resolve claims of innocence relating to prior state convictions no matter how old the state conviction. In these circumstances, defendants should first seek redress in the state of conviction (used to enhance the federal sentence), and if successful, they should then seek federal habeas review of their sentence.⁴²

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

Finally, in order to discourage a flood of baseless claims, Section 2291 does not clearly set out the requirements that a defendant assert under penalty of perjury that they are actually innocent of the federal crime (or any other offense used to enhance their federal sentence), and does not specifically provide for full prosecution of defendants who make false claims of innocence in support of a DNA testing request. Section 2291(g)(2)(D) allows a court to hold a defendant in contempt (18 U.S.C. § 401) but does not authorize federal prosecution of other applicable crimes such as perjury or false statements.⁴³

In Michigan, for example, the first DNA test conducted pursuant to a then new Michigan law, confirmed that a defendant, Michael Hicks, raped and kidnaped a woman in Calhoun County, notwithstanding his contention that semen found on a pillowcase could not be his. The Innocence Project, founded by Barry Scheck, pursued Hick’s request for a DNA test. After the

⁴⁰ See 18 U.S.C. §§ 924(e)(1), 3592(c)(2)(3)(4)(10)(12), and (15); 21 U.S.C. §§ 848(n)(2)(3)(4), and (10); United States Sentencing Commission, *Guidelines Manual*, §4B1.1 (Nov. 2001).

⁴¹ Recognizing the practical difficulties in requiring federal judges to order post-conviction DNA testing of evidence in prior state cases, the Judicial Conference of the United States specifically opposes this provision for non-capital cases. See Letter from Secretary , Judicial Conference of the United States, Leonian Ralph Mecham to Chairman Patrick J. Leahy, June 20, 2002.

⁴² See 28 U.S.C. § 2255.

⁴³ See 18 U.S.C. §§1001, 1621, and 1623

test confirmed Hicks' guilt, Calhoun County Prosecutor John Hallacy responded by stating that Hicks "perpetrated a fraud on the court . . . and there's no penalty for it."⁴⁴ To be fair, our justice system must ensure that those who would abuse it suffer a consequence. The Majority ignores this concern in the drafting of S. 486.

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

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

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

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

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

One month before his scheduled execution Bradley filed suit in federal court. His federal

⁴⁴ Dawson Bell, *New DNA Law Gets its First Test*, Detroit Free Press, July 17, 2001.

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

(ii) Section 2292

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

While there are certain exceptions to the evidence retention requirements, this provision is unnecessarily broad and will burden the government with preserving mountains of evidence with little to no relevance to the defendant’s actual innocence. For example, this section could be construed to require the preservation of items that are largely irrelevant but fall within the ambit of the statute applicable to all evidence obtained in connection with a federal investigation. For example, an automobile that was seized and searched might have to be preserved because DNA might be found on the steering wheel, the upholstery or the windows. Blood, saliva, hair roots, semen, fingernail scrapings – biological materials that are shed or left during the commission of the crime – are the most obvious sources of DNA and the most likely to be probative of the perpetrator. Incidental DNA on a steering wheel or upholstery that could have been left at any time and has no obvious connection to the crime is not likely to be probative of the identity of the perpetrator. The presence of another person’s DNA inside an apartment or automobile or the absence of the defendant’s DNA would not shed light on whether he had committed the crime.⁴⁵

IV. DEFENSE COUNSEL IN STATE CAPITAL CASES

We strongly disagree with the majority on the need for, and the means chosen in, S. 486

⁴⁵ The Majority’s citation of older individual cases to justify imposing burdensome evidence retention requirements is misguided. Majority Report at 18. These cases, while dramatic, have little relevance to determining what evidence should be preserved prospectively when DNA testing is now routinely made available prior to trial. The older cases occurred during a time when DNA testing was not routinely conducted. That situation has changed. States now conduct such testing and there is no reason to impose costly requirements in this situation, particularly when doing so without providing adequate funding to comply with these requests requirements.

to ensure that indigent defendants are afforded competent counsel. If such a need exists, then we would agree that additional funding to the States and state courts for such purposes would be appropriate. However, the Majority has not demonstrated that there is a significant, systemic problem in the quality of representation in state capital cases which would justify the provisions in Title II of S. 486. Indeed, the Majority ignores the significant protections which already exist in the Sixth Amendment guarantee of competent counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, as discussed herein, even assuming that such a problem exists with the competence of counsel in state capital proceedings, we oppose the means by which S. 486 seeks to “improve” the quality of representation.

A. The Claimed Need for Federal Intervention

The Majority asserts – with little factual support – that “the prevalence of incompetent counsel in state death penalty proceedings, particularly at the trial level, has been well documented.” Majority Report at 20. The Majority provides no credible evidence to support this claim. The Majority relies on the Liebman study, recommendations of organizations whose members are generally opposed to the death penalty, newspaper reports, as well as anecdotal or erroneous claims of individual instances of ineffective assistance of counsel, to justify the claimed need for improvements in the quality of representation of indigent defendants in capital cases. As we have explained above, the Liebman study has been so thoroughly discredited that it cannot justify the federal intrusion and burdens imposed by S. 486 on the state judicial and criminal justice systems. Second, the recommendations of the Constitution Project and the American Bar Association, while significant, are not based on any analysis of performance of counsel in state capital proceedings, and may reflect the influence of organization’s political opposition to the death penalty.⁴⁶

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

Contrary to the Majority’s characterization of the competence of state capital defense counsel, several witnesses provided testimony during hearings on S. 486 that supports a completely different picture of state capital litigation -- prosecutors in state capital cases are

⁴⁶ The Majority also fails to note that almost every State which has capital punishment already has implemented the Constitution Project Committee’s recommendation that each State enact competency of counsel standards in capital cases. *See Effective Counsel Recommendations Number 2.*

typically out-manned and out-gunned by defense teams funded by a combination of public and private sources. See *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001 (statement of Alabama Attorney General William Pryor, statement of Philadelphia Deputy District Attorney Ronald Eisenberg, and statement of South Carolina District Attorney Kevin S. Brackett); *Post-Conviction Testing: When is Justice Served?*: Hearing Before United States Senate Committee on the Judiciary, June 13, 2000 (responses of Joshua K. Marquis to questions from Chairman Leahy), pp.143-44; Letter from Sue Kiorth to Chairman Patrick J. Leahy, July 10, 2002 (noting that S. 486 is “an effort to out-gun” already over-taxed prosecutors offices). Kevin Brackett explained:

I am not aware of any sleepy or drunken capital defense attorneys in South Carolina. No judge I know would tolerate it.

Nor have I seen any incompetent attorneys take up the cause of a man on trial for their life. South Carolina already imposes minimum standards for capital defense counsel and the judges are required to find affirmatively that any prospective capital defense attorney is qualified. Five years of recent felony trial experience is the minimum requirement for the lead attorney. In most cases the actual level of experience far surpasses this. South Carolina law requires indigent defendants be appointed at least two attorneys.

I have also had the pleasure of meeting many fine defense experts over the last 10 years. South Carolina provides ample funding for retaining expert witnesses and private investigators. This year’s budget provides \$2.75 million for use in paying appointed counsel and hiring experts and investigators. In addition, State law allows for part of every dollar paid in criminal fines to be deposited into the same account. When you consider that South Carolina tries approximately 15 capital cases per year you realize that our legislature is not stingy in this regard.

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

Capital punishment opponents charge that defense lawyers in state capital cases are chronically underfunded. Much of the impetus for the complaint stems from the so-called defunding of the capital resource centers, set up by Congress in 1994 to provide legal advice, training and assistance in state death penalty cases. While it was largely unreported, however, federal assistance for state capital defense was not actually cut off. Instead, the funding was picked up by the Administrative Office of United States Courts.

This reallocation process began at the end of 1995, before the resource center cutoff date, so that new funding would be immediately in place. There was never any gap, and many of the new federal court-funded attorneys were the very same lawyers who had worked for the resource centers.

* * *

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

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

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

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

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

Aside from these Justice Department studies, the Majority ignores the very substantial

reforms that have already been enacted by almost every state. Nearly all of the capital punishment States now have competency standards for appointed counsel. *See* Herman, *Indigent Defense & Capital Representation* (National Center for State Courts, No. IS01-0407, July 17, 2001); *see also* Office of Justice Programs, *Compendium of Standards for Indigent Defense Counsel* (December 2000) (study found 17 States have statute or rule setting standards for appointment of defense counsel in capital cases; 14 other States have public defender systems for capital representation; and study predated Texas indigent defense system). In most cases, those standards exceed the qualifications that Congress required for appointment of counsel in federal capital cases. *See* 21 U.S.C. §§848(q)(4)(A) and (5)-(7); *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001(statement of Philadelphia Deputy District Attorney Ronald Eisenberg).⁴⁷

More specifically, the Majority cites five cases in which it claims that ineffective counsel resulted in “innocent” defendants being convicted. Majority Report at 19-20. A closer examination of these cases reveals the weakness in the Majority’s claim.⁴⁸ Of the five cases, in three it is far from clear that the defendant is, in fact, innocent. In a fourth case, the defendant was never even sentenced to death. And in all of these cases, any flaws in the conviction have little to do with the system by which the State appoints its defense attorneys. In two of the cases, prosecutors withheld evidence that would have seriously undercut hair-analysis testimony that was used against the defendant. In a third case, prosecutors failed to reveal that they had reduced a prison informant’s sentence in exchange for his testimony. In another case, although the court found ineffective assistance, it also concluded that trial counsel was one of the best lawyers in the city. And in the last case – from Cook County – defendant’s trial was undermined by police and prosecutors’ gross misconduct, including witness intimidation, concealment of benefits granted in exchange for testimony, and concealment of evidence of other suspects. No defense lawyer can be blamed for not using evidence that the prosecution has wrongfully failed to surrender.

Further, two of the States implicated in the Majority’s examples have substantially upgraded their indigent-defense systems – increasing lawyer’s pay and expert-witness

⁴⁷ Equally unpersuasive is the Majority’s claim that there exists a “crisis” in post-conviction representation of capital defendants. Majority Report at 21. That view is contradicted by the testimony of Ronald Eisenberg cited above which suggests that, despite Congress’ attempt to defund capital resource litigation centers, many of the attorneys assigned to these groups have continued to represent capital defendants in state court proceedings. In addition, Alabama Attorney General Bill Pryor outlined that significant appellate post-conviction resources are made available to Alabama death row inmates. *See Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001 (statement (and attachments) of Alabama Attorney General William Pryor).

⁴⁸ A more detailed analysis of each of the five cases is set forth in Attachment E.

allowances – since the time of those examples. (Most of the examples cited by the Majority are at least twenty years old). See Diane Jennings, *Indigent Defense Bill Passes Senate*, THE DALLAS MORNING NEWS, April 11, 2001, at 1A; Beth Kuhles, *County Overhauls Indigent Defense – Changes Bring More Money, Speeder Representation*, HOUSTON CHRONICLE, January 3, 2002, at 1; *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). Despite its ready use of examples from these States, the Majority neglects to even mention these important changes. This is not surprising, since those changes undercut any remaining legitimate justification for this bill.

Finally, it bears describing the posture of this Minority Report. Once the Minority issues this dissent, the Majority will have a chance to respond, and that will end the debate. We assume that the Majority will try to find some more credible cases to support its argument – and may discretely delete from its report some of the more ridiculous examples reviewed here. We will not have a chance to respond, even to any new examples. Such examples may seem impressive – as the initial examples no doubt did to some – when not all of the facts have been presented. Regardless of what may appear in the final draft, we simply ask observers to keep in mind that “[t]he Innocence Protection Act was first introduced * * * on February 10, 2000, by Senators Leahy” *et al.*, Majority Report at 2. It thus speaks volumes that today – over two-and-a-half years later – the proponents of this bill do not have readily available even a single credible example that plausibly supports their argument that States must be forced to restructure their indigent counsel systems (or fund capital resource centers) in order to protect “innocence.”

B. Federal Intrusion on State Authority

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

(i) Section 201

Even assuming that there exists a problem with the quality of representation in state capital cases, the means for addressing the problem are misguided. Section 201 creates a federal grant program, administered by the Department of Justice, which requires States to create a new entity (independent of the executive, legislative and judicial branches) to set qualifications for attorneys who represent indigent defendants in capital cases; to establish and maintain a roster of

qualified attorneys;⁴⁹ and appoint 2 attorneys from the roster to represent an indigent in a capital case. S. 486's approach simply ignores the traditional role of the States and state courts in administering systems for the appointment of competent counsel in state criminal courts. This is a province legitimately reserved to the States and the state courts, and one that should be protected from unnecessary federal intrusions. In effect, Section 201 would strip States and state courts of their traditional role in establishing a system for appointing counsel to represent indigent defendants.

Section 201 would impose significant costs on the states. For example, Section 201 requires that the new independent state entity would have to pay qualified attorneys at a rate "typically paid to attorneys" in the federal system, and would have to provide "reasonable reimbursement for costs" for staff and support services comparable to such reimbursement rates in federal capital cases. While federal grants are authorized to assist the States in creating and administering this new competency of counsel program, the federal share of such costs in future years is reduced and the state share will increase.⁵⁰

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

(ii) Section 202

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

⁴⁹ In qualifying attorneys for the appointment roster, the independent entity is required to consider whether, in the past 5 years, an attorney has been sanctioned for ethical misconduct, found to have rendered ineffective assistance of counsel, or asserted in 3 or more cases that he or she rendered constitutionally ineffective assistance of counsel.

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

even more State funds to implement such settlements.

C. Federally-Funded Capital Resource Centers: A Mistake We Have Made Before

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

(i) Section 203

We strongly oppose this provision which would, in effect, re-fund private capital defense litigation centers like those which were shut down in the mid-1990s because of ethical and obstructionist tactics. *See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1996: Hearing Before the United States Senate Subcommittee of the Committee on Appropriations, 104th Cong., March 29, 1995, pp. 270-73.* When Congress discontinued public funding for the capital-resource centers seven years ago, it had good cause. The past several years' experience had shown that these groups, which were not accountable to the courts or any other branch of government, had engaged in a consistent pattern of unethical behavior, misconduct, and abuse of the legal process. These incidents included:

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

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

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

- In Texas, the District Attorney of Harris County described an incident in which the Texas Resource Center, “in lieu of timely seeking federal habeas review, issued news releases” to the media announcing “their recent discovery of ‘astounding proof of [the defendant’s] innocence.’” *See Letter from John B. Holmes, District Attorney, Harris County, Texas to The Honorable Henry A. Politz, Chief Judge, United States Court of Appeals, Fifth Circuit, March 23, 1992.* The Resource Center then filed a nine-count petition for a writ of habeas corpus, one day before the defendant’s scheduled execution. As the District Attorney noted, the Resource Center’s “‘astounding evidence’ of innocence was subsequently characterized by the Fifth Circuit as “‘so riddled with holes that it

will not hold water.” Quoting *Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir. 1992). See also *Ellis v. State*, 726 S.W.2d 39, 40-41 (Tex. Crim. App. 1986). The District Attorney emphasized that this incident was simply one event in a pattern of “highly questionable practices by the Resource Center” – practices that included “late Friday afternoon filings prior to a three-day holiday weekend; recurrent claims of lack of counsel even though withdrawal of counsel was reasonably foreseeable or, in many cases, arranged by the Resource Center; and misrepresentations to the court as well as opposing counsel.” See, *supra*, Letter from John B. Holmes, March 23, 1992.

- ❑ In Louisiana, the District Attorney of Jefferson Parish described a case in which the Loyola Death Penalty Resources Center helped a defendant clearly guilty of a brutal torture-murder to draw out his post-conviction proceedings for 13 years. According to the District Attorney, this delay was not accomplished through legitimate means. The Resource Center “misstated medical reports from [the defendant’s] medical history, misstated [the defendant’s] current mental condition, * * * fabricated an alleged immunity statement based on hearsay, fabricated physical evidence in the form of a silver cigarette case, intimidated the eyewitness [to the crime], * * * attempting to change her testimony, and badgered jurors, as reported by two jurors, until they found a juror who would make claims regarding coercion during jury deliberations.” Oversight Hearing on Habeas Corpus, House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Statement of John Mamoulides, District Attorney, Jefferson Parish, Louisiana, February 24, 1994. See also *State v. Sawyer*, 422 So.2d 95, 97-98 (La. 1982).
- ❑ In California, the State’s Supreme Court is believed to have taken over the recruitment of capital defense lawyers from the California Appellate Project – the state’s capital resource center – because “it felt the center was delaying recruitment in order to delay litigation.” Marcia Coyle, *Death Penalty Resource Centers Are “Obstructionist,” Say Their Enemies – Judges Call Them Vital*, NAT’L L.J., September 18, 1995, at A1, col. 2. Such tactics by resource centers are inevitable, according to Charles Hobson of the Sacramento-based Criminal Justice Legal Foundation: “You’re always going to have that problem when people’s avowed goal is to abolish the death penalty.”
- ❑ One South Carolina prosecutor has also emphasized the need for independent supervision of all criminal-justice attorneys – especially in the politically charged context of capital appeals. Kevin Brackett noted that it is “the opinion of many prosecutors who spend any time in capital litigation that some defense attorneys will deliberately infect a record with error or, confess to error at a later habeas hearing in order to secure a new trial for their client.” See *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*: Hearing Before the United States Senate Committee on the Judiciary, 107th Cong., June 27, 2001

(statement of statement of South Carolina District Attorney Kevin S. Brackett).

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

- ❑ In July of 1993, an attorney, from the Texas Resource Center, representing convicted murderer Richard Wayne Jones in Tarrant County Texas, presented a Motion to Vacate Order Setting Execution Date ex parte, to the judge in the case. Neither the prosecutors nor the victim's family were notified, and therefore were not present in the judge's chambers. These actions were a violation of Texas Rules of Professional Conduct and Texas Rules of Appellate Procedure. (Letter from Sharen Wilson, District Court Judge, Criminal District Court No. 1, Fort Worth, Texas, August 16, 1992).
- ❑ Investigators and interning law students from the Texas Resource Center regularly represented themselves to jurors who served on capital cases, as law enforcement officials, district attorney investigators, and law students researching trials for college credit, in an attempt to gain affidavits from the former jurors containing information to be used in the appellate defense of convicted murderers. (Letter from James Elliot, First Assistant District Attorney, Bowie County Criminal District Attorney's Office, Texarkana, Texas, August 6, 1993).
- ❑ Attorneys from TRC made up and filed false allegations of prosecutorial misconduct in a capital murder case in Potter County Texas in 1992. The prosecutor was forced to litigate the claims against him, thus allowing the TRC attorneys to delay the appellate procedure and subsequent execution of the defendant. The claims against the prosecutor were unsubstantiated and the findings of the trial court, that the prosecutor engaged in no prosecutorial misconduct, were affirmed by the Texas Court of Criminal Appeals. The prosecutor was forced to withdraw from the case and a special prosecutor was appointed, at taxpayer expense, which resulted in an additional cost of at least \$4,500.00 to the taxpayers in Texas. (Letter from Danny E. Hill, District Attorney for the 47th Judicial District of Texas, Amarillo, Texas, July 19, 1993).
- ❑ In Navarro County, Texas, the TRC attorney for convicted murderer Gary Starling requested items from prosecutors during the discovery process. Many of the items were non-discoverable under Texas law. The TRC attorneys, undeterred by the law, attempted to obtain the items from a lower level employee at the Sheriff's Office. When this attempt failed, due to the diligence of the sheriff's office employee, the TRC then asked for personnel records of all of the sheriff's office employees, pursuant to the Texas Open Records Act. Much of the requested information was exempt from discovery under the Open Records Act and most of the employees had not even worked on the Starling case. The request was deemed to have been made to harass the sheriff's office in retaliation for not

handing over the requested items from the Sterling case. (Letter from Patrick C. Batchelor, Criminal District Attorney of Navarro County, Corsicana, Texas, July 15, 1993).

- ❑ One of the jurors in the Starling case was contacted by a TRC member who tried to convince her that she did not do the right thing by convicting Starling. (Letter from Patrick C. Batchelor, Criminal District Attorney of Navarro County, Corsicana, Texas, July 15, 1993).
- ❑ In 1993, a paralegal for an attorney contracted by TRC telephoned a former juror in the case of a convicted murderer. The paralegal identified himself as Joseph Ward and arranged an appointment with the former juror to review an already prepared statement. The juror had discussed the case with two people the previous year who identified themselves as students interviewing former capital murder jurors for a research project on the death penalty. Information that she had given to the “students” was the basis for Ward’s prepared statement. When the juror expressed discomfort at the fact she had been deceived by the “students” as to the purpose of their interview, Ward asked the juror if she wasn’t interested in seeing an innocent man’s plight be addressed. (Letter from Luis V, Saenz, Cameron County Criminal District Attorney, Brownsville, Texas, July 9, 1993).
- ❑ In 1992, Eden Harrington, director of TRC, informed the Fifth Circuit Court of Appeals that the trial court in Harris County, Texas, in the case of convicted murderer Joe Angel Cordova, entered findings of fact and scheduled Cordova’s execution without notice to Cordova or his attorney. The Presiding Judge of Harris County Criminal District Courts subsequently informed the Fifth Circuit that Harrington’s statements were not true and provided documentation of the notice to Cordova’s attorney to the Fifth Circuit. (Letter from John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, July 12, 1993).
- ❑ In 1993 a TRC attorney tried to elicit a “confession” from the co-defendant of a TRC client in an attempt to “exonerate” the client. The co-defendant refused to change his true trial testimony. (Letter from John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, July 12, 1993).
- ❑ TRC delayed the appellate process and execution of a death row inmate by hiring two attorneys to represent the inmate’s co-defendant and then claiming a conflict of interest at a hearing in which an execution date was to be set. (Letter from Deena McConnell, Assistant District Attorney for Brazos County, Bryan, Texas, February 21, 1994).
- ❑ TRC represented convicted murder Robert Black. Grady Deckard, who testified on behalf of Black at an evidentiary hearing, was charged with aggravated perjury in connection with that testimony. At Deckard’s perjury trial, the State called

Eden Harrington, Director of TRC, believing that Deckard committed perjury at the request of TRC, was bonded out of jail with TRC money, and had an attorney provided for him by TRC. Deckard's attorney subsequently became Harrington's attorney, which caused a delay because the issue of attorney client privilege had to be resolved. (Letter from Deena McConnell, Assistant District Attorney for Brazos County, Bryan, Texas, February 21, 1994).

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

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

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

These incidents cannot be ignored, nor can the consistent complaints of state and local prosecutors be dismissed. This troubling pattern of behavior by the resource centers – their repeated unethical conduct and abuse of the legal process – is endemic to their structure. The resource centers were created to litigate against death sentences, a highly ideologically charged subject matter. Yet, despite, the fact that they were taxpayer funded, the resource centers' lawyers were allowed to operate with virtually no accountability to the courts and justice system that they served. The inevitable result of such a system is aptly described by Kent Scheidegger, the Legal Director of the Criminal Justice Legal Foundation:

We know from experience with the resource centers that specialized capital defense agencies are usually, if not invariably, captured by the hard core of death penalty opponents. We also know that the hard core regards obstruction as a legitimate means toward their goals, and that they feel unconstrained by the ethical rules against such tactics.

Keeping the appointment authority in the hands of the local courts provides an important check on unethical conduct by defense lawyers. This check is badly needed. The prosecution alone, of all litigants in our courts, cannot appeal after an adverse verdict. The prosecution's evidence, witnesses, arguments, and tactics are examined with a fine-toothed comb on appeal and habeas corpus, and a conviction may be reversed for misconduct. In contrast, even the most outrageous violations of professional standards by the defense side cannot endanger a verdict of acquittal. Once that verdict comes in, the defendant walks, no matter how clear his guilt may be. Bar discipline and contempt proceedings are available in theory, but in practice they provide little deterrent threat.

Because most murder defendants have appointed counsel, the simplest and most practical way to deal with unethical defense lawyers is to not give them any more appointments.

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

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

By stripping state courts – and all other branches of state and local government – of their appointment power and supervisory authority over publicly funded counsel, S. 486 virtually guarantees a return to the abuses of the past. Indeed, S. 486 promises to make the problem much worse. In the last year that they were funded by Congress, the capital resource centers received only \$20 million. Yet under S. 486, the new resource centers are authorized to potentially receive as much as \$100 million a year from the federal government.

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

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

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

The Majority Report now attempts to take away even this limited discretion. The Report states that the new provision's use of the term "frivolous" implies that the Attorney General would have to find that a resource center acted with "some measure of bad faith" before he could deny it funding. Majority Report at 29. As every trial attorney knows, a finding of bad faith is an extremely high threshold. While it is always clear what an attorney actually did during litigation, and it is possible to discover what that attorney knew or should have known before filing a claim, it is virtually impossible to divine an attorney's subjective intentions in filing a claim. A bad-faith requirement would effectively nullify the already very modest anti-abuse provision added to S. 486. Indeed, a bad-faith requirement would be indistinguishable from the standard for attorney sanctions that *already* applies to lawyers appearing before a court – a standard that has in the past proven woefully inadequate to regulate the resource centers'

behavior.⁵¹

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

We recognize that the Supreme Court may overrule its precedent. The same criminal-justice procedure that it specifically endorses in one decade, *see Walton v. Arizona*, 497 U.S. 639 (1990), it may bar in the next. *See Ring v. Arizona*, 122 S.Ct. 2428 (2002). Nevertheless, it would be an abuse of the courts’ process to allow criminal defendants to pursue every claim that has already been rejected by binding precedent, simply on the hope that the Supreme Court might someday change its mind. Indeed, the Supreme Court itself has made very clear that defendants generally should not be allowed to assert newly announced rules on federal collateral review. *See Horn v. Banks*, 122 S.Ct. 2147, 2150 (2002) (reiterating general rule that “new constitutional rules of criminal procedure will not be applicable to those cases which have

⁵¹ Moreover, it is doubtful that the Majority Report is even correct in asserting that the word “frivolous” requires a finding of bad faith. The frivolous-litigation standard – one of the standards applied in the alternative to prevailing Title VII defendants seeking to recover attorneys fees by *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978) – has been construed by the Supreme Court to *not* require a showing of bad faith. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 759-60 (1989) (concluding that fees may be awarded against suits that were “brought in good faith, but only upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation”). The Majority Report’s odd attempt to alter the meaning of this provision after its adoption should not override the basic interpretive rule that “Congress expects its statutes to be read in conformity with the [Supreme] Court’s precedents.” *United States v. Wells*, 519 U.S. 482, 495 (1997). And to the extent the matter is in dispute and S. 486 can be deemed facially ambiguous, the Attorney General would be well within the discretion he enjoys in interpreting a statute that he is charged with administering to construe “frivolous” in conformity with *Christianburg*. Under that standard, he would be entitled to deny funding to any group that has filed a large number of claims for which it knew or should have known of those facts that would require rejection of the claim as a matter of law (*see, e.g. Bill Johnson’s Restaurants v. N.L.R.B.*, 461 U.S. 731, 746 (1983); *Werch v. City of Berlin*, 673 F.2d 192, 195-96 (7th Cir. 1982)), or that rest on a legal theory that is clearly precluded by binding precedent. *See Reeves v. Harrell*, 791 F.2d 1481, 1485 (11th Cir. 1986).

become final before the new rules are announced”). With a possible exception for precedents that are cast into doubt by a recent grant of *certiorari* – an exception that, in any event, does not occur in “large numbers” – criminal defendants should not be allowed to sue on claims that are clearly precluded by binding precedent. The Majority Report’s purported authorization to do so casts doubt on assertions that S. 486 has anything to do with innocence.⁵² Artillery-barrage filings do not aid the fair and efficient administration of the States’ criminal justice systems, or any other legitimate object of federal legislation.

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

D. Opposition From Conference of Chief Justices and State Attorneys General

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

WHEREAS, the provision of competent legal representation and the use of scientific evidence in state courts are first and foremost a state responsibility, and particular provisions included in legislative proposals recently introduced in Congress raise substantial federalism concerns and intrude upon the responsibilities of state courts and the independence of the judiciary; and

BE IT [] RESOLVED that the Conference also reaffirms its interest in working cooperatively with the federal government to adequately fund defender programs in capital cases but opposes any attempt by Congress to impose on state courts standards related to the competence of counsel, or the conduct of state court proceedings, in addition to those required by the Constitution.

⁵² Again, we would emphasize that such a construction of the anti-abuse provision would appear to be inconsistent with language adopted by the Judiciary Committee, and in any event would not be not binding on the Attorney General. *See supra*.

The concerns of the Conference of Chief Justices have been echoed by various state attorneys general. In a letter to the Senate Judiciary Committee dated June 8, 2000, 30 state attorneys general registered their opposition to the original version of the Innocence Protection Act, citing federalism concerns. Several state attorneys general have filed letters reiterating their opposition to S. 486. *See* letter dated July 17, 2002, from Alabama State Attorney General Bill Pryor to the Senate Judiciary Committee; and letter dated July 18, 2002, from Nevada Attorney General Frankie Sue Del Papa to the Senate Judiciary Committee. For example, M. Jane Brady, Attorney General for the State of Delaware, stated in her July 23, 2002 letter:

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

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

[S. 486] would directly mandate jobs and high pay for cadres of criminal defense attorneys in all state capital prosecutions. Currently, states appoint lawyers for indigent defendants according to local court rules and state statutes. [S. 486] would completely federalize this process by overriding existing state law and instead requiring the states to set up panels who will themselves decide which attorneys get these lucrative appointments.

Under the bill, those chosen few defense lawyers must be paid at rates comparable to those in federal court, which generally means \$125 an hour, or assuming a 40-hour work week, \$250,000 over the course of a year.

Moreover, if the lawyers seeking these desirable appointments don't like the way the states set up the new appointing panels, they can sue in federal court for that too, and once again secure attorneys fees for having sued.

If a state tries to opt out by not setting up appointing panels at all, then under this bill the federal government would pay millions of dollars directly into the hands of capital defense lawyer groups, and the money for those payments, if not specifically appropriated by Congress, would be diverted from federal "Byrne" grants used

now to promote safe streets for citizens.

In light of all of these provisions, it appears the so-called “Innocence Protection Act” is not really about protecting innocent defendants at all. Instead, it could more appropriately be known as the “Attorney Protection Act” for lawyers opposed to capital punishment.

V. SUPREME COURT REVIEW AND STAY OF EXECUTION

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

Chief Justice Rehnquist submitted a letter to the Committee dated August 6, 2002, commenting on this specific proposal.⁵³ The Chief Justice points out that the Court’s existing practice is to issue a stay of execution upon the grant of a petition for certiorari. In addition, the Chief Justice notes that the decision of whether and when to issue stays of execution should be left to the discretion of the Court. Finally, the Chief Justice explains that the current provision, requiring the Court to treat a motion for stay of execution as a petition for certiorari, would significantly change the Court’s current practice which limits such treatment to rare situations where immediate action may be required or when the stay application contains enough information to allow the Court to make an informed decision about the case. By requiring the Court to treat motions for stay of execution as a petition for certiorari, the Chief Justice notes that it will be very difficult for the Court to determine whether or not to grant certiorari where the stay application fails to provide sufficient information to make such a determination.

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

VI. OTHER PROVISIONS

A. Compensation for the Wrongfully Convicted

⁵³ Letter from Supreme Court Chief Justice Rehnquist to Chairman Patrick Leahy, August 6, 2002.

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

B. Student Loan Repayment

Section 501 provides for assistance to state and local prosecutors and public defenders to repay Stafford loans who agree to remain employed for not less than 3 years. We agree that additional incentives are needed to encourage prosecutors and public defenders to continue in their public service positions. The National District Attorneys Association (“NDAA”) supported this proposal as a way to encourage prosecutors to remain in public service and thereby improve the quality of state and local prosecutions. *See Protecting the Innocent: Proposals to Reform the Death Penalty*: Hearing Before the Senate Committee on the Judiciary, 107th Cong., June 18, 2002 (statement of Paul A. Logli). It should be noted, however, that even with such a significant benefit offered to members of the NDAA, the organization continues to oppose S. 486 for many of reasons outlined above.

VII. CONCLUSION

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

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

We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art.I, Section 8. As James Madison wrote, ‘the powers delegated by the proposed Constitution to the federal government are few and defined.’ Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to

prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

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

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

Attachment A

ATTACHMENT A

CRITIQUE OF DPIC LIST (“INNOCECE: FREED FROM DEATH ROW”)

Ward A. Campbell⁵⁴

The Death Penalty Information Center (DPIC) Innocence List (“Innocence: Freed from Death Row”) is frequently cited as support for the claim that 102 innocent prisoners have been released from Death Rows across the nation.⁵⁵ This list is uncritically accepted as definitive. However, an examination of the premises and sources of the List raises serious questions about whether many of the allegedly innocent prisoners named on the List are actually innocent at all.

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

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

A. Background of DPIC List

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

⁵⁴ Supervising Deputy Attorney General, State of California. Member, Association of Government Attorneys in Capital Litigation (AGACL). The writer represents the State in death penalty appeals and is a supporter of the death penalty. This paper was the basis for a presentation at an annual meeting of AGACL during 2002. However, this work represents solely the views of its author and is not an official publication of the California Department of Justice nor does it represent the views of AGACL.

⁵⁵The DPIC List is located at its website: <http://www.deathpenaltyinfo.org/innoc.html>

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

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

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

1. The *Stanford* Study

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

The article limited the cases it discussed to defendants in cases in which it was later determined no crime actually occurred or the defendants were both legally and physically uninvolved in the crimes. The focus was primarily on “wrong-person mistakes.” The article did not include defendants acquitted on grounds of self-defense. *Id.* at 45. The article relied on a variety of sources, including the “unshaken conviction by the defense attorney....” that his or her client was innocent. *Id.* at 53.⁵⁶

⁵⁶ The *Stanford* study includes historically controversial defendants such as Bruno Hauptmann, executed for the kidnapping and murder of the Lindbergh baby, and Dr. Sam

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

2. *In Spite of Innocence*

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

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

3. The *Cooley* Article

The recent *Cooley* article is the principal source for the DPIC List.⁵⁷ Two of its authors, Bedau & Radelet, also wrote the original *Stanford* study and *In Spite of Innocence*. The *Cooley* article ostensibly continued the *Stanford* focus of identifying “factually innocent” defendants—wrongly convicted persons who were not actually involved in the crime. *Cooley*, at 911.

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

Sheppard, ultimately acquitted on retrial for the murder of his wife, as examples of wrongfully convicted murderers. However, the most recent study of Hauptmann’s case supports the evidence of his conviction. Fisher, *The Ghosts of Hopewell* (Southern Ill. Univ. Press 1999). Similarly, the most recent civil litigation concerning the conviction of the late Dr. Sheppard rejected evidence of his innocence. *Cleveland Plain Dealer* (4/13/00).

⁵⁷ *Cooley* itself only lists 68 defendants. The DPIC does not explain how it has otherwise learned of the cases or defendants it has since added to its current list of 102 defendants.

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

The *Cooley* article purported not to include inmates released because of “due process errors” unrelated to allegations of innocence. *Cooley*, at 911-912. Finally, *Cooley* excluded inmates who were found to be guilty of lesser included homicides or not guilty by reason of mental defenses. *Cooley*, at 912-913.

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

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

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

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

overstates the frequency of wrongful convictions in capital cases.

B. The DPIC List: Miscarriages of Justice or Miscarriages of Analyses?

Using the *Cooley* article as a starting point, this paper explains that as many as 68 of the 102 names on the DPIC List (2/3 of the List as of September 17, 2002) should be eliminated. In several respects, the methodology of the DPIC List as explained in the *Cooley* article is deficient. The premises used in selecting and pronouncing particular defendants as “actually innocent” do not in fact support that conclusion or do not assist in determining the actual number of allegedly mistaken convictions under current capital punishment jurisprudence.

1. Time Frame: Relevance of DPIC List to Current Death Penalty Procedures

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

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

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

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

Implicitly, the *Cooley* article accepted this premise by limiting its time frame to cases that were actually disposed of after the 1972 *Furman* decision. The mistake in *Cooley*, however, was in not further limiting the time frame to defendants sentenced to death after their state enacted the appropriate post-1972, post-*Furman* "guided discretion" statutes. See also Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 147-152 (1988).

In addition, the United States Supreme Court has from time to time invalidated other state death penalty statutes or issued rulings which would have affected the penalty procedures in various states. To the extent that those changes affected the eligibility for or selection of the penalty, it is inappropriate to include inmates who may not have had the benefit of those procedures.⁵⁸

2. The Concept of "Actual Innocence"

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

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

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

As noted, the DPIC currently limits the cases on the List to those in which a prisoner has been acquitted on retrial or charges have been formally dismissed. However, the DPIC List also

⁵⁸ For example, just recently the United States Supreme Court abrogated statutes in at least four states. *Ring v. Arizona*, __U.S.__, 122 S.Ct. 2428 (2002). The Court also held that mentally retarded defendants could not be sentenced to death. *Atkins v. Virginia*, __U.S.__, 122 S.Ct. 2242 (2002). For purposes of assessing whether innocent defendants have been sentenced to death, both of these cases may indicate that certain defendants currently on the DPIC List would not have been or should not have been eligible for the death penalty at all.

includes other cases in which the conviction was reversed because of legally insufficient evidence or because the prisoner ultimately pled to a lesser charge. As will be shown, inserting these cases on the List is misleading in terms of assessing whether truly innocent defendants have been convicted and sentenced to death. In actuality, the DPIC List includes a number of “false exonerations”.

To begin with, defendants are only convicted if a jury or court finds them guilty of murder "beyond a reasonable doubt." Implicit in the “reasonable doubt” standard, of course, is that a conviction does not require "absolute certainty" as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather than convicted, because the proof does not eliminate all "reasonable doubt." *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981).

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

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

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

Louisiana state court.

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

Similarly, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the he Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 16-18 (1978). However, the judges on the appeals court cannot reverse or uphold convictions because they personally believe the convicted defendant is guilty or innocent.. Ordinarily, the judges cannot substitute their opinion for the jury's guilty verdict. They cannot second guess how the jury resolved conflicts in the evidence or the inferences the jury drew from the evidence. *Jackson v. Virginia*, 443 U.S. at 319.⁵⁹

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

As will be noted in the discussions of some of the various cases on the DPIC List, some individual states themselves have their own unique and more demanding standards for sufficiency of evidence or double jeopardy. Accordingly, a reversal in one state is not representative of the potential disposition of the case under the United States Constitution or other states' laws. In other words, a prisoner may have had his case reversed for insufficient evidence in one state when that conviction might have been upheld in federal court or another state.⁶⁰

Thus, the "reasonable doubt" standard represents the determination that the prosecution will pay the price if the evidence is insufficient and that any errors in fact-finding in criminal cases will be

⁵⁹ As will be shown, in some states there are some exceptions to this general rule of appellate review which favor the defendant.

⁶⁰ An example of such a difference relates to convictions based on accomplice testimony. A conviction based solely on accomplice testimony is insufficient for a conviction in California unless it is corroborated by some other evidence. However, a conviction on accomplice testimony would be sufficient in federal court even without corroboration. *Laboa v. Calderon*, 224 F.3d 972 (9th Cir. 2000).

in favor of the defendant, i.e., that the guilty will be acquitted because of insufficient proof. *Schlup v. Delo*, 513 U.S. 298, 325 (1995). Indeed, evidence of guilt is frequently excluded and never presented to the jury if the prosecution or police have violated the defendant's constitutional rights in obtaining that evidence—even if the evidence proves the defendant's guilt. *Id.*, at 327-328.

For instance, a technical violation of the rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) may lead to the exclusion of powerful evidence of guilt such as a defendant's confession or other damaging statements. If evidence is seized from the defendant in violation of the Fourth Amendment's rule against unreasonable searches and seizures, the evidence which was taken will not be presented to the jury even though that evidence demonstrates the defendant's guilt. As a result, the jury may be deprived of sufficient convincing evidence of guilt even though the defendant is undoubtedly guilty or the prosecution may no longer have sufficient evidence to try the defendant.⁶¹

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

Local prosecutors have discretion to decide whether to seek the death penalty. That discretion is motivated by such factors as the strength of the case, the likelihood of conviction, witness and evidence problems, potential legal issues, the character of the defendant, the case's value as a deterrent to future crime, and the Government's overall law enforcement priorities. *United States v. Armstrong*, 517 U.S. 456, 463-464 (1996); *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White,

⁶¹ Furthermore, when a defendant secures a new trial on grounds of ineffective assistance of counsel or because the prosecution has improperly withheld material, exculpatory evidence, he is not required to prove that he is innocent or even that he would have been acquitted. In fact, he does not need to even prove that it is "more likely than not" that he would be acquitted--found not guilty under a "reasonable doubt" standard. He need only show a "reasonable probability" that the outcome would have been different--he need only undermine confidence in the guilt verdict in his case. *Strickland v. Washington*, 466 U.S. 668, 693-694 (1984); *United States v. Bagley*, 473 U.S. 667, 679-682 (1985). If a prosecutor presents perjured testimony, the conviction is reversed if there is any reasonable likelihood the verdict would be different. *Bagley*, at 679-680. Although a defendant may get a new trial because of these claims, none of these standards amount to a finding of the defendant's "actual innocence".

J. conc.); *People v. Gephart*, 93 Cal.App.3d 989, 999-1000 (1979). Prosecutors have the discretion to decline to charge the defendant, to offer a plea bargain, or to decline to seek the death penalty in any particular case. *McCleskey v. Kemp*, 481 U.S. 279, 311-312 (1987.)

"Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or go to trial. Witness availability, credibility, and memory also influence the results of prosecutions." *McCleskey*, at 306-307 fn. 28. As even the authors of the *Stanford* study concede, "[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a reasonable doubt', but for reasons wholly unrelated to guilt or innocence." 1998 *Law & Contemporary Problems* at 106. When a conviction is reversed, this discretion will also be affected by the toll that the passage of time has taken on the witnesses and the evidence. *United States v. Mechanik*, 475 U.S. 66, 72 (1986).

C. Cases on DPIC List: Actually Innocent or Falsely Exonerated?

After examination of the DPIC List and available supporting materials including appellate opinions, newspaper reports, and academic articles, it is submitted that the following 68 defendants should be stricken from the current DPIC List of 102 allegedly innocent defendants "freed from Death Row."⁶² The DPIC List fails to take into account many of the factors mentioned above that may lead to an acquittal or a prosecutorial decision not to retry a case even though a defendant is not actually innocent. As a result, it includes defendants whose guilt is debatable to say the least and whom it is hard to believe that a majority of neutral observers would conclude were innocent. The List also includes cases that should not be considered in terms of assessing the overall effectiveness of today's post-1972 death penalty procedures in reliably and accurately imposing the ultimate punishment on defendants who legitimately deserve that sanction, procedures that "probably reduce the likelihood of executing the innocent."

For ease of cross-referencing, the cases which should be omitted from the DPIC List are discussed in the same numerical order as they currently appear on the DPIC's website.⁶³

⁶² The author has also been aided by information recently compiled by the Florida Commission on Capital Crimes, the Journal of the DuPage County Bar Association, and the Philadelphia District Attorney's office.

⁶³ This study is not exhaustive, but is based on materials available to the author. These materials are cited in the summaries and also include the *Stanford* study, *In Spite of Innocence*, the *Cooley* article, and the summaries available on the DPIC website. It is not conceded that other defendants on the DPIC List who are not mentioned in this study are actually innocent. For that matter, the writer is always interested in additional information bearing on a defendant's

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

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

3. **Wilbur Lee**--

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

5. **James Creamer**--Creamer was mistakenly sentenced to death for a 1971 murder. According to Cobb County court records, his initial death sentence was imposed on February 4, 1973, but was then reduced to life on September 28, 1973. This reduction is understandable since the Georgia death penalty law had been declared unconstitutional in 1972 in *Furman* and could not be applied to offenses occurring prior to the passage of the new Georgia death penalty law in March, 1973. *Jackson v. State*, 195 S.E.2d 921 (Ga. 1973); *Clemmons v. State*, 210 S.E.2d 657 (Ga. 1974); *Creamer v. State*, 205 S.E.2d 240 (Ga. 1974) (Creamer sentenced to four consecutive life terms); *Emmett v. Ricketts*, 397 F.Supp. 1025 (N.D.Ga. 1975). By the time the case was appealed, Creamer was serving a life sentence. There was some initial confusion about the actual sentence in this case since the original *Stanford* study and the reviewing courts' decisions simply stated that Creamer had received a life sentence. Of course, Creamer's case is not relevant to assessing today's post-*Furman* capital punishment system.

6. **Thomas Gladish**

7. **Richard Greer**

8. **Ronald Keine**

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

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

Tibbs' conviction was reversed by a 4-3 vote of the Florida Supreme Court. The majority applied

claim of "actual innocence".

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

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

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

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

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

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

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

When Treadaway's retrial began, the Arizona Supreme Court reviewed several pretrial evidentiary rulings. It admitted evidence that Treadaway sexually attacked and tried to strangle a boy three months before the murder at issue in the boy's bedroom. However, the court excluded the interrogation in which Treadaway failed to explain his palmprints outside the victim's bedroom window, specifically refused to provide information any information, and made other incriminating statements. The exclusion was based on the police failure to comply with the technical requirements of the *Miranda* decision, not because Treadaway's statements or failure to explain the palmprints on the window were somehow unreliable or involuntary.

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

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

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

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

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

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

19. **Annibal Jaramillo**--*Jaramillo v. State*, 417 So.2d 257 (Fla. 1982). This defendant's double murder conviction and death judgment were reversed for legal insufficiency of evidence. The male victim had been bound with cord and then shot. Near the body was a coil of cord and near that coil was the packaging for a knife. Jaramillo's fingerprint was found on the packaging and the knife, but not on the knife wrapper. A nearby grocery bag had Jaramillo's fingerprint. Jaramillo testified that he was helping the victims' nephew stack boxes in the garage the day before the murder. He asked for a knife to help cut the boxes. The nephew directed him inside to a grocery bag with a knife. According to Jaramillo, he removed the knife from the wrapper and returned to the garage. He claimed he later left the knife on the dining room table where it was found after the murder. Thus, Jaramillo's testimony conveniently explained the fingerprints on the incriminating objects. According to the recent report of the Florida Commission on Capital Cases, the victims' nephew who could have either corroborated or contradicted Jaramillo's version of events was unavailable to testify at trial since his whereabouts were unknown.

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

This Florida case illustrates a key point about our federal-state criminal justice system. Florida's "sufficiency of evidence" rule in this case was more stringent than the standard required under the Federal Constitution and applied by the majority of other states. See, e.g., *Fox v. State*, 469 So.2d 800, 803 (Fla.App. 1985); *Geesa v. State*, 820 S.W.2d 154, 161 fn. 9 (Tex.Crim. 1991). Ordinarily, it is not necessary for the prosecution to eliminate every hypothesis other than guilt. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979). Thus, in both federal court and the majority of

states, the evidence would have been sufficient to support Jaramillo's conviction notwithstanding his alternative explanation for his fingerprints. The presence of Jaramillo's fingerprints on items associated with the murder would have been sufficient for conviction. See, e.g., *Taylor v. Stainer*, 31 F.3d 907 (9th Cir. 1994); *Schell v. Witek*, 218 F.3d 1017 (9th Cir. en banc 2000).

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

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

24. **Joseph Green Brown**--*Brown v. State*, 381 So.2d 690 (Fla. 1980); *Brown v. State*, 439 So.2d 872 (Fla. 1983); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). Brown was convicted and sentenced to death based primarily on the testimony of potential accomplice Ronald Floyd, a witness who subsequently went through a series of recantations and retractions of his recantations. Associate Justice Brennan actually relied on Brown's case to note: "**Recantation testimony is properly viewed with great suspicion.**" *Dobbert v. Wainwright*, 468 U.S. 1231 (1984) (Brennan, J. dis.) (citing *Brown v. State*, 381 So.2d 690). Brown was not granted a retrial because Floyd's testimony implicating Brown was false, but because Floyd and the prosecution did not disclose that Floyd was testifying in return for an agreement that he would not be prosecuted in the case. Floyd initially flunked a polygraph test about his general involvement in the murder, but then passed the test three times in terms of whether or not he was an actual perpetrator in the crime. However, Floyd also recanted his testimony implicating Brown, then recanted that recantation during an evidentiary hearing. Subsequently, Floyd again repudiated his initial trial testimony and the prosecution was unable to retry Brown. Given the inherent unreliability of the sequence of Floyd's multiple recantations (which are "properly viewed with great suspicion"), Brown cannot be deemed actually innocent.

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

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

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

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

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

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

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

(8/27/91,11/19/92, 11/20/92,8/11/96); *Phoenix Gazette* (12/6/91, 11/20/92); *Associated Press* (11/19/92).

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

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

30. **Anthony Ray Peek**--*Peek v. State*, 488 So.2d 52 (Fla. 1986). Peek was acquitted after his two prior convictions for this 1977 murder were reversed for various evidentiary errors, including the admission of an unrelated rape. He was prosecuted for raping and strangling to death an elderly woman in her home. She lived a mile from the halfway house where Peek resided. Her car was found also found abandoned even nearer the halfway house. Two of Peek's fingerprints were lifted from inside the victim's car window. Blood and seminal stains on the victim's bedclothes were consistent with Peek's identity as a type-O secretor. A hair with features similar to Peek's was recovered in a cut stocking in the victim's garage area. Peek claimed that his fingerprints got on the victim's car when he was out of his halfway house in the morning and tried to burglarize her abandoned car. Peek presented evidence that the periodic night checks at the halfway house did not indicate any unauthorized absences the night of the murder.

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

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

33. **Richard Neal Jones**--*Jones v. State*, 738 P.2d 525 (Okla.Crim. 1987). Jones' defense was that he was passed out in a car while three other men beat up the victim, shot him, and threw his weighted body in the river. Jones' conviction was reversed in a 2-1 decision because the trial court erroneously admitted incriminating post offense statements by Jones' non-testifying codefendants, a violation of the hearsay rule. The dissent noted that the only hearsay statement which actually implicated Jones should still should have been admitted as a prior consistent statement. At the very least, Jones was present at the murder scene and a party to the conspiracy leading to the murder. Accordingly, he would not have been considered "actually innocent" under the standards of the original *Stanford* study. His culpability would appear to be no less than

that of the actual murderers. See *Mann v. State*, 749 P.2d 115 (1988); *Thompson v. Oklahoma*, 487 U.S. 815, 817, 859 (1988); *Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986) (separate trial of co-defendant with evidence directly implicating Jones).

34. **Jerry Bigelow**-- *Bigelow v. Superior Court (People)*, 204 Cal.App.3d 1127 (1988). Bigelow's conviction and death sentence were reversed for a reasons unrelated to his guilt. On retrial, the jury convicted Bigelow of robbery and kidnaping. The jury also found true that the murder occurred while Bigelow was committing or was an accomplice in the robbery and kidnaping of the victim. In short, the jury found true beyond a reasonable doubt all the facts necessary to convict Bigelow of first degree felony murder under California law. Nonetheless, the jury did not actually convict Bigelow of the separate charge of first degree murder. The trial judge made the mistake of excusing the jury without clarifying its inconsistent verdict. Therefore, under California law, the verdict had to be entered and Bigelow was not eligible for the death penalty. However, rather than establishing that Bigelow was innocent, the jury's verdicts still indicated that the jury totally rejected Bigelow's defense and found that he was at least an accomplice to the murder. An inconsistent verdict, such as Bigelow's, is not an exoneration. "Inconsistent verdicts" are often a product of jury lenity, rather than a belief in innocence. The prosecution cannot appeal an inconsistent verdict. *United States v. Powell*, 469 U.S. 57, 65-66 (1984). As noted, the jury's verdict also indicates that, at a minimum, it believed that Bigelow was an accomplice to the murder. Originally, this factual distinction between actual perpetrator and accomplice was not considered proof of "actual innocence". *Stanford*, at 43.

35. **Willie A. Brown**

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

37. **William Jent**

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

assertions that the defendants did have an alibi for this murder.

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

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

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

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

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

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

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

Croy's second trial was depicted as a political trial, not a trial about guilt or innocence. "What made...Croy worthy in his attorney's mind was not so much his innocence as his symbolic value as an aggrieved Indian [sic]..." More significantly, neither defense at Croy's two trials established that Croy was "actually innocent" or the "wrong person". *Los Angeles Times* (5/11/00); *San Francisco Examiner* (7/8/90); *Santa Rosa Press Democrat*, (7/27/97)

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

47. **Dale Johnston**-- *State v. Johnston*, 1986 WL 8798 (Oh.App. 1986) [2 unreported opinions]; *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988); *State v. Johnston*, 580 N.E.2d 1162 (Ohio 1990). This defendant was convicted and sentenced to death for slaying his stepdaughter and her fiancé. The stepdaughter had publicly complained in the past about incestuous advances by Johnston. A witness who had been hypnotized to refresh his recollection testified as to his pre-hypnosis recollection that he identified Johnston angrily forcing a couple into his car on or about the day of the murders. Feedbags consistent with feedbags found on Johnston's farm were also found at the gravesite of the two victims. Some bloodstained items were seized from a strip mining pit on Johnston's property. Johnston's first conviction was ultimately reversed because of some problems with the hypnotized witness and the state's failure to disclose evidence which may have helped Johnston with his defense. Prior to retrial, the court excluded incriminating statements Johnston made during his initial interrogation as well as incriminating evidence seized due to the interrogation. The prosecution then dismissed the case due to the passage of time, poor

recollection of the witnesses, and the suppression of evidence. Johnston's subsequent wrongful imprisonment lawsuit was rejected since "although the evidence did not prove Johnston committed the murders, it did not prove his innocence." *Cleveland Plain Dealer* (5/11/90, 5/12/90, 6/22/91, 9/13/93); *Associated Press* (5/11/90).

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

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

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

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

57. **James Robison**-- Robison was accused of being one of three participants in the conspiracy to murder Arizona news reporter Don Bolles. The other conspirators were Adamson and Dunlap. Robison was acquitted on retrial because the jury did not believe the testimony of his accomplice,

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

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

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

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

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

filed for bankruptcy after her death. There was evidence he forged his wife's signature on insurance applications. The “heavy finger of suspicion” indicates that Golden is not “innocent”.

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

63. Rolando Cruz

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

Hernandez’s first conviction was reversed. After a hung jury ended his second trial, he was convicted in a third trial and sentenced to 80 years in prison. However, that conviction was reversed and after the court dismissed Cruz’s case the prosecution dropped charges against Hernandez.

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

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

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

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

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

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

There does not appear to be any witness as to what occurred prior to the CPR. The jury was not told that Butler had lost custody of another child because of abuse. Apparently, the defense provided sufficient alternative explanations for the baby's injuries to "speculate" (but not establish) that the cause of death was either SIDS or a cystic kidney disease. There does not appear to be any definitive verdict as to the cause of death. Even Butler's own attorney stated that he "doesn't know what the truth is." Butler's co-counsel indicated that at best the case should have been prosecuted as a manslaughter, hardly an endorsement of Butler's innocence. Butler's acquittal on retrial does not represent a finding that she did not administer a deadly trauma to baby Walter's abdomen. *Mississippi Clarion-Ledger* (1/22/96); *Baltimore Sun*, (1/02/96); *Washington Times* (12/30/95).

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

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

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

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

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

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

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

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

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

Since Harris could not be retried, the prosecution sought his civil commitment based on a petition from hospital psychiatrists. He was confined in state a mental hospital, but a jury subsequently found he should be kept in a less restrictive environment. These circumstances do not support placing Harris on a list of the actually innocent. *Seattle Times*, (8/19/97,4/16/00); *Portland Oregonian*, (8/24/97); *Seattle Post-Intelligencer*, (7/17/97, 8/23/97); *Tacoma News Tribune*,

(5/29/97).

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

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

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

78. **Shareef Cousin**--*State v. Cousin*, 710 So.2d 1065 (La. 1998). Contrary to the DPIC List's summary, Cousin's case was not reversed because of "improperly withheld evidence . . .". In fact, the Louisiana Supreme Court explicitly did not rule on that issue. *State v. Cousin*, 710 So.2d at 1073 fn. 8. Rather, the Louisiana high court reversed Cousin's conviction because the prosecutor improperly impeached a witness with prior inconsistent statements recounting a confession made to him by Cousin. In other words, to prove the case against Cousin, the prosecutor brought out the fact that the witness had previously told the police that Cousin had confessed to the crime. Under Louisiana law, such prior statements cannot be used as substantive evidence of the defendant's guilt. *State v. Brown*, 674 So.2d 428 (La.App. 1996) Other jurisdictions, of course, would not necessarily find this evidence inadmissible as substantive evidence. See *State v. Owunta*, 761 So.2d 528 (La. 2000) (acknowledging that Louisiana follows the minority rule in not allowing prior inconsistent statements to be used as substantive evidence). Thus, Cousin's conviction may have been upheld in other states. See

California v. Green, 399 U.S. 49 (1970). Without these statements, the prosecution determined that the remaining evidence (weak or tentative identifications and Cousin's incriminating comment that the arrest warrant had the wrong date for the murder) was insufficient to carry the burden of proof. *Baton Rouge Saturday State Times/Morning Advocate* (1/9/99); *New Orleans Times-Picayune* (1/9/99). Cousin was not retried because the prosecution believed he was "actually innocent," but because Louisiana state law precluded evidence of guilt in this case that would actually have been admissible in other states.

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

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

Smith's conviction after retrial was then reversed for insufficient evidence. In any event, although various witnesses identified Smith in the bar before the victim was shot, only one eyewitness identified Smith as the actual shooter. The appellate court found that there were too many serious inconsistencies and impeachment of that witness at the trial to support Smith's conviction for shooting the victim. The court rejected the State's arguments reconciling some of the conflicting accounts of the shooting, although only because the State had not raised these arguments until it was too late for the defense to challenge the State's theory. It is not clear if the witness was confronted with previous statements that were consistent with the accounts of other witnesses. Ordinarily, the testimony of a single witness is sufficient to convict. However, the Illinois court explained that the conviction may be rejected if the witnesses' testimony "is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." At best, the circumstantial evidence "tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim..." Given the evidence, Smith appears to have been an accomplice to the shooting even if he was not the actual triggerman. He was certainly not eliminated from the "class of individuals who may have killed the victim....".

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

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

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

"Williamson was not convicted 'on the strength of a jailhouse snitch' as reported. Among the direct and circumstantial evidence of his guilt was a statement he gave to the Oklahoma State Bureau of Investigation describing a "dream" in which he had committed the murder. Williamson said, "I was on her, had a cord around her neck, stabbed her frequently, pulled the rope tight around her neck." He paused and then stated that he was worried about what this would do to his family.

"When asked if Fritz was there, Williamson said, 'yes.'

"When asked if he went there with the intention of killing her, Williamson said 'probably'

"In response to the question of why he killed her, Williamson said, 'she made me mad.'

"The Pontotoc County prosecutor had a tough decision to make on a re-prosecution of Williamson and Fritz and concluded that conviction was highly unlikely in the wake of the DNA evidence, even though the note left at the scene said "Don't look fore us or ealse," [sic] indicating multiple perpetrators."

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

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

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

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

86. **Steve Manning**-- *People v. Manning*, 695 N.E.2d 423 (Ill. 1998). The prosecution exercised its discretion not to retry Manning after his conviction was reversed. The Illinois Supreme Court forbade the use of certain evidence including questionable informant testimony. However, the Illinois Supreme Court also excluded the victim’s wife’s hearsay testimony that the victim had warned her that if he was ever killed to tell the FBI that Manning killed him. Apparently, the victim had told his wife that Manning had “ripped him off for a lot of money “and he was going to get the money back. Thus, while legally inadmissible under state law, there was evidence that Manning had a motive to murder the victim. It was also “consolation” to the district attorney in not retrying the case that Manning, a former cop gone bad, was already serving two life

sentences plus 100 years for kidnaping in Missouri. *Chicago Tribune*, 1/19/00.

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

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

90. **William Nieves** -- *Commonwealth v. Nieves*, 746 A.2d 1102 (Pa. 2000). This Hispanic defendant was convicted of murdering Eric McAiley due to a drug debt. As the police sped to the scene of the murder, a bearded Hispanic in a Cadillac pointed out where the murder occurred and drove away. A witness ultimately identified Nieves as the man who got out of a Cadillac and shot McAiley. The witness also admitted that she initially failed to identify Nieves. McAiley's nephew testified that McAiley sold drugs for Nieves. Another witness testified that before the murder he overheard Nieves warn McAiley, "Better get me my fucking money, I'm not playing with you." Nieves did not testify at the guilt phase of his first trial because his lawyer erroneously advised him that he would be impeached with his prior record of firearms and drug trafficking offenses. Ultimately, Nieves did testify at his penalty phase. He admitted he was a "small-time drug dealer" who had only a few drug transactions with McAiley. Nieves' case was reversed because of his attorney's faulty advice about whether he would be impeached if he testified.

Nieves was acquitted on retrial. His retrial defense again impeached the eyewitness who identified Nieves with prior conflicting statements she had made, including that she had initially

identified two thin black men and then a husky Hispanic. The witness denied identifying the assailant(s) as black men. Nieves is Hispanic, but not “husky.” Another witness testified that he saw a black man shoot McAiley, but this witness’ testimony was also rife with inconsistencies. The Philadelphia district attorney continues to maintain that Nieves is guilty. The Nieves case is not an example of a defendant who was found actually innocent, but of a defendant for which the prosecution could not prove guilt beyond a reasonable doubt. *Associated Press* (10/20/00, 5/14/01, 5/25/01).

92. Michael Graham

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

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

96. Joaquin Martinez-- *Martinez v. State*, 261 So.2d 1074 (Fla. 2000). Spanish native Martinez was accused of murdering a couple at their home sometime between October 27, 1995 and October 30, 1995. One victim was shot and the other victim died of multiple stab wounds. There was no physical evidence of a forced entry, indicating that the victims knew their assailant. A phone list in the kitchen included a pager number for “Joe.” After the police left several messages for “Joe,” Martinez’s ex-wife, Sloane, called and explained she had the pager. She advised the police of her suspicions that Martinez was involved in the murders. The detective listened to a phone conversation Martinez had with his ex-wife in which he stated, “[T]his is something that I explained to you before, and that I am going to get the death penalty for what I did.” When she asked him if he was referring to the murder, he cryptically replied, “No, I can’t talk to you about it on the phone right now.” Martinez’s ex-wife Sloane then had a surreptitiously recorded conversation at her home during which Martinez made “several remarks that could be interpreted as incriminating.” Martinez’s girlfriend testified that Martinez went out on October 27 and returned with ill-fitting clothes, a swollen lip, and scraped knuckles. Another witness testified he saw Martinez on October 27 and that he looked like he had been in a fight. Three inmates testified to incriminating statements by Martinez. The prosecution relied primarily on Sloane’s testimony and the surreptitious tape. Sloane testified about the contents of the taped conversations, Martinez’s behavior, and other statements he had made to her as well.

Martinez’s case was reversed because a police witness erroneously testified as to his opinion that

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

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

Nevertheless, on retrial and despite the appeals court indications that portions of the tape were audible, the trial court excluded the tape completely as inaudible.⁶⁴ Sloane Martinez now stated that she had lied about what her former husband had said. The tape was not available to contradict her. The prosecution chose not to call Sloane to testify and instead relied on a police officer to testify from memory about what he had heard when Martinez's incriminating conversation with Sloane. However, the officer had no independent recollection any more of the conversation and had to rely on a transcript of the recording. The jury's request to hear the actual tape was denied. *Associated Press* (6/6/01); *St. Petersburg Times* (6/7/01). Martinez's acquittal on retrial appears attributable to a deterioration and gutting of the prosecution's evidence, not proof of innocence. Both the prosecution and the defense advised the Florida Commission on Capital Cases that the prosecution was unable to present the same evidence at Martinez's retrial.

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

According to newspaper accounts, the prosecutor did not retry the case since he believed there was insufficient evidence to convict Sheets beyond a reasonable doubt, not because the prosecutor believed that Sheets was innocent. In fact, Sheets' arrest originally resulted from a tip based on Barnett's statements that he and Sheets had murdered the victim. The tipster then tape

⁶⁴ The appeals court holding about the tape was not binding on the trial court. Thus, the trial court judge had the discretion on retrial to exclude the entire tape. The prosecution would not have been able to appeal the trial court's ruling. The Martinez acquittal could have boiled down to no more than a disagreement between the prosecution and the trial court about the audibility of a tape.

recorded statements by Barnett implicating Sheets as the murderer. Once again, there is no reason to doubt the reliability of this particular taped statement by Barnett since it occurred before Barnett's arrest. Sheets' own testimony that he did not buy a car involved in the murder until after the murder occurred was contradicted by other police testimony. Testimony was also presented that Sheets had threatened an African American neighbor and had a fascination with Nazism, including shaving his head and drawing swastikas.

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

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

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

After his conviction, Melendez continued to attack the credibility of the prosecution's witnesses and to further support his defense that James actually committed the murder. Various witnesses testified as to incriminating statements by James. However, James never explicitly confessed to these witnesses or he otherwise gave conflicting explanations for murdering the victim. His accounts of the murder also conflicted. Berrien partially recanted and it was revealed he had negotiated a deal for his testimony. However, none of these witnesses who provided this new information for Melendez were found to be credible.

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

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

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

Despite the acquittal on retrial, the prosecution maintained that Kimbell was the murderer and noted that "the more time that elapses between a crime and a trial, the harder it can be to obtain a conviction." Lost in the shuffle was evidence casting doubt on the credibility of the mother's testimony and recollection in general, given her understandable grief about her daughter's murder. At the first trial, a psychiatrist had testified that the mother's testimony "could be affected by the impact that the slayings have had on her." Indeed, when the mother testified at the first trial, she repeatedly broke down sobbing and said she had talked to her daughter a "whole bunch" and that the conversations were "mixed up together". She had also told investigators before that her daughter had hung up to make dinner, but she could not remember that previous statement. Furthermore, another witness had testified that he did stop briefly at the victims' home at around 2:00 p.m. to make a phone call and then left (although this person could have been the person whom the daughter referred to in the phone call with her mother, he is apparently not considered a suspect in the case). When Kimbell was interviewed by the police he provided them information about the murder that he claimed he overheard on police scanners, but this information had not been broadcast on the police radios.

At the first trial, a friend of Kimbell's testified that Kimbell had pointed at the victims' home after the murders and admitted killing the people. However, this witness died after the first trial. Other witnesses had identified Kimbell as being near the victims' home on the day of the murder and other witnesses had testified to incriminating admissions by Kimbell. *Pittsburgh Post-Gazette*, 5/4/02; 5/6/98, 5/2/98; 2/4/97; *Associated Press*, 5/6/98. While there might have been "reasonable doubt" about Kimbell's guilt, the available information does not exonerate him.

102. **Larry Osborne**--*Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky.2001). Osborne was convicted of breaking into the home of an elderly couple, bludgeoning them, and burning their house down. Osborne was acquitted on retrial due to reasonable doubt, but not because the evidence established that he was not the actual culprit. A friend and potential accomplice of Osborne's implicated Osborne in a grand jury proceeding. However, this witness then died by drowning before the first trial. Instead, his grand jury testimony was read at Osborne's first trial. The conviction was reversed because of the admission of the dead witnesses' grand jury

testimony—since there was no opportunity for Osborne to cross-examine the witness. On retrial, without the grand jury testimony of the dead witness, the prosecution had insufficient evidence to convince the jury of Osborne’s guilt beyond a reasonable doubt. Nevertheless, there was evidence that Osborne and his mother staged a phony “911” call to the police in order to divert police attention to another potential perpetrator. There was also a dispute whether Osborne possessed a set of wire cutters removed from the victims’ home. *Louisville Courier-Journal* (8/2/02; 8/3/02); *Associated Press* (8/2/02).

D. *United States v. Quinones*

On July 1, 2002, in the case of *United States v. Quinones*, 205 F.Supp.2d 256 (S.D.N.Y. 2002) the United States District Court for the Southern District of New York declared that the Federal Death Penalty Act unconstitutional. The federal court based its decision in part on the DPIC List. The federal court itself analyzed the List and applied undefined “conservative criteria” to conclude that 40 defendants on the List were released on grounds indicating “factual innocence.” However, 23 of the names on the *Quinones*’ List are names which this study submits that should be eliminated from the DPIC List. If the *Quinones* court’s analysis of the DPIC List is combined with this critique’s analysis, only 17 defendants should be on the List, not the 102 defendants currently listed.

IMPLICATIONS AND CONCLUSION

The DPIC engaged in a “rush to judgment” to compile a list of allegedly innocent defendants released from Death Row. It is tragic whenever an innocent person is convicted and sentenced to death. Obviously, it is a very serious charge to claim that 102 innocent defendants have suffered such an unjust fate. While recent developments such as DNA have revealed “wrongful convictions,” the evidence does not support other claims of such miscarriages under our current capital punishment system.

In compiling its List, the DPIC has too often relied on inexact standards such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence to exonerate released death row inmates. However, there is a big difference between “reasonable doubt” and the kind of “wrong person mistake” that was the genesis of the original *Stanford* study. Moreover, the DPIC has used old cases in which the defendants did not receive the modern protections that “probably reduce the likelihood of executing the innocent.”

No reasonable person would be so dishonest as to say that no actually innocent person has ever been convicted and sentenced to death. The system has always anticipated potential factual error and has provided remedies for wrongly convicted defendants—that is why there is a more elaborate post-*Furman* trial process, an appellate process, state and federal habeas corpus processes, and clemency. The development in DNA technology is now giving birth to new post-conviction procedures in many of the states designed to give inmates the opportunity to have DNA testing that was not available at the time of their trials. Moreover, our open society promotes ongoing inquiry and investigation into legitimate claims of injustice.

However, it is irresponsible to misrepresent the extent and dimensions of this phenomenon. “It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons.” Schwartz, at 154-155. The DPIC’s gimmicky and superficial List falsely inflates the problem of wrongful convictions in order to skew the public’s opinion about capital punishment.

The *Cooley* article includes the dramatic, but meaningless, statistical conclusion that “one death row inmate is released because of innocence for every five inmates executed.” *Cooley*, at 916. Of course, comparing an execution rate with a “sentenced to death” rate is mixing apples and oranges since there is no claim that any innocent defendants have actually been executed—being sentenced to death is not the same as then being executed. Yet, the recent book by Barry Scheck and Peter Neufeld, *Actual Innocence* (2000), updated this hysterical ratio to assert that one innocent inmate is being released for every seven inmates executed. This contrived “statistic” has even made its way to the Senate floor. 148 *Congressional Record* S889-92 (2/15/02). The “wide use” of this dubious “new measure for evaluating the accuracy of the death penalty....” is cited as one of the events most responsible for “igniting the current capital punishment debate.” 33 *Columbia Human Rights Law Review* 527 (2002); 63 *Ohio St. Law Journal* 343 (2002).

Of course, the valid comparison is between the total number of death sentences and the number of innocent Death Row inmates actually released from Death Row. The most recent available statistics reveal that 6,930 death sentences were imposed between 1973 and 2000.⁶⁵ Thus, even under the DPIC’s own questionable estimate that 102 innocent defendants have been sentenced to death—only 1.4% of the inmates sentenced to death were released because of innocence. Of course, given the analysis in this paper, the DPIC’s estimate of 102 innocent inmates is artificially inflated. If the 68 cases analyzed in this paper are removed from the DPIC List, then the most that can be said is that between 1973 and 2000, there were 34 wrongly convicted defendants, i.e. less than ½ of 1% or 0.4% of the inmates sentenced to death were actually innocent.

The analysis of the federal court opinion in *Quinones* yields similar results. As noted, that decision held that 40 names on the DPIC List were released for reasons indicating “actual innocence.” This would mean that approximately ½ of 1% of the 6,930 inmates sentenced to death between 1973 and 2000 were “actually innocent.” When the *Quinones* analysis and this critique are combined to remove all but 17 names from the List, the result is that 2/10 of 1% or 0.2% of the 6,930 prisoners were released on actual innocence grounds.

The significance of these figures may be appreciated when contrasted with the aforementioned hyperbolic ratio used by the authors of the *Cooley* study and echoed in *Actual Innocence* and in the halls of Congress which fallaciously compares executions and exonerations. That 7:1 ratio is a nonsensical public relations statistic that creates the misimpression of an epidemic of wrongful convictions. The facts actually show that for every 6,930 death sentences imposed, 102 innocent defendants were sentenced to death or more likely it is that for every 6,930 death sentences

⁶⁵ The total number of death sentences since 2000 is not yet available.

imposed only 40 or 34 or 17 innocent defendants have been sentenced to death. In other words, the relative number of innocent defendants sentenced to death appears to be infinitesimal.

The public may or may not take comfort from these estimates. The microscopic percentage of defendants who may have been wrongly convicted and sentenced to death can be considered a testament to the accuracy and reliability of our modern capital punishment system in filtering out and punishing the actual perpetrators of our most heinous crimes. The United States Supreme Court continues to monitor and modify this system.

However, if a person believes that the death penalty should be abolished if there is any risk at all that an innocent person could be sentenced to death, then that person is justified in advocating the abolition of capital punishment. No criminal justice system can promise that kind of foolproof perfection—although the minute number of cases in which an innocent person may have been sentenced to death in this country approaches that absolute standard.

However, the inherent risk of sentencing an innocent person to death and the still unrealized possibility that an innocent person may actually be executed cannot be considered in isolation. Counterbalancing the concern that even one innocent person may be executed is the question of whether the death penalty saves innocent lives by deterring potential murderers.⁶⁶ Now, for the first time, various academic and statistical reports have been published that examine the effect of capital punishment during this modern post-*Furman* period of death penalty jurisprudence. A recent study by the Emory University Department of Economics concludes that capital punishment as it is currently administered has a strong deterrent effect, saving 8-28 lives per execution. Another study conducted by School of Business & Public Administration at the University of Houston-Clear Lake and published in *Applied Economics* shows that homicides increase during periods when there are no executions and decrease during periods when executions are occurring. Economists with the University of Colorado at Denver studied the impact of capital punishment during the years 1977 through 1997. The preliminary results of the Colorado study indicate a deterrence effect of 5-6 fewer homicides per execution. Finally, statistical evidence has been cited to argue that the homicide rates have fallen more steadily and steeply in states that have conducted executions as opposed to states that do not conduct executions or do not have capital punishment. *The Weekly Standard*, 8/13/01. Inevitably (and properly), the debate over deterrence and the validity of these new studies will continue.⁶⁷

⁶⁶ By focusing on the deterrence aspects of capital punishment, this writer is not ignoring that for many people there are reasons for supporting and opposing the death penalty that are totally irrelevant to the deterrence issue.

⁶⁷ Indeed, the Emory study notes potential problems with some of these other studies. However, the objectivity of some these studies is underscored by the ambivalence expressed about the death penalty by several of the academicians who compiled the information. For instance, the Emory study warns: “[D]eterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as

Deterrence, of course, involves more than numbers. As Senator Dianne Feinstein (D.-Cal.) explained to the Senate Judiciary Committee in 1993:

“In the 1960's, I was appointed to one of the term-setting and paroling authorities and sat on some 5,000 cases of women who were convicted of felonies in the State of California. I remember one woman who came before me because she was convicted of robbery in the first degree, and I noticed on what is called the granny sheet that she had a weapon, but it was unloaded. I asked her the question why was the gun unloaded and she said, so I wouldn't panic, kill somebody and get the death penalty.

“That case went by and I didn't think too much of it at the time. I read a lot of books that said the death penalty was not a deterrent. Then in the 1970's, I walked into a mom-and-pop grocery store just after the proprietor, his wife and dog had been shot. People in real life don't die the way they do on television. There was brain matter on the ceiling, on the canned goods. It was a terrible, terrible scene of carnage.

“ I came to remember that woman because by then California had done away with the death penalty. I came to remember the woman who said to me in the 1960's, the gun was unloaded so I wouldn't panic and kill someone, and suddenly the death penalty came to have new meaning to me as a deterrent.”

Statement of the Honorable Dianne Feinstein, Senator from California, Hearing Before the Senate Judiciary Committee on S.221 (April 1, 1993).⁶⁸

Under any analysis, innocent lives are at stake. On the one hand, there is the remote prospect that an innocent person may be executed despite the most elaborate, protracted, and sympathetic legal review procedures in the world. On the other, there is the possibility of innocent people horribly and brutally murdered in the streets and in their homes with no legal review process at all. When

the possible unfairness of the justice system and discrimination need to be considered when making a social decision regarding capital punishment.” The Colorado working paper concludes with a similar caveat about other “significant issues” including racial discrimination in the imposition of the death penalty and the pardon process. “Given these concerns, a stand for or against capital punishment should be taken with caution.” Thus, the researchers who have prepared these most recent deterrence studies do not appear predisposed to supporting the death penalty.

⁶⁸ Moreover, case law reveals examples of the ineffectiveness of imprisonment as a deterrent to murder. See, e.g. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987)(prison escapee commits triple murder of witnesses who testified against him); *Hernandez v. Johnson*, 108 F.3d 554 (5th Cir. 1997) (twice-convicted murderer murders jail guard during abortive jail escape); *People v. Allen*, 42 Cal.3d 1222 (Cal. 1986) (murderer serving life sentence convicted of murdering witness on the outside, murder of two bystanders, and conspiracy to murder seven other prior witnesses).

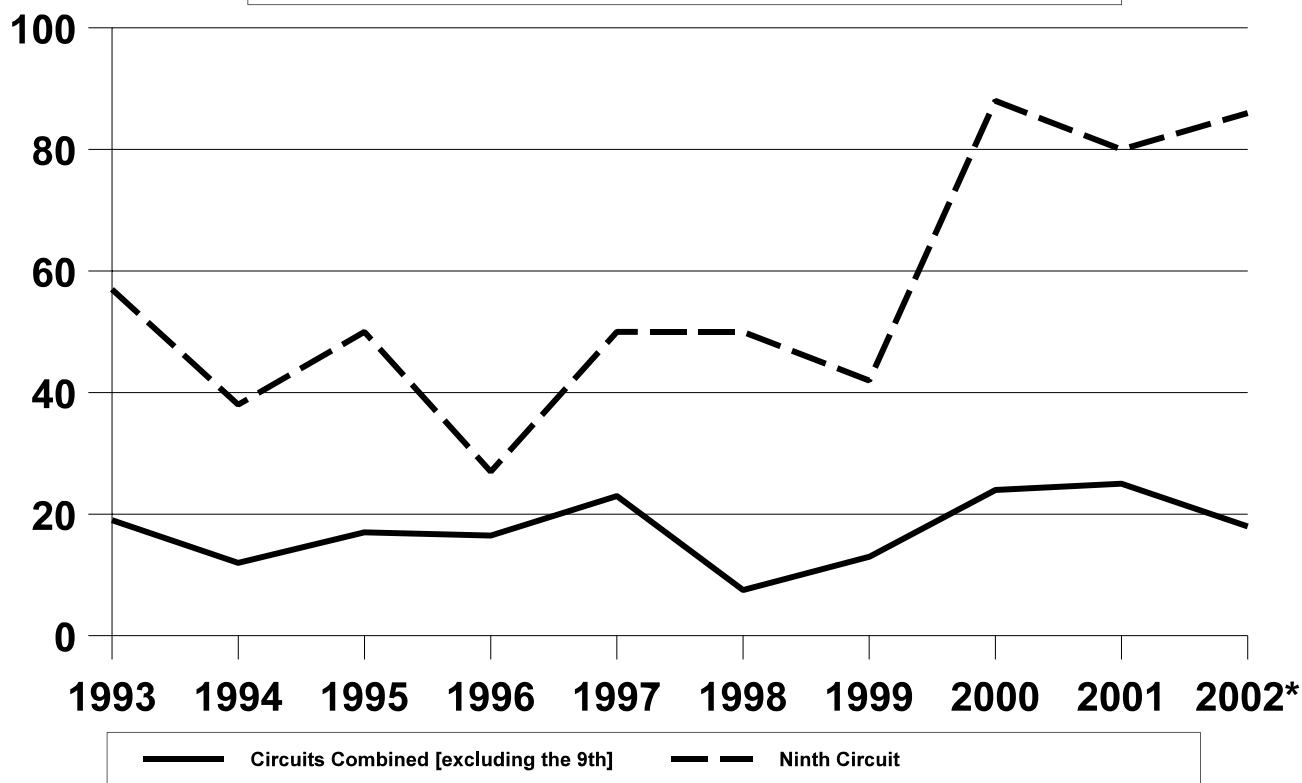
weighing these choices, the public deserves information that places the innocence question in proper perspective. The DPIC List of allegedly innocent defendants released from Death Row fails to provide that legitimate perspective.

POSTSCRIPT: ACTUALLY GUILTY

Recent international interest has focused on the case of James Hanratty, one of the last murderers to be executed in England. Hanratty was hung in 1962 for the notorious “A-6 Murder”. He was convicted of murdering Michael Gregsten and also raping/shooting Gregsten’s girlfriend, Valerie Storie. Despite some alleged confusion about Storie’s identification of him as the perpetrator, Hanratty was convicted after the longest murder trial in English history. After Hanratty was hung, another man confessed to the murder, but then recanted the confession. Hanratty’s case became a *cause celebre* and was part of the final impetus leading to the abolition of the death penalty in England in 1969. Bailey, *Hangmen of England* (1992 Barnes & Noble ed.) at 190-191. The late Beatle John Lennon mourned Hanratty as a victim of “class war”. However, the continuing efforts of Hanratty’s supporters to “clear” his name have now come to naught. DNA evidence from Ms. Storie’s underpants established Hanratty’s guilt and eliminated the other alleged perpetrator who had “confessed” after Hanratty’s execution. In dismissing the Hanratty family’s case, the English court graciously “commend[ed] the Hanratty family for the manner in which they have logically but mistakenly pursued their long campaign to establish James Hanratty’s innocence.” *Regina v. James Hanratty Deceased by his Brother Michael Hanratty*, 2002 WL 499035 (May 10, 2002). Since the abolition of the death penalty, the rate of unlawful killings in Britain has soared. McKinstry, All my Life I have Been Passionately Opposed the Death Penalty . . . This is Why I have Changed My Mind, *Daily Mail*, 3/13/02. “All of us who regret the transformation of our country from a ‘relative oasis in violent world’ to a society where crimes like the A6 murder are almost daily occurrences, are surely entitled to an apology.” Hanratty Deserved to Die, *The Spectator* (May 11, 2002) at 24-25.

Attachment B

Percent Death Penalty Reversal Rate



* data current through September 2002

I. 2002 VOTES BY CIRCUIT
(through September 30, 2002)

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	6	4	1	1		67%
Fourth	9	8		1		89%
Fifth	18	18				100%
Sixth	10	8	2			80%
Seventh	12	8	4			67%
Eight	7	5	1	1		71%
Tenth	17	14	2	1		82%
Eleventh	11	9	2			82%
D.C.	0					N/A
Overall Totals	90	74	12	4		82%

II. 2001 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	1	1				100%
Second	0					N/A
Third	5		5			0%
Fourth	6	5	1			83%
Fifth	24	20	4			83%

Sixth	14	10	3	1		71%
Seventh	7	5	1	1		71%
Eight	10	8	2			80%
Tenth	20	15	5			75%
Eleventh	14	12	2			86%
D.C.	0					N/A
Overall Totals	101	76	23	2		75%

III. 2000 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	1	1				100%
Second	0					N/A
Third	3	3				100%
Fourth	19	17	1	1		89%
Fifth	25	19	1	5		76%
Sixth	10	5	2	3		50%
Seventh	6	5		1		83%
Eight	10	7	1	2		70%
Tenth	19	13	1	5		68%
Eleventh	12	10		2		83%
D.C.	0					N/A
Overall Totals	105	80	6	19		76%

IV. 1999 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	1	1				100%
Fourth	20	18		2		90%
Fifth	21	20	1			95%
Sixth	3	2		1		67%
Seventh	7	7				100%
Eight	9	7	2			78%
Tenth	20	16	1	3		80%
Eleventh	11	9	2			82%
D.C.	0					N/A
Overall Totals	92	80	6	6		87%

V. 1998 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	1	1				100%
Third	0					N/A
Fourth	33	32			1	97%
Fifth	27	26	1			96%
Sixth	4	3		1		75%
Seventh	7	6	1			86%
Eight	15	14	1			93%

Tenth	8	8				100%
Eleventh	12	9	3			75%
D.C.	0					N/A
Overall Totals	107	99	6	1	1	92.5%

VI. 1997 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	3		3			0%
Fourth	13	12		1		92%
Fifth	22	18	1	3		82%
Sixth	7	3	3	1		43%
Seventh	9	8	1			89%
Eight	16	12	3	1		75%
Tenth	4	3	1			75%
Eleventh	9	8	1			89%
D.C.	0					N/A
Overall Totals	83	64	13	6		77%

VII. 1996 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A

Second	0					N/A
Third	0					N/A
Fourth	15	14	1			93%
Fifth	16	14	1	1		87.5%
Sixth	2	2				100%
Seventh	11	8	1	2		73%
Eight	18	16	1	1		89%
Tenth	8	5	1	2		62.5%
Eleventh	9	7	1	1		78%
D.C.	0					N/A
Overall Totals	79	66	6	7		83.5%

VIII. 1995 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	2	1		1		50%
Fourth	10	9		1		90%
Fifth	14	14				100%
Sixth	2	1	1			50%
Seventh	6	5			1	83%
Eight	14	13	1			93%
Tenth	7	5	2			71%
Eleventh	15	10	2	3		67%
D.C.	0					N/A
Overall Totals	70	58	6	5	1	83%

IX. 1994 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	2	1		1		50%
Fourth	9	9				100%
Fifth	17	16		1		94%
Sixth	1	1				100%
Seventh	8	8				100%
Eight	14	11	1	2		79%
Tenth	1	1				100%
Eleventh	14	11	3			79%
D.C.	0					N/A
Overall Totals	66	58	4	4		88%

X. 1993 VOTES BY CIRCUIT

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	0					N/A
Second	0					N/A
Third	0					N/A
Fourth	5	5				100%
Fifth	12	9	1	2		75%
Sixth	0					N/A

Seventh	2	1		1		50%
Eight	10	8	1	1		80%
Tenth	0					N/A
Eleventh	8	7	1			87.5%
D.C.	0					N/A
Overall Totals	37	30	3	4		81%

XI. TOTAL VOTES BY CIRCUIT (2002-1993)

Circuit Courts	Total Number of Cases	Affirm Death Penalty	Reverse Death Penalty Sentence	Remand/Evidentiary Hearing	Deny Evidentiary Hearing	Percentage of Rulings resulting in Death Penalty
First	2	2				100%
Second	1	1				100%
Third	22	10	9	3		45%
Fourth	139	129	3	6	1	93%
Fifth	196	176	10	12		90%
Sixth	53	35	11	7		66%
Seventh	75	61	8	5	1	81%
Eight	123	101	14	8		82%
Tenth	104	80	13	11		77%
Eleventh	115	92	17	6		80%
D.C.	0					N/A
Overall Totals	830	685	85	58	2	83%

XII. NINTH CIRCUIT STATISTICS

Ninth Circuit Reversal Rate By Year

Year	Total Cases	Rev'd/Rem'd	Percentage
2002*	14	12	86%
2001	15	12	80%
2000	8	7	88%
1999	12	5	42%
1998	12	6	50%
1997	22	11	80%
1996	11	3	27%
1995	10	5	50%
1994	8	3	38%
1993	7	4	57%
Overall	115	65	57%

*as of September 2002

Post-1992 Votes of Judges Appointed by Republican Presidents

Republican President Appointees	Affirm Death Penalty Sentence	Reverse Death Penalty Sentence	Remand/ Evidentiary Hearing	Deny Evidentiary Hearing
Beezer	7	1		
Brunetti	13	3		
Fernandez	11	2		1
Goodwin	2	2		
Hall	6	3		
Kleinfeld	12	3	1	2
Kovinski	16	5	3	1
Leavy	4	3		
T.G. Nelson	16	4	2	
Noonan	1	1		
O'Scannlain	12	2	1	
Rymer	11	5	2	
Thompson	13	9	2	

Trott	14	4	1	
Wallace	8	1		
Wiggins	6		1	
Totals	146	48	13	4

Post-1992 Votes of Judges Appointed by Democratic Presidents

Democratic President Appointees	Affirm Death Penalty Sentence	Reverse Death Penalty Sentence	Remand/ Evidentiary Hearing	Deny Evidentiary Hearing
Alarcon	2			
Berzon		4	2	
Boochever	1	1		
Browning	7	11		
Canby	1	7		
Farris	9	2		
Ferguson	1	10	3	
Fisher		1	1	
B. Fletcher	2	13	1	
W. Fletcher		6	2	
Graber	2	5		
Gould	4	2		
Hawkins	7	6	1	
P. Hug-Jr.	10	9	1	
McKeown		1		
D. Nelson	3	4		
Norris		5		
Paez		2	2	
Poole	3	1		
Pregerson	2	17	3	
Rawlinson		2		
Reinhardt		21	4	
Schroeder	5	11	3	

Silverman		2	1	
Tallman	1	1	1	
Tang		2		
Tashima		9		
Thomas	2	8	3	
K. Wardlaw	2	2	1	
Totals	64	165	29	0

Judge Ferguson

All but one of his votes has been to reverse/remand the death penalty sentence. Total of seventeen cases: *Caro v. Woodford*, 280 F.3d 1247 (2002); *Morris v. Woodford*, 273 F.3d 826 (2001); *Murtishaw v. Woodford*, 255 F.3d 926 (2001); *Lambright v. Stewart*, 241 F.3d 1201 (2001); *Smith v. Stewart*, 241 F.3d 1191 (2001); *Morris v. Woodford*, 229 F.3d 775 (2000); *Lambright v. Stewart*, 220 F.3d 1022 (2000); *Comer v. Stewart*, 215 F.3d 910 (2000); *Lambright v. Stewart*, 191 F.3d 1181 (1999); *Smith v. Stewart*, 189 F.3d 1004 (1999); *Lambright v. Stewart*, 167 F.3d 477 (1999); *Caro v. Calderon*, 165 F.3d 1223 (1999); *McLain v. Calderon*, 134 F.3d 1383 (1998); *Moore v. Calderon*, 108 F.3d 261 (1997); *Adamson v. Lewis*, 955 F.2d 614 (1992); *Smith v. McCormick*, 914 F.2d 1153 (1990); *Adamson v. Ricketts*, 865 F.2d 1011 (1988).

Judge B. Fletcher

All but two of her votes have been to reverse/remand the death penalty sentence. Total of twenty-two cases: *Pizzuto v. Arave*, 280 F.3d 949 (2002); *Silva v. Woodford*, 279 F.3d 825 (2002); *Phillips v. Woodford*, 267 F.3d 966 (2001); *Dyer v. Calderon*, 151 F.3d 970 (1998); *Thompson v. Calderon*, 151 F.3d 918 (1998) (en banc); *Smith v. Stewart*, 140 F.3d 1263 (1998); *McDowell v. Calderon*, 130 F.3d 833 (1997) (en banc); *Thompson v. Calderon*, 120 F.3d 1045 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (1997) (en banc); *Villafuerte v. Stewart*, 111 F.3d 616 (1997); *Ceja v. Stewart*, 97 F.3d 1246 (1996); *Rice v. Wood*, 77 F.3d 1138 (1996) (en banc); *Villafuerte v. Lewis*, 75 F.3d 1330 (1996); *Phillips v. Vasquez*, 56 F.3d 1030 (1995); *Jeffers v. Lewis*, 38 F.3d 411 (1994) (en banc); *Hamilton v. Vasquez*, 17 F.3d 1149 (1994); *Hoffman v. Arave*, 952 F.2d 1164 (1991); *Smith v. McCormick*, 914 F.2d 1153 (1990); *Coleman v. McCormick*, 874 F.2d 1280 (1989); *McKenzie v. Risley*, 842 F.2d 1525 (1988); *Campbell v. Kincheloe*, 829 F.2d 1453 (1987); *U.S. v. Harper*, 729 F.2d 1216 (1984).

Judge Pregerson

All but two of his votes have been to reverse/remand death sentence. Twenty-eight cases total: *Payton v. Woodford*, 299 F.3d 815 (2002); *Visciotti v. Woodford*, 288 F.3d 1097 (2002); *Caro v. Woodford*, 280 F.3d 1247 (2002); *Petrocelli v. Angelone*, 248 F.3d 877 (2001); *Hoffman v. Arave*, 236 F.3d 523 (2001); *Comer v. Stewart*, 215 F.3d 910 (2000); *McDowell v. Calderon*, 197 F.3d 1253 (1999); *Rich v. Calderon*, 187 F.3d 1064 (1999) (voting to uphold); *Siripongs v. Calderon*, 167 F.3d 1225 (1999); *Caro v. Calderon*, 165 F.3d 1223 (1999); *Dyer v. Calderon*, 151 F.3d 970 (1998); *Crandell v. Bunnell*, 144 F.3d 1213 (1998); *LaGrand v. Stewart*, 133 F.3d 1253 (1998);

Siripongs v. Calderon, 133 F.3d 732 (1998); *Carriger v. Stewart*, 132 F.3d 463 (1997); *McDowell v. Calderon*, 130 F.3d 833 (1997) (en banc); *Fields v. Calderon*, 125 F.3d 757 (1997); *Thompson v. Calderon*, 120 F.3d 1045 (1997); *Gretzler v. Stewart*, 112 F.3d 992 (1997); *Rupe v. Wood*, 93 F.3d 1434 (1996); *Moran v. Godinez*, 57 F.3d 690 (1995); *Jeffers v. Lewis*, 38 F.3d 411 (1994) (en banc); *Siripongs v. Calderon*, 35 F.3d 1308 (1994); *Jeffers v. Lewis*, 5 F.3d 1199 (1992); *Jeffers v. Lewis*, 974 F.2d 1075 (1992); *Moran v. Godinez*, 972 F.2d 263 (1992); *Adamson v. Ricketts*, 865 F.2d 1011 (1988); *McKenzie v. Risley*, 842 F.2d 1525 (1988); *Jeffers v. Ricketts*, 832 F.2d 476 (1987).

Judge Reinhardt

All his votes have been to reverse/remand the death penalty sentence. Total of thirty one cases: *Valerio v. Crawford*, 2002 WL 31056609 (2002); *Benn v. Lambert*, 282 F.3d 1040 (2002); *Ghent v. Woodford*, 279 F.3d 1121 (2002); *Phillips v. Woodford*, 267 F.3d 966 (2001); *Lambright v. Stewart*, 241 F.3d 1201 (2001); *Smith v. Stewart*, 241 F.3d 1191 (2001); *Lambright v. Stewart*, 220 F.3d 1022 (2000); *Lambright v. Stewart*, 191 F.3d 1181 (1999); *Smith v. Stewart*, 189 F.3d 1004 (1999); *Lambright v. Stewart*, 167 F.3d 477(1999); *Vargas v. Lambert*, 159 F.3d 1161 (1998); *Chaney v. Stewart*, 156 F.3d 921 (1998); *Dyer v. Calderon*, 151 F.3d 970 (1998); *Thompson v. Calderon*, 151 F.3d 918 (1998); *Bloom v. Calderon*, 132 F.3d 1267 (1997); *Carriger v. Stewart*, 132 F.3d 463 (1997); *McDowell v. Calderon*, 130 F.3d 833 (1997) (en banc); *Gerlaugh v. Stewart*, 129 F.3d 1027 (1997); *Thompson v. Calderon*, 120 F.3d 1045 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (1997); *Jeffries v. Wood*, 103 F.3d 827 (1996); *Clabourne v. Lewis*, 64 F.3d 1373 (1995); *Phillips v. Vasquez*, 56 F.3d 1030 (1995); *Bartholomew v. Wood*, 34 F.3d 870 (1994); *Wade v. Calderon*, 29 F.3d 1312 (1994); *Campbell v. Wood*, 18 F.3d 662 (1994) (en banc); *Beam v. Paskett*, 3 F.3d 1301 (1993); *Beam v. Paskett*, 966 F.2d 1563 (1992); *Richmond v. Lewis*, 948 F.2d 1473 (1990); *Coleman v. McCormick*, 874 F.2d 1280 (1989); *Coleman v. Risley*, 839 F.2d 434 (1988); *Vickers v. Ricketts*, 798 F.2d 369 (1986); *U.S. v. Harper*, 729 F.2d 1216 (1984).

Judge Schroeder

All but five of her votes have been to reverse/remand the death penalty sentence. Total of twenty-three cases: *Valerio v. Crawford*, 2002 WL 31056609 (2002); *Payton v. Woodford*, 299 F.3d 815 (2002); *Mayfield v. Woodford*, 270 F.3d 915 (2001); *Sandoval v. Calderon*, 241 F.3d 765 (2001); *Coleman v. Calderon*, 210 F.3d 1047 (2000); *Lambright v. Stewart*, 191 F.3d 1181 (1999); *Siripongs v. Calderon*, 167 F.3d 1225 (1999); *Thompson v. Calderon*, 151 F.3d 918 (1998); *Coleman v. Calderon*, 150 F.3d 1105 (1998); *Vickers v. Stewart*, 144 F.3d 613 (1998); *Correll v. Stewart*, 137 F.3d 1404 (1997); *Siripongs v. Calderon*, 133 F.3d 732 (1998); *Carriger v. Stewart*, 132 F.3d 463 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (1997); *Rupe v. Wood*, 93 F.3d 1434 (1996); *Rice v. Wood*, 77 F.3d 1138 (1996); *Siripongs v. Calderon*, 35 F.3d 1308 (1994); *Hamilton v. Vasquez*, 17 F.3d 1149 (1994); *Fetterly v. Paskett*, 997 F.2d 1295 (1993); *Carriger v. Lewis*, 971 F.2d 329 (1992); *Adamson v. Lewis*, 955 F.2d 614 (1992); *Hamilton v. Vasquez*, 882 F.2d 1469 (1989); *Adamson v. Ricketts*, 865 F.2d 1011 (1988).

Judge Tashima

All of his votes have been to reverse/remand the death penalty sentence. Total of nine cases:

Payton v. Woodford, 299 F.3d 815 (2002); *Visciotti v. Woodford*, 288 F.3d 1097 (9th Cir. 2002); *Garceau v. Woodford*, 275 F.3d 769 (2001); *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001); *McDowell v. Calderon*, 197 F.3d 1253 (1999); *Thompson v. Calderon*, 151 F.3d 918 (1998) (en banc); *Paradis v. Arave*, 130 F.3d 385 (1997); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997); *Jeffries v. Wood*, 114 F.3d 1484 (1997).

POST-1992 NINTH CIRCUIT DEATH PENALTY APPEALS -SUMMARIES OF CASES

1. *Valerio v. Crawford*, 2002 WL 31056609 (2002).

Judges: Schroeder, Reinhardt, O'Scannlain, Rymer, G. Nelson, Thomas, Graber, W. Fletcher, Fisher, Paez, Berzon (Rymer, O'Scannlain, Nelson, Graber dissenting)

Summary: Valerio was convicted of first degree murder after he stabbed Karen Blackwell 45 times and was sentenced to death. The district court dismissed his petition for a writ of habeas corpus. The court of appeals reversed the district courts' ruling stating that the jury instructions during the penalty phase were unconstitutional under Godfrey.

2. *Williams v. Woodford*, 2002 WL 31012121 (2002).

Judges: Hug, Nelson, Gould

Summary: Williams was convicted of multiple counts of first degree murder and armed robbery and sentenced to death. He was denied federal habeas relief by the district court who also denied Williams' Federal Rules of Civil Procedure Rule 60(b) motion for relief from the court's judgment denying the habeas petition. The circuit court affirmed but vacated the order denying Williams' Rule 60(b) motion because the district court lacked jurisdiction to consider the motion.

3. *Hayes v. Woodford*, 301 F.3d 1054 (2002).

Judges: O'Scannlain, Rymer, Thomas (Thomas dissenting in part)

Summary: Petitioner was convicted for robbery, burglary, and first degree murder and was sentenced to death. The district court denied habeas relief and the petitioner appealed. The circuit court affirmed the district courts' ruling saying that the petitioner's attorney did not provide insufficient assistance of counsel and the evidentiary findings of the lower court were sufficiently supported by the record.

4. *Payton v. Woodford*, 299 F.3d 815 (2002).

Judges: Schroeder, Pregerson, Kozinski, Trott, Fernandez, Nelson, Tashima, W. Fletcher, Paez, Berzon, Tallman (Tallman dissenting in part, joined by Kozinski, Trott, Fernandez, Nelson)

Summary: Payton was convicted of first degree murder, rape, and two counts of attempted murder and sentenced to death. He sought a writ of habeas corpus that was granted by the district court requiring either a new penalty trial or a reduction of sentence to a life terms without parole. The circuit court, sitting en banc, affirmed the ruling of the district court.

5. *Visciotti v. Woodford*, 288 F.3d 1097 (2002).

Judges: Pregerson, Tashima, Berzon

Summary: After being fired from their jobs, Visciotti and his co-worker Hefner devised a plan to rob two of their former co-workers. After robbing the two co-workers, Visciotti shot both of

them. He was later convicted of murder, attempted murder, and armed robbery and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition as to the penalty phase of the trial, but not as to the guilt phase. The court held that part of the California Supreme Court's decision was contrary to Supreme Court law outlined in Strickland.

6. *Karis v. Calderon*, 283 F.3d 1117 (2002).

Judges: Hug, Browning, Kleinfeld (Kleinfeld dissenting)

Summary: Karis abducted two women who were taking a morning walk, raped them, shot them, and then buried them in a hole. He was convicted of two counts of kidnapping, two counts of rape, one count of attempted murder, and murder and was sentenced to death. The court of appeals affirmed the district court's grant of petition for habeas corpus as to the penalty phase, but not as to the conviction phase of the trial. The court held that counsel was deficient during the penalty phase of the trial because he failed to introduce mitigating evidence regarding the defendant's troubled childhood.

7. *Benn v. Lambert*, 283 F.3d 1040 (2002).

Judges: Reinhardt, Trott, W. Fletcher

Summary: Benn shot and killed his half-brother and his half-brother's friend. A jury convicted Benn of two counts of premeditated murder and sentenced him to death. The court of appeals affirmed the district court's decision granting the petition for a writ of habeas corpus because the trial court violated Brady and the state court's determinations were unreasonable applications of established Supreme Court law.

8. *Gray v. Klauser*, 282 F.3d 633 (2002).

Judges: Berzon, Lay, Trott (Trott dissenting)

Summary: Gray was convicted of killing his wife and her friend and was sentenced to death. The court of appeals reversed the district court's ruling denying the habeas petition. The court held that the Idaho trial court's rulings regarding the admission of hearsay evidence violated Gray's constitutional rights and that the presentation of the hearsay evidence was not harmless error.

9. *Fields v. Woodford*, 281 F.3d 963 (2002).

Judges: Rymer, Kozinski, and Silverman

Summary: After already serving a sentence for voluntary manslaughter, a jury convicted Fields of a variety of criminal acts including murder and sentenced him to death. The court affirmed the district court's decision on all of the claims having to do with the petitioner's conviction except for his claim of juror bias. As to it, the court concluded that an evidentiary hearing was needed and remanded the case. Given this disposition, the court did not reach any of the penalty phase issues.

10. *Turner v. Calderon*, 281 F.3d 851 (2002).

Judges: Wardlaw, Paez, Tallman

Summary: Turner stabbed (over forty times), killed, and robbed a man who had hired him to do yard work at his home. A jury convicted Turner of first-degree murder and robbery and

sentenced him to death. The appellate court reversed the district court's ruling denying Turner's request for an evidentiary hearing on his claim that his counsel was constitutionally ineffective during the penalty phase of his trial. The court held that his counsel may have been ineffective in presenting mitigating evidence during the sentencing phase of the trial.

11. *Pizzuto v. Arave*, 280 F.3d 949 (2002).

Judges: B. Fletcher, Rymer, Gould (Fletcher dissenting)

Summary: Pizzuto robbed and murdered two people at a campsite in Idaho. A jury convicted Pizzuto of two counts of murder and sentenced him to death. The district court dismissed Pizzuto's habeas petition, and the court of appeals affirmed.

12. *Caro v. Woodford*, 280 F.3d 1247 (2002).

Judges: Pregerson, Ferguson, Kleinfeld (Kleinfeld dissenting)

Summary: Caro was convicted for the murders of two teenage cousins who were killed by a close range gunshot wound to the head and was sentenced to death. The court of appeals affirmed the district court's grant of the habeas petition holding that the district court was not clearly erroneous in finding that the defendant's counsel was ineffective during the penalty phase of the trial because he failed to present evidence of the defendant's brain damage.

13. *Ghent v. Woodford*, 279 F.3d 1121 (2002).

Judges: Reinhardt, Hawkins, and Rawlison

Summary: Ghent was found guilty of first degree murder and attempted rape of an acquaintance and was sentenced to death. The district court's denial of petitioner's habeas request with respect to the claims regarding his first trial was affirmed. However, the determination of the district court with respect to petitioner's special circumstances retrial was reversed and remanded with instructions to vacate petitioner's death sentence. The court held that the admission of the psychiatrist's testimony during the special circumstances retrial warranted habeas relief.

14. *Silva v. Woodford*, 279 F.3d 825 (2002).

Judges: B. Fletcher, Thomas, and Wardlaw

Summary: Silva was convicted of the abduction, robbery and murder of a college student and was sentenced to death. The court of appeals reversed the district court's denial of the habeas petition as to the penalty phase of petitioner's trial, vacated petitioner's death penalty, and remanded for a new sentencing hearing. In addition, the appellate court remanded for an evidentiary hearing as to the petitioner's Brady claim.

15. *Garceau v. Woodford*, 275 F.3d 769 (2001).

Judges: O'Scannlain, Tashima, Thomas (O'Scannlain dissenting)

Summary: Garceau stabbed and killed his girlfriend and her 14-year-old son. A jury convicted him of double homicide and sentenced him to death. The court of appeals reversed the district court's ruling denying the habeas petition holding that a jury instruction inferring Garceau's propensity for criminal actions violated due process.

16. *Morris v. Woodford*, 273 F.3d 826 (2001).

Judges: Ferguson, Graber, W. Fletcher

Summary: Morris killed a man as part of a plot to steal his van. A jury convicted him of murder and sentenced him to death. The court of appeals reversed the district court's ruling denying the habeas petition holding that a typographical error contained in a written penalty phase instruction created a harmful constitutional error.

17. *Landrigan v. Stewart*, 272 F.3d 1221 (2001).

Judges: Fernandez, Rymer, and Wardlaw

Summary: Landrigan escaped from incarceration in Oklahoma and then killed a man in Arizona. A jury convicted him of murder and a trial judge sentenced him to death. The appellate court affirmed the district court's denial of the habeas petition.

18. *Mayfield v. Woodford*, 270 F.3d 915 (2001) (en banc).

Judges: Schroeder, O'Scannlain, Rymer, Kleinfeld, Hawkins, Silverman, Graber, Gould, Berzon, Tallman, and Rawlison.

Summary: Mayfield killed a person who had sworn out a complaint against him for auto theft, and then killed again to eliminate the only eyewitness to the case. The jury convicted and recommended he be put to death. The court of appeals, en banc, reversed the district court's denial of the habeas petition and granted COAs as to two of petitioner's claims and denied as to five of his claims. The denial of petitioner's claim for ineffective assistance at the guilt phase was affirmed. (Judges Schroeder, Hawkins, and Rawlison dissented on this point.) The denial of petitioner's claim for ineffective assistance at the penalty phase was reversed.

19. *Ainsworth v. Woodford*, 268 F.3d 868 (2001).

Judges: Hug, Graber, W. Fletcher (Graber dissenting)

Summary: Ainsworth and an accomplice shot a woman in the hip, raped her, put her in the trunk of her car, dumped her body in the woods (after she had died), and stole her car. Ainsworth was convicted of first degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting the habeas writ. The court held that defendant's counsel was ineffective during the penalty phase of his trial because he failed to present mitigating evidence.

20. *Phillips v. Woodford*, 267 F.3d 966 (2001).

Judges: B. Fletcher, Reinhardt, Kleinfeld (Kleinfeld dissenting)

Summary: Phillips shot two people who were involved in a cocaine deal with him, killing one of them. A jury found the special circumstance of murder during the commission of a robbery to be true and sentenced Phillips to death. The court of appeals reversed the district court's denial of an evidentiary hearing holding that petitioner showed cause for his ineffective assistance of counsel claim.

21. *Summerlin v. Stewart*, 267 F.3d 926 (2000).

Judges: Trott, Thomas, Kozinski (Kozinski dissenting)

Summary: Summerlin killed a woman who was sent to his home to collect a delinquent debt by hitting her head with a hatchet. He was convicted of murder and sentenced to death. The district

court denied habeas relief, but the court of appeals held that petitioner was entitled to an evidentiary hearing regarding whether the trial judge's alleged use of marijuana deprived his due process rights.

22. *Payton v. Woodford*, 258 F.3d 905 (2001).

Judges: Rymer, Gould, Hawkins (Hawkins dissenting)

Summary: Payton was convicted of rape and murder and two counts of attempted murder and was sentenced to death. The court of appeals reversed the district court's ruling granting Payton's habeas petition.

23. *Cooper v. Calderon*, 255 F.3d 1104 (2001).

Judges: Rymer, Gould, Browning (Browning dissenting)

Summary: Cooper escaped from a California state prison and later hacked four people to death using a hatchet or ax and a knife. He was convicted of the four murders and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

24. *Murtishaw v. Woodford*, 255 F. 3d 926 (2001).

Judges: Hug, Ferguson, and Wardlaw

Summary: Murtishaw shot and killed three students who were in the desert filming a movie. He was convicted of three counts of first degree murder and sentenced to death. The court of appeals affirmed the district court's denial of the Murtishaw's petition pertaining to his guilt conviction, but reversed the denial as to his sentence. The court ordered that the death penalty sentence be vacated.

25. *Petrocelli v. Angelone*, 248 F.3d 877 (2001).

Judges: Rymer, Pregerson, and Tashima

Summary: Petrocelli killed his fiancée in Washington and then killed a car salesman in Reno to obtain a vehicle for his flight. A jury convicted Petrocelli of first-degree murder and robbery with use of a deadly weapon and imposed the death penalty. The court of appeals reversed the district court's ruling that some of petitioner's claims were procedurally defaulted and remanded for the evaluation of those claims.

26. *Lambright v. Stewart*, 241 F.3d 1201 (2001).

Judges: Ferguson, Reinhardt, and D.R. Thompson

Summary: Lambright was convicted of first degree murder, sexual assault, and kidnapping and was sentenced to death. The conviction was affirmed as was the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applied. However, the court of appeals reversed the district court's ruling denying habeas relief as to the penalty phase of the trial. The court held that the state-court procedural default of petitioner's ineffective counsel claim did not bar federal habeas review and that he was entitled to an evidentiary hearing on this claim.

27. *Smith v. Stewart*, 241 F.3d 1191 (2001).

Judges: Ferguson, Reinhardt, and D.R. Thompson

Summary: Smith and his accomplice, Lambright, were convicted of sexual assault, kidnapping,

and first-degree murder and the trial judge sentenced him to death. The court of appeals reversed the district court's denial of the habeas petition. Federal habeas review was not barred because it was unclear from the state court order denying rehearing whether the court invoked a procedural bar as the basis of its ruling. The court ordered an evidentiary hearing because petitioner had made a colorable claim of ineffective assistance.

28. *Sandoval v. Calderon*, 241 F.3d 765 (2001).

Judges: Schroeder, Hawkins, and Fisher

Summary: Sandoval was convicted of four murders and one attempted murder and was sentenced to death for one of the murders. The court of appeals reversed the district court's ruling, which granted Sandoval relief from his conviction, but affirmed the writ as to the death sentence.

29. *Odle v. Woodford*, 238 F.3d 1084 (2001).

Judges: Kozinski, Hawkins, Berzon

Summary: Odle was convicted of two first degree murders and sentenced to death. The court of appeals held that failure to conduct a competency hearing resulted in denial of due process and remanded the case to the district court.

30. *Hoffman v. Arave*, 236 F.3d 523 (2001).

Judges: Pregerson, W. Fletcher, and Gould

Summary: An Idaho jury found Hoffman guilty of first-degree murder for killing a police informant. The court of appeals reversed the ruling that the U.S. Constitution amendments V, VI did not apply to petitioner's pre-sentence interview, and deferred judgment whether the denial of counsel during petitioner's pre-sentence interview constituted harmless error until after the hearing. They affirmed the district court's denial of all other claims.

31. *Anderson v. Calderon*, 232 F.3d 1053 (2000).

Judges: Trott, Fernandez, McKeown (McKeown dissenting)

Summary: Anderson killed an 81-year-old woman who was lying in bed before robbing her house. A jury convicted him and sentenced him to death. The court of appeals affirmed the district court's denial of the habeas petition.

32. *Mayfield v. Calderon*, 229 F.3d 895 (2000).

Judges: Brunetti, Fernandez, Kleinfeld

Summary: Mayfield shot and killed two people who had filed charges against him for auto theft. He was convicted of both of the murders and was sentenced to death. The appellate court affirmed the district court's ruling denying petitioner's habeas relief request.

33. *Morris v. Woodford*, 229 F.3d 775 (2000).

Judges: Ferguson, Graber, W. Fletcher

Summary: Morris was convicted of murder in 1985 and was sentenced to death. The district court dismissed Morris's habeas petition, but the court of appeals held that petitioner stated colorable constitutional claims that warranted an evidentiary hearing.

34. *Lambright v. Stewart*, 220 F.3d 1022 (2000).

Judges: Ferguson, Reinhardt, Thompson

Summary: Lambright was convicted of first degree murder, sexual assault, kidnapping and was sentenced to death. The court of appeals granted certificates of appealability on five of his nine claims, reversing the district court's denial of the certificates.

35. *Comer v. Stewart*, 215 F.3d 910 (2000).

Judges: Pregerson, Ferguson, Rymer

Summary: Comer was convicted of murder and sentenced to death. The district court denied his habeas petition, but the court of appeals remanded for an evidentiary hearing to determine petitioner's competence to withdraw appeal.

36. *Jackson v. Calderon*, 211 F.3d 1148 (2000).

Judges: Canby, Thomas, O'Scannlain (O'Scannlain dissenting)

Summary: Jackson, while intoxicated with PCP, shot and killed a police officer. He was convicted of first-degree murder and sentenced to death. The court of appeals affirmed petitioner's conviction, but reversed the district court's denial of the habeas petition as to the penalty phase holding that the claims of ineffective assistance of counsel were not procedurally defaulted.

37. *Coleman v. Calderon*, 210 F.3d 1047 (2000).

Judges: Schroeder, Thompson, Brunetti (Brunetti dissenting)

Summary: A jury convicted Coleman of rape and murder and sentenced him to death. The court of appeals affirmed the district court's grant of the habeas petition as to Coleman's death sentence holding that an erroneous jury instruction had a substantial and injurious effect on the jury's verdict.

38. *McDowell v. Calderon*, 197 F.3d 1253 (1999) (en banc).

Judges: Hug, Browning, Pregerson, Brunetti, Kozinski, Rymer, T.G. Nelson, Kleinfeld, Tashima, Silverman, Graber

Summary: McDowell was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling granting McDowell's habeas petition.

39. *Lambright v. Stewart*, 191 F.3d 1181 (1999) (en banc).

Judges: Hug, Ferguson, Reinhardt, Browning, Schroeder, Kozinski, O'Scannlain, Trott, T.G. Nelson, Graber, and Wardlaw (Reinhardt dissenting)

Summary: Lambright and an accomplice (Smith) killed a woman who they had kidnaped and Smith had raped. Lambright was convicted of murder and sentenced to death. The district court denied Lambright's habeas petition. The court of appeals, en banc, took up the issue of whether the use of dual juries violated due process and affirmed the district court's ruling that the use of dual juries did not violate due process.

40. *Smith v. Stewart*, 189 F.3d 1004 (1999).

Judges: Reinhardt, Ferguson, Fernandez (Fernandez dissenting)

Summary: Smith picked up two teenage hitchhikers (on two different occasions), stabbed them multiple times, suffocated them by putting dirt in their mouths then taping them shut, and left them in the desert to die. Smith was convicted and sentenced to death for the two murders. The court of appeals affirmed on all but the ineffective assistance of counsel claim, which it reversed holding counsel's failure at sentencing to present any mitigating evidence of defendant's mental condition or background was sufficient to undermine confidence in the sentence, and remanded for re-sentencing.

41. *Rich v. Calderon*, 187 F.3d 1064 (1999).

Judges: Pregerson, Kleinfeld, Hawkins

Summary: A jury convicted Rich of a series of sexual attacks and murders of several defenseless young women and sentenced him to death. The judgment of the district court denying defendant prisoner's petition for habeas corpus was affirmed because there were no constitutional errors in the selection and composition of the grand jury, jury instructions, defense counsel, defendant's shackling during the trial, and because there was no prosecutorial misconduct, and defendant was mentally competent to stand trial.

42. *Wallace v. Stewart*, 184 F.3d 1112 (1999).

Judges: Kozinski, Hug, T.G. Nelson

Summary: Wallace brutally killed his girlfriend and her two children in their mobile home. He was convicted of the murders and was sentenced to death. The district court denied his habeas petition. The appellate court remanded for an evidentiary hearing because petitioner made a prima facie case of ineffective assistance in the penalty phase of the trial.

43. *Lord v. Wood*, 184 F.3d 1083 (1999).

Judges: Kozinski, Browning, T.G. Nelson

Summary: A jury convicted Lord of first degree murder of a sixteen year old girl and sentenced him to death. The district court granted habeas relief as to the penalty phase of the petitioner's trial, but not as to the guilt phase. The appellate court held that habeas relief should be granted as to the guilt phase because petitioner's counsel failed to call three witnesses who claimed to have seen the victim after petitioner was supposed to have killed her.

44. *Houston v. Roe*, 177 F.3d 901 (1999).

Judges: D.W. Nelson, Kozinski, Trott

Summary: After seeing his wife hug and kiss another man, Houston hid outside his wife's office and shot her with a shotgun as she exited. He was convicted of the murder and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

45. *Poland v. Stewart*, 169 F.3d 573 (1999).

Judges: Hug, Browning, T.G. Nelson

Summary: Poland was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition holding that he did not establish that any prejudice resulted from the denial of his right to exercise his challenges for cause. Therefore, the court ruled that no violation of his constitutional right to an impartial jury

occurred.

46. *Siripongs v. Calderon*, 167 F.3d 1225 (1999).

Judges: Schroeder, Fernandez, Pregerson (Pregerson dissenting)

Summary: Siripongs brutally killed the owner and an employee of a Thai market. He was convicted of the murders and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's successive habeas petition. (This was the fourth time the case was brought before the panel).

47. *Lambright v. Stewart*, 167 F.3d 477 (1999).

Judges: Ferguson, Reinhardt, Thompson (Thompson dissenting)

Summary: Lambright was convicted of first degree murder and was sentenced to death. The district court denied habeas relief, but the court of appeals reversed holding that the trial court violated the Fourteenth Amendment by conducting dual trials.

48. *Malone v. Calderon*, 165 F.3d 1234 (1999).

Judges: Beezer, Kleinfeld, Hawkins

Summary: Malone was under sentence of death in California and Missouri and filed a habeas petition a few days prior to his execution date. The district court denied the petition and the court of appeals affirmed.

49. *Caro v. Calderon*, 165 F.3d 1223 (1999).

Judges: Pregerson, Ferguson, Kleinfeld (Kleinfeld dissenting)

Summary: Caro was convicted of two counts of first degree murder, the kidnapping of one of the victims, and two counts of assault with intent to commit murder. The jury sentenced him to death. The district court dismissed petitioner's habeas petition, but the court of appeals held that he was entitled to an evidentiary hearing on his claim that counsel was ineffective during the sentencing phase of the trial.

50. *Bean v. Calderon*, 163 F.3d 1073 (1998).

Judges: Canby, Thomas, O'Scannlain (O'Scannlain dissenting)

Summary: Bean and an accomplice, on two different occasions, killed two older women while burglarizing and robbing their homes. He was convicted of two counts of first degree murder, two counts of burglary, and two counts of robbery and was sentenced to death. The court of appeals affirmed the district courts ruling granting habeas relief holding that petitioner received ineffective assistance during the penalty phase of his trial. The court held that the joinder of two indictments deprived the petitioner of a fundamentally fair trial.

51. *Vargas v. Lambert*, 159 F.3d 1161 (1998).

Judges: Reinhardt, Thompson, Kleinfeld (Kleinfeld dissenting)

Summary: Sagastegui admitted sodomizing and killing a three-year-old boy whom he was babysitting and then killing the boy's mother and her friend. He was convicted of three counts of first-degree murder and was sentenced to death. The court of appeals reversed the district court's judgment denying appellant's application for a stay of execution in order to conduct a hearing to

determine the Sagastegui's present competency.

52. *Chaney v. Stewart*, 156 F.3d 921 (1998).

Judges: Hawkins, Rymer, Reinhardt (Reinhardt dissenting)

Summary: Chaney stole a truck in New Mexico and some guns in Texas, hid out in a wooded area in Flagstaff, AZ, and shot a Deputy in pursuit. He was convicted of the murder of the reserve deputy and was sentenced to death. The appellate court affirmed the district court's ruling denying habeas relief.

53. *Babbitt v. Calderon*, 151 F.3d 1170 (1998).

Judges: Hall, Brunetti, Thompson

Summary: Babbitt was found guilty of the first-degree murder after his victim died of heart failure during Babbitt's burglary, robbery, and attempted rape. The court of appeals affirmed the district court's grant of summary dismissal in favor of the state regarding petitioner's habeas petition.

54. *Dyer v. Calderon*, 151 F.3d 970 (1998) (en banc).

Judges: Hug, Browning, Fletcher, Pregerson, Reinhardt, Brunetti, Kozinski, Thompson, O'Scannlain, T.G. Nelson, and Kleinfeld. (Judges Brunetti, D.R. Thompson, Kleinfeld, and O'Scannlain dissented.)

Summary: Dyer and two friends took four people hostage, drove them into some remote hills, and shot them (two survived). He was convicted of the murders and sentenced to death. The court of appeals vacated the panel decision that affirmed the denial of defendant's petition for federal habeas relief. The court determined that the state court's finding of juror impartiality was not entitled to a presumption of correctness. The court concluded that juror bias was implied from the lies that the juror told during voir dire and during the state court investigation of the matter.

55. *Thompson v. Calderon*, 151 F.3d 918 (1998) (en banc).

Judges: Hug, Browning, Schroeder, B. Fletcher, Kozinski, O'Scannlain, T.G. Nelson, Kleinfeld, Thomas, Reinhardt, Tashima (Reinhardt and Tashima dissenting)

Summary: Thompson was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of a second habeas petition.

56. *Coleman v. Calderon*, 150 F.3d 1105 (1998).

Judges: Thompson, Brunetti, Schroeder

Summary: Coleman was convicted of rape and murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

57. *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998).

Judges: D.W. Nelson, Brunetti, Hawkins

Summary: A jury found Ortiz guilty of one count of first-degree murder, three counts of attempted first-degree murder, two counts of aggravated assault, one count of arson of an occupied structure, one count of first-degree burglary, and one count of conspiracy to commit first-degree murder. The court of appeals affirmed the decision granting summary judgment in

favor of the state on petitioner's petition for a writ of habeas corpus because his arguments lacked merit or were partially barred.

58. *Crandell v. Bunnell*, 144 F.3d 1213 (1998).

Judges: Hall, Beezer, Pregerson

Summary: During an argument, Crandell killed his roommate and his roommate's son. Crandell was convicted of two counts of first degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting habeas relief holding that defense counsel's representation was incompetent and appointment of substitute counsel was warranted.

59. *Vickers v. Stewart*, 144 F.3d 613 (1998).

Judges: Schroeder, Rymer, T.G. Nelson

Summary: Vickers killed a fellow inmate while on death row, was convicted of first-degree murder, and was sentenced to death. The court of appeals affirmed the district court's denial of habeas relief.

60. *Smith v. Stewart*, 140 F.3d 1263 (1998).

Judges: B. Fletcher, Brunetti, Fernandez

Summary: Smith killed a store clerk during a robbery, was found guilty, and was sentenced to death. The court of appeals affirmed the district court's order granting summary judgment for the state and denying summary judgment for defendant, but reversed the district court's denial of habeas relief with respect to the death sentence and remanded the case with directions that defendant be re-sentenced. The court reasoned that counsel's ineffectiveness during the sentencing phase, by failing to present mitigating factors, prejudiced the defendant.

61. *Ainsworth v. Calderon*, 138 F.3d 787 (1998).

Judges: Leavy, Browning, Trott

Summary: Ainsworth and an accomplice shot a woman in the hip, raped her, put her in the trunk of her car, dumped her body in the woods (after she had died), and stole her car. Ainsworth was convicted of first degree murder and was sentenced to death. The appellate court reversed the district court's ruling granting petitioner's habeas relief holding that petitioner did not have ineffective counsel at trial.

62. *Correll v. Stewart*, 137 F.3d 1404 (1997).

Judges: Schroeder, O'Scannlain, Thomas

Summary: Correll brought three victims, who he rounded up during a robbery, to the Phoenix desert and shot all of them. He was convicted of first-degree murder, attempted first-degree murder, kidnapping, armed robbery, and first-degree burglary and was sentenced to death. The appellate court reversed the lower court's denial of an evidentiary hearing because Correll made a colorable ineffective assistance of counsel claim.

63. *Bonillas v. Hill*, 134 F.3d 1414 (1998).

Judges: Hall, Brunetti, Rymer

Summary: Bonillas was convicted of murder and sentenced to death. The court of appeals

affirmed the district court's ruling denying petitioner's habeas petition.

64. *McLain v. Calderon*, 134 F.3d 1383 (1998).

Judges: Ferguson, Hall, Kozinski

Summary: A jury convicted McLain of killing a young girl (he has a history of raping and sometimes killing young women) and was convicted to death. The court of appeals affirmed the district court's judgment, which set aside his death sentence because the jury instructions violated that which was set forth in another decision.

65. *LaGrand v. Stewart*, 133 F.3d 1253 (1998).

Judges: Hug, Pregerson, T.G. Nelson (Pregerson dissenting)

Summary: LaGrand killed a bank employee during a bank robbery. He was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

66. *Siripongs v. Calderon*, 133 F.3d 732 (1998).

Judges: Schroeder, Pregerson, Fernandez

Summary: Siripongs was convicted and sentenced to death in 1983 for the murders of the owner and an employee of a Thai market. The court of appeals affirmed the district court's ruling denying petitioner's successive habeas petition.

67. *Bloom v. Calderon*, 132 F.3d 1267 (1997).

Judges: Reinhardt, Thompson, Hawkins

Summary: During a fight with his father, Bloom, an eighteen-year-old, shot and killed his father, his step-mother, and his sister. A jury convicted Bloom of three counts of murder and sentenced him to death. The court of appeals reversed the district court's ruling denying habeas relief holding that counsel's representation was constitutionally deficient.

68. *Carriger v. Stewart*, 132 F.3d 463 (1997).

Judges: Hug, Browning, Schroeder, Pregerson, Reinhardt, Thomas, Kozinski, Farris, Fernandez, T.G. Nelson, Kleinfeld (Kozinski, Farris, Fernandez, T.G. Nelson, and Kleinfeld dissenting)

Summary: During the robbery of a jewelry store, Carriger strangled the owner, killing him. Carriger was convicted of murder and was sentenced to death. The court of appeals reversed the district court's denial of petitioner's second habeas petition holding that the Brady violation warranted habeas relief.

69. *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc).

Judges: Browning, Hug, B. Fletcher, Pregerson, Reinhardt, Brunetti, Kozinski, Thompson, Trott, Kleinfeld, Thomas (Thompson, Brunetti, Kozinski, Kleinfeld dissenting)

Summary: McDowell was convicted of murder with the special circumstance of burglary and rape, and was sentenced to death. The court of appeals reversed the district court's denial of the habeas petition holding that the jury misunderstood its task, which had a substantial and injurious effect and influence on its verdict of death.

70. *Paradis v. Arave*, 130 F.3d 385 (1997).

Judges: Tashima, Canby, Silver

Summary: Paradis was convicted of murder and was sentenced to death. The court of appeals reversed the district court's dismissal of petitioner's habeas petition. The court held that petitioner demonstrated cause and prejudice sufficient to permit his presentation of successive claim that prosecution violated Brady.

71. *Gerlaugh v. Stewart*, 129 F.3d 1027 (1997).

Judges: Reinhardt, Trott, Thompson (Reinhardt dissenting)

Summary: Gerlaugh and two others hitched a ride from a man who they robbed and killed. Gerlaugh was convicted of the murder and sentenced to death. The appellate court affirmed the district court's denial of the habeas petition.

72. *Fields v. Calderon*, 125 F.3d 757 (1997).

Judges: Pregerson, Wiggins, T.G. Nelson

Summary: Fields was convicted of murder and sentenced to death. The district court dismissed his claims ruling that they were procedurally defaulted. The court of appeals vacated the district court's ruling that petitioner's claims were procedurally defaulted and remanded to the district court.

73. *Gallego v. McDaniel*, 124 F.3d 1065 (1997).

Judges: Camby, Norris, Leavy

Summary: A jury convicted Gallego of the kidnap and murder of several teenage girls. The district denied the habeas petition. The court of appeals held that the jury instructions during the penalty phase of the trial were incorrect and remanded the penalty portion of the action. The court ordered the district court to issue the writ unless Nevada re-sentences the defendant within a specified time.

74. *Amaya-Ruiz v. Stewart*, 121 F.3d 486 (1997).

Judges: Thompson, Kozinski, Fernandez

Summary: Amaya-Ruiz killed his employer while working on her ranch. He was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition.

75. *Thompson v. Calderon*, 120 F.3d 1045 (1997).

Judges: Browning, Fletcher, Pregerson, Reinhardt, Hall, Kozinski, T.G. Nelson, Kleinfeld, Tashima, and Thomas. (Judges Hall, T.G. Nelson, Kozinski, and Kleinfeld dissented.)

Summary: Thompson raped and murdered a 20-year-old and was sentenced to death. The court affirmed the grant of defendant's petition for writ of habeas corpus on his ineffective assistance claim, because counsel's deficient performance at trial affected the verdict and vacated the death penalty. The court reversed the denial of defendant's petition on his prosecutorial misconduct claim because the prosecutor advanced inconsistent theories, which constituted fundamental error that violated due process.

76. *Woratzeck v. Stewart*, 118 F.3d 648 (9th Cir. 1997).

Judges: Wallace, Farris, Boochever

Summary: Woratzeck was on death row and sentenced to die the next day when this appeal was taken. The appellate court denied petitioner's application to file a successive application for a writ of habeas corpus because petitioner had failed to make a prima facie showing that his claims complied with federal requirements to file such a successive writ.

77. *Poland v. Stewart*, 117 F.3d 1094 (1997).

Judges: Hug, Browning, T.G. Nelson

Summary: Poland hijacked, robbed, and killed two drivers of an armored truck. He was convicted of the two murders and sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

78. *Jeffries v. Wood*, 114 F.3d 1484 (1997) (en banc).

Judges: Hug, Schroeder, B. Fletcher, Reinhardt, Tashima, Thomas, Kozinski, Goodwin, Brunetti, T.G. Nelson, Hawkins (Kozinski, Goodwin, Brunetti, T.G. Nelson, Hawkins dissenting)

Summary: After being released from jail, the Skiffs invited Jeffries to live in their home. A few months later the Skiffs' bodies were found in a shallow grave with bullet wounds. A jury found Jeffries guilty of two counts of aggravated first degree murder and sentenced him to death. The court of appeals reversed the district court's ruling denying habeas relief.

79. *Gretzler v. Stewart*, 112 F.3d 992 (1997).

Judges: Farris, Leavy, Pregerson (Pregerson dissenting)

Summary: In California, Gretzler pleaded guilty and was convicted for nine counts of first-degree murder. In Arizona, he was convicted of two murders and sentenced to death. The court of appeals affirmed the district court's ruling denying his habeas petition.

80. *Villafuerte v. Stewart*, 111 F.3d 616 (1997).

Judges: B. Fletcher, Thompson, T.G. Nelson

Summary: Villafuerte physically assaulted his girlfriend, tied her to a bed, gagged her, and left. A few days later the police found his girlfriend dead. Villafuerte was sentenced to death after a jury convicted him of kidnapping, theft, and felony murder. The court of appeals affirmed the district court's denial of petitioner's habeas petition.

81. *Langford v. Day*, 110 F.3d 1380 (9th Cir. 1997).

Judges: Canby, Trott, Hawkins

Summary: Langford was convicted of robbing and killing two people and was sentenced to death. The court of appeals affirmed the district court's denial of the habeas petition.

82. *Moore v. Calderon*, 108 F.3d 261 (1997).

Judges: O'Scannlain, Ferguson, Fernandez

Summary: A jury found Moore guilty of two murders and sentenced him to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas request. The court held that his request for self-representation made two weeks before trial began was timely, so that

denial of the request violated his Sixth Amendment right to self-representation.

83. *Greenawalt v. Stewart*, 105 F.3d 1268 (1997).

Judges: Wallace, Alarcon, Wiggins

Summary: Greenawalt was convicted of four murders and sentenced to death. The court of appeals affirmed the district court's denial of petitioner's habeas petition.

84. *Poland v. Stewart*, 104 F.3d 1099 (1996).

Judges: Hug, Browning, T.G. Nelson

Summary: Poland and his brother were convicted of the murders of two armored car drivers and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas request.

85. *Ceja v. Stewart*, 97 F.3d 1246 (1996).

Judges: Farris, Beezer, B. Fletcher (B. Fletcher dissenting)

Summary: Ceja was tried, convicted and sentenced to death for the drug related murders of two people. The court of appeals affirmed the district court's denial of the habeas petition.

86. *Carriger v. Stewart*, 95 F.3d 755 (1996).

Judges: Farris, Kozinski, O'Scannlain

Summary: Carriger was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's second habeas petition.

87. *Rupe v. Wood*, 93 F.3d 1434 (1996).

Judges: Wallace, Schroeder, Pregerson

Summary: Rupe was convicted and sentenced to death for killing two bank tellers during a robbery. The court of appeals affirmed the district court's grant of the habeas petition that vacated petitioner's sentence and granted him a new penalty phase hearing so that the jury could consider a previously excluded polygraph test as mitigating evidence.

88. *Morales v. Calderon*, 85 F.3d 1387 (1996).

Judges: Farris, Canby, Thompson

Summary: Morales was convicted of murder and sentenced to death. The court of appeals reversed the district court's ruling dismissing petitioner's habeas petition holding that California's habeas corpus timeliness requirements were not clear, consistently applied, and well-established and thus could not procedurally bar his claims.

89. *Williams v. Calderon*, 83 F.3d 281 (1996).

Judges: Poole, Thompson, Trott

Summary: Williams was convicted of murder and sentenced to death. He brought this appeal days before his scheduled execution. The court of appeals affirmed the district court's ruling denying petitioner's second habeas petition.

90. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (1996).

Judges: T.G. Nelson, D.W. Nelson, Leavy

Summary: Martinez-Villareal was sentenced to death for two homicides committed after stealing guns and ammo from another family's residence. The court of appeals reversed the district court's grant of habeas relief as to the petitioner's penalty phase holding that his claims had been procedurally defaulted.

91. *Bonin v. Calderon*, 77 F.3d 1155 (1996).

Judges: Wallace, Brunetti, Kozinski

Summary: Bonin was convicted of murder and sentenced to death. The court of appeals affirmed the district court's denial of his habeas petition.

92. *Rice v. Wood*, 77 F.3d 1138 (1996) (en banc).

Judges: Kozinski, Wallace, Hall, T.G. Nelson, Hawkins, Trott, D.W. Nelson, Browning, Schroeder, B. Fletcher, Thompson (D.W. Nelson, Browning, Schroeder, B. Fletcher, Thompson dissenting)

Summary: Rice entered his victims' home and proceeded to kill all four family members. He was convicted of the murders and sentenced to death. The court of appeals reversed the district court's ruling granting petitioner's habeas request. The court held that imposing the death penalty in defendant's absence was not structural error and therefore was subject to harmless error analysis. In this case, the error was harmless.

93. *Villafuerte v. Lewis*, 75 F.3d 1330 (1996).

Judges: T.G. Nelson, B. Fletcher, Thompson

Summary: A jury convicted Villafuerte of felony murder for kidnapping and sentenced him to death. The court of appeals reversed the district court's ruling denying petitioner's habeas request holding that the state trial court erred in failing to instruct on lesser included offense to kidnapping and that error had a substantial and injurious effect on the verdict.

94. *Jeffries v. Wood*, 75 F.3d 491 (1996).

Judges: Goodwin, Farris, Fernandez

Summary: Jeffries was convicted on two counts of aggravated murder and was sentenced to death. The court of appeals reversed the district court's ruling granting petitioner's habeas petition.

95. *Hendricks v. Calderon*, 70 F.3d 1032 (1995).

Judges: Goodwin, Canby, Rymer

Summary: The jury found Hendricks guilty of multiple murders and felony-murder and imposed the death penalty. The court of appeals affirmed the district court's grant of the habeas petition as to the penalty phase of petitioner's trial.

96. *McKenna v. McDaniel*, 65 F.3d 1483 (1995).

Judges: Hug, Hall, Trott

Summary: While in jail, McKenna killed another inmate in his cell. A jury convicted him and

sentenced him to death. The court of appeals affirmed the district court's grant of the habeas petition finding an exception to a procedural bar.

97. *Clabourne v. Lewis*, 64 F.3d 1373 (1995).

Judges: Kozinski, Reinhardt, Rymer

Summary: Clabourne admitted to raping and killing a college student. He was convicted of kidnapping, sexual assault, and first degree murder. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition holding that the defense counsel's failure to adequately prepare and present a case for mitigation at the sentencing hearing amounted to ineffective assistance of counsel.

98. *Bonin v. Calderon*, 59 F.3d 815 (1995).

Judges: Wallace, Brunetti, Kozinski

Summary: A jury found Bonin guilty of a series of murders of boys ranging from ages 12 to 19. The court of appeals affirmed denial of appellant prisoner's two petitions for writ of habeas corpus relief because the performance of appellant's counsel did not fall below the standard of objective reasonableness, appellant was not deprived of a fair trial, and there were no due process violations. Furthermore, the death penalty was properly handed out and there were no other procedural or substantive errors which entitled appellant to the relief requested.

99. *McKenzie v. Day*, 57 F.3d 1493 (1995) (en banc).

Judges: Wallace, Wiggins, Brunetti, Kozinski, O'Scannlain, Trott, Rymer, Kleinfeld, Browning, D. Thompson, Hawkins (Browning, D. Thompson, Hawkins dissenting)

Summary: McKenzie was convicted of murder and sentenced to death. The court of appeals affirmed the district court's decision denying McKenzie's petition for habeas relief.

100. *McKenzie v. Day*, 57 F.3d 1461 (1995).

Judges: Kozinski, Beezer, Norris (Norris dissenting)

Summary: McKenzie was convicted of murder and sentenced to death. (He had been on death row for two decades when this appeal came up - this was his third habeas petition) The court of appeals affirmed the district court's decision denying McKenzie's petition for habeas relief.

101. *Moran v. Godinez*, 57 F.3d 690 (1995).

Judges: Thompson, Farris, Pregerson (Pregerson dissenting)

Summary: Moran was convicted of two murders and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas petition.

102. *Phillips v. Vasquez*, 56 F.3d 1030 (1995).

Judges: B. Fletcher, Reinhardt, Kleinfeld

Summary: Phillips was convicted of first-degree murder and was sentenced to death. The court of appeals reversed the district court's ruling denying petitioner's habeas petition.

103. *Williams v. Calderon*, 52 F.3d 1465 (1995).

Judges: Poole, Thompson, Trott

Summary: To recover a \$1500 check, Williams shot and killed three people who had sold a car to him. A jury found Williams guilty of three counts of first-degree murder. The court of appeals affirmed the district court's denial of the habeas writ.

104. *Rice v. Wood*, 44 F.3d 1396 (1995).

Judges: D.W. Nelson, Leavy, Wallace (Wallace dissenting)

Summary: Rice was convicted of four murders and sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

105. *Jeffers v. Lewis*, 38 F.3d 411 (1994) (en banc).

Judges: Thompson, Farris, Wallace, Beezer, Wiggins, Leavy, Rymer, Pregerson, B. Fletcher, Norris, Noonan (Pregerson, Fletcher, Norris, Noonan dissenting)

Summary: A jury convicted Jeffers of murder and the court sentenced him to death. The court of appeals affirmed the district court's denial of the habeas petition because the sentencing court adequately reviewed the record and reweighed and explained the mitigation and aggravation factors offered by defendant.

106. *Siripongs v. Calderon*, 35 F.3d 1308 (1994).

Judges: Schroeder, Pregerson, Fernandez (Fernandez dissenting)

Summary: Siripongs was convicted of first-degree murder and sentenced to death for a violent robbery/double homicide. The appellate court reversed the district court's ruling that petitioner is not entitled to an evidentiary hearing holding that petitioner may have an ineffective assistance claim.

107. *Wade v. Calderon*, 29 F.3d 1312 (1994).

Judges: Canby, Reinhardt, Trott (Trott dissenting)

Summary: Wade beat his wife's ten-year-old child to death. He was then convicted of murder and sentenced to death. The court of appeals reversed the district court's denial of the habeas petition holding that the torture-murder circumstance instruction failed to meet requirements of Eighth Amendment and petitioner received ineffective assistance of counsel at the penalty phase of the trial.

108. *McKenzie v. McCormick*, 27 F.3d 1415 (1994).

Judges: Kozinski, Beezer, Norris (Norris dissenting)

Summary: McKenzie was convicted of murder and sentenced to death. The court of appeals affirmed the district court's ruling denying petitioner's habeas petition.

109. *James v. Borg*, 24 F.3d 20 (1994).

Judges: Hug, Wiggins, Noonan

Summary: James shot two women while attempting to rob them. A jury convicted James of first-degree murder committed during a robbery. The court affirmed the court's denial of the habeas petition.

110. *Paradis v. Arave*, 20 F.3d 950 (1994).

Judges: Alarcon, Beezer, Nielsen (sitting by designation)

Summary: A jury convicted Paradis of murder and the trial judge sentenced him to death. The appellate court affirmed the district court's ruling denying the habeas petition.

111. *Campbell v. Wood*, 18 F.3d 662 (1994) (en banc).

Judges: Wallace, Browning, Tang, Poole, D.W. Nelson, Reinhardt, Beezer, Wiggins, Thompson, O'Scannlain, Kleinfeld (Browning, Tang, Poole, D.W. Nelson, Reinhardt dissenting)

Summary: Campbell was convicted of three counts of aggravated murder and sentenced to death (Two of the three had testified against Campbell on a previous charge of sexual assault). The appellate court affirmed the district court's ruling denying the habeas petition.

112. *Hamilton v. Vasquez*, 17 F.3d 1149 (1994).

Judges: Schroeder, B. Fletcher, Trott (Trott dissenting)

Summary: A jury convicted Hamilton of first degree murder, burglary, robbery and kidnapping and sentenced him to death. The court of appeals reversed the district court's denial of the habeas petition as to the penalty phase of petitioner's trial. The court held that the trial court's penalty phase jury instruction distracted jurors from considering relevant mitigating evidence and thus violated Hamilton's due process rights.

113. *Jeffries v. Blodgett*, 5 F.3d 1180 (1993).

Judges: Goodwin, Farris, Fernandez (Fernandez dissenting)

Summary: Jeffries was convicted of two counts of aggravated first-degree murder and sentenced to death. The appellate court vacated the district court's ruling, which denied petitioner's request for habeas corpus relief.

114. *Beam v. Paskett*, 3 F.3d 1301 (1993).

Judges: Reinhardt, Boochever, D.W. Nelson

Summary: Beam was convicted of the rape and murder of a thirteen-year old girl. The appellate court remanded to the district court directing it to grant the habeas petition. Additionally, the court vacated the death sentence and directed the state court to conduct new sentencing proceedings.

115. *Blazak v. Ricketts*, 1 F.3d 891 (1993).

Judges: Tang, Beezer, Brunetti (Beezer (no opinion on the merits) Brunetti dissenting)

Summary: During an attempted robbery of a bar, a man wearing a ski mask shot and killed two people. Blazak was convicted of two counts of first-degree murder and was sentenced to death. The court of appeals affirmed the district court's ruling granting petitioner's habeas petition.

116. *Clark v. Lewis*, 1 F.3d 814 (1993).

Judges: Farris, Brunetti, Thompson

Summary: Clark was convicted of four counts of first-degree murder (two guests and two wranglers at a dude ranch he worked at). The court of appeals affirmed the district court's denial of his application for certificate of probable cause and stay of execution.

117. *Fetterly v. Paskett*, 997 F.2d 1295 (1993).

Judges: Trott, Schroeder, Leavy

Summary: A jury convicted Fetterly of murder and sentenced him to death. The appellate court reversed the district court's denial of the habeas petition.

118. *Campbell v. Blodgett*, 997 F.2d 512 (1993).

Judges: Hug, Poole, Hall

Summary: Campbell was convicted of murder and sentenced to death. The court of appeals affirmed the district court's dismissal of the habeas writ.

119. *Brewer v. Lewis*, 989 F.2d 1021 (1993).

Judges: Hall, Browning, Norris (Norris dissenting)

Summary: Brewer was convicted of murder and sentenced to death. The court of appeals dismissed the writ appealing the district court's denial of the habeas petition.

XIII. Citations

- **2002 to 1993 Circuit Court cases, excluding the Ninth Circuit**

2002 circuit cases (From January 1 to October 1). See *Marshall v. Hendricks*, 2002 WL 31018600 (3rd Cir. 2002); *Scarborough v. Johnson*, 300 F.3d 302 (3rd Cir. 2002); *Carpenter v. Vaughn*, 296 F.3d 138 (3rd Cir. 2002); *Cristin v. Brennan*, 281 F.3d 404 (3rd Cir. 2002); *Whitney v. Horn*, 280 F.3d 240 (3rd Cir. 2002); *Gattis v. Snyder*, 278 F.3d 222 (3rd Cir. 2002); *Brosius v. Pennsylvania*, 278 F.3d 239 (3rd Cir. 2002); *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002); *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002); *Basden v. Lee*, 290 F.3d 602 (4th Cir. 2002); *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002); *Ivey v. Catoe*, 36 Fed.Appx 718 (4th Cir. 2002); *Booth-El v. Nuth*, 288 F.3d 571 (4th Cir. 2002); *Carter v. Lee*, 283 F.3d 240 (4th Cir. 2002); *Hartman v. Lee*, 283 F.3d 190 (4th Cir. 2002); *McWee v. Weldon*, 283 F.3d 179 (4th Cir. 2002); *Woods v. Cockrell*, 2002 WL 31114329 (5th Cir. 2002); *Johnson v. Cockrell*, 2002 WL 31059311 (5th Cir. 2002); *Dunn v. Cockrell*, 302 F.3d 491 (5th Cir. 2002); *Kutzner v. Cockrell*, 303 F.3d 333 (5th Cir. 2002); *Janecka v. Cockrell*, 301 F.3d 316 (5th Cir. 2002); *Johnson v. Cockrell*, 301 F.3d 234 (5th Cir. 2002); *Collier v. Cockrell*, 300 F.3d 577 (5th Cir. 2002); *U.S. v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *Ogan v. Cockrell*, 297 F.3d 349 (5th Cir. 2002); *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002); *Foster v. Johnson*, 293 F.3d 766 (5th Cir. 2002); *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002); *Martinez v. Keller*, 292 F.3d 417 (5th Cir. 2002); *Riddle v. Cockrell*, 288 F.3d 713 (5th Cir. 2002); *U.S. v. Jones*, 287 F.3d 325 (5th Cir. 2002); *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002); *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002); *Williams v. Puckett*, 283 F.3d 272 (5th Cir. 2002); *Buell v. Anderson*, 2002 WL 31119679 (6th Cir. 2002); *Brewer v. Anderson*, 2002 WL 31027950 (6th Cir. 2002); *Hutchison v. Bell*, 2002 WL 1988196 (6th Cir. 2002); *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002); *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002); *Caldwell v. Bell*, 288 F.3d 838 (6th Cir. 2002); *Coleman v. Coyle*, 37 Fed. Appx. 134 (6th Cir. 2002); *Cooley v. Coyle*, 289 F.3d 882 (6th Cir. 2002); *House v. Warden*, 283 F.3d 737 (6th Cir. 2002); *Martin v. Mitchell*, 280 F.3d 594 (6th Cir. 2002); *Williams v. Davis*, 301 F.3d 625 (7th Cir. 2002); *Trueblood v. Davis*, 301 F.3d 784 (7th Cir. 2002); *Holleman v. Cotton*, 301 F.3d

737 (7th Cir. 2002); *Pierre v. Walls*, 297 F.3d 617 (7th Cir. 2002); *Henderson v. Walls*, 296 F.3d 541 (7th Cir. 2002); *Mahaffey v. Schomig*, 294 F.3d 907 (7th Cir. 2002); *Roche v. Davis*, 291 F.3d 473 (7th Cir. 2002); *Wright v. Walls*, 288 F.3d 937 (7th Cir. 2002); *Pecoraro v. Walls*, 286 F.3d 439 (7th Cir. 2002); *Bracy v. Schomig*, 286 F.3d 406 (7th Cir. 2002); *Todd v. Schomig*, 283 F.3d 842 (7th Cir. 2002); *Rastafari v. Anderson*, 278 F.3d 673 (7th Cir. 2002); *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002); *Hall v. Luebbers*, 296 F.3d 685 (8th Cir. 2002); *Johnston v. Luebbers*, 288 F.3d 1048 (8th Cir. 2002); *Gray v. Bowersox*, 281 F.3d 749 (8th Cir. 2002); *Owesley v. Luebbers*, 281 F.3d 687 (8th Cir. 2002); *Moore v. Kinney*, 278 F.3d 774 (8th Cir. 2002); *Kenley v. Bowersox*, 275 F.3d 709 (8th Cir. 2002); *Jackson v. Mullin*, 2002 WL 31053984 (10th Cir. 2002); *Duckett v. Mullin*, 2002 WL 31075013 (10th Cir. 2002); *Gilbert v. Mullin*, 2002 WL 2005911 (10th Cir. 2002); *Scott v. Mullin*, 2002 WL 1965329 (10th Cir. 2002); *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002); *Hooker v. Mullin*, 293 F.3d 1232 (10th Cir. 2002); *Willingham v. Mullin*, 296 F.3d 917 (10th Cir. 2002); *Knighton v. Mullin*, 293 F.3d 1165 (10th Cir. 2002); *Charm v. Mullin*, 37 Fed.Appx. 475 (10th Cir. 2002); *Hawkins v. Mullin*, 291 F.3d 658 (10th Cir. 2002); *Revilla v. Gibson*, 283 F.3d 1203 (10th Cir. 2002); *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *Romano v. Gibson*, 278 F.3d 1145 (10th Cir. 2002); *Fields v. Gibson*, 277 F.3d 1203 (10th Cir. 2002); *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002); *Robinson v. Gibson*, 35 Fed.Appx. 715 (10th Cir. 2002); *Brownlee v. Haley*, 2002 WL 31050882 (11th Cir. 2002); *Robinson v. Moore*, 300 F.3d 1320 (11th Cir. 2002); *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002); *Fortenberry v. Haley*, 297 F.3d 1213 (11th Cir. 2002); *Van Poyck v. Florida*, 290 F.3d 1318 (11th Cir. 2002); *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002); *Brown v. Head*, 285 F.3d 1325 (11th Cir. 2002); *Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002); *Bui v. Haley*, 279 F.3d 1327 (11th Cir. 2002); *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002).

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1996 circuit cases: See *Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996); *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996); *George v. Angelone*, 100 F.3d 353 (4th Cir. 1996); *Gray v. Netherland*, 99 F.3d 158 (4th Cir. 1996); *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996); *Beaver v. Thompson*, 93 F.3d 1186 (4th Cir. 1996); *Hoke v. Netherland*, 92 F.3d 1350 (4th Cir. 1996); *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996); *Payne v. Netherland*, 94 F.3d 642 (4th Cir. 1996); *U.S. v. Roane*, 90 F.3d 861 (4th Cir. 1996); *Savino v. Murray*, 82 F.3d 593 (4th Cir. 1996); *Tuggle v. Netherland*, 79 F.3d 1386 (4th Cir. 1996); *Middleton v. Evatt*, 77 F.3d 469 (4th Cir. 1996); *Townes v. Angelone*, 73 F.3d 545 (4th Cir. 1996); *Darden v. Barnett*, 74 F.3d 1231 (4th Cir. 1996); *Lauti v. Johnson*, 102 F.3d 166 (5th Cir. 1996); *Moore v. Johnson*, 101 F.3d 1069 (5th Cir. 1996); *Mata v. Johnson*, 99 F.3d 166 (5th Cir. 1996); *Herman v. Johnson*, 98 F.3d 171 (5th Cir. 1996); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996); *Graham v. Johnson*, 94 F.3d 958 (5th Cir. 1996); *West v. Johnson*, 92 F.3d 1385 (5th Cir. 1996); *Boyle v. Johnson*, 93 F.3d 180 (5th Cir. 1996); *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996); *Washington v. Johnson*, 90 F.3d 945 (5th Cir. 1996); *Westley v. Johnson*, 83 F.3d 714 (5th Cir. 1996); *Lackey v. Johnson*, 83 F.3d 116 (5th Cir. 1996); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996); *Spence v. Johnson*, 80 F.3d 989 (5th Cir. 1996); *Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996); *Woods v. Johnson*, 75 F.3d 1017 (5th Cir. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996); *O'Guinn v. Dutton*, 88 F.3d 1409 (6th Cir. 1996); *Pitsonbarger v. Gramley*, 103 F.3d 1293 (7th Cir. 1996); *Neal v. Gramley*, 99 F.3d 841 (7th Cir. 1996); *Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996); *Eddmonds v. Peters*, 93 F.3d 1307 (7th Cir. 1996); *Emerson v. Gramley*, 91 F.3d 898 (7th Cir.

1996); *Gaston v. Washington*, 85 F.3d 631 (7th Cir. 1996); *Collins v. Welborn*, 81 F.3d 684 (7th Cir. 1996); *Steward v. Gilmore*, 80 F.3d 1205 (7th Cir. 1996); *Jones v. Page*, 76 F.3d 831 (7th Cir. 1996); *Gosier v. Welborn*, 76 F.3d 381 (7th Cir. 1996); *Stewart v. Gramley*, 74 F.3d 132 (7th Cir. 1996); *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996); *Zeitvogal v. Bowersox*, 103 F.3d 54 (8th Cir. 1996); *Clemmons v. Delo*, 100 F.3d 1394 (8th Cir. 1996); *Preston v. Delo*, 100 F.3d 596 (8th Cir. 1996); *Bannister v. Delo*, 100 F.3d 610 (8th Cir. 1996); *Mathenia v. Delo*, 99 F.3d 1476 (8th Cir. 1996); *Boliek v. Bowersox*, 96 F.3d 1070 (8th Cir. 1996); *Reese v. Delo*, 94 F.3d 1177 (8th Cir. 1996); *Six v. Delo*, 94 F.3d 469 (8th Cir. 1996); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir. 1996); *Oxford v. Bowersox*, 86 F.3d 127 (8th Cir. 1996); *Schneider v. Delo*, 85 F.3d 335 (8th Cir. 1996); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Zeitvogal v. Delo*, 78 F.3d 335 (8th Cir. 1996); *Sloan v. Bowersox*, 77 F.3d 234 (8th Cir. 1996); *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996); *Davis v. Exec. Dir. Dept. of Corrections*, 100 F.3d 750 (10th Cir. 1996); *Silver v. Hargett*, 96 F.3d 1453 (10th Cir. 1996); *U.S. v. McCullah*, 87 F.3d 1136 (10th Cir. 1996); *U.S. v. Montoya*, 85 F.3d 641 (10th Cir. 1996); *Stouffer v. Fields*, 85 F.3d 641 (10th Cir. 1996); *Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996); *Hatch v. Reynolds*, 76 F.3d 392 (10th Cir. 1996); *Chateloin v. Singletary*, 89 F.3d 749 (11th Cir. 1996); *Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Williams v. Turpin*, 87 F.3d 1204 (11th Cir. 1996); *Hays v. Alabama*, 85 F.3d 1492 (11th Cir. 1996); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996); *Waldrop v. Jones*, 77 F.3d 1308 (11th Cir. 1996); *Buenoano v. Singletary*, 74 F.3d 1078 (11th Cir. 1996); *Strickland v. Linahan*, 72 F.3d 1531 (11th Cir. 1996); *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996).

1995 circuit cases. See *Flamer v. Snyder*, 68 F.3d 736 (3rd Cir. 1995); *Riley v. Taylor*, 62 F.3d 86 (3rd Cir. 1995); *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995); *Townes v. Murray*, 68 F.3d 840 (4th Cir. 1995); *Kornahrens, III v. Evatt*, 66 F.3d 1350 (4th Cir. 1995); *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995); *Tuggle v. Thompson*, 57 F.3d 1356 (4th Cir. 1995); *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995); *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995); *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995); *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995); *Noland v. Dixon*, 53 F.3d 328 (4th Cir. 1995); *Rogers v. Scott*, 70 F.3d 340 (5th Cir. 1995); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Johnson v. Scott*, 68 F.3d 106 (5th Cir. 1995); *Belyeu v. Scott*, 67 F.3d 535 (5th Cir. 1995); *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995); *Montoya v. Scott*, 65 F.3d 405 (5th Cir. 1995); *U.S. v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *Bridle v. Scott*, 63 F.3d 364 (5th Cir. 1995); *Vuong v. Scott*, 62 F.3d 673 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d 333 (5th Cir. 1995); *Irving, III v. Hargett*, 59 F.3d 23 (5th Cir. 1995); *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995); *Davis v. Scott*, 51 F.3d 457 (5th Cir. 1995); *James v. Cain*, 50 F.3d 1327 (5th Cir. 1995); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995); *In re Parker*, 49 F.3d 204 (6th Cir. 1995); *Stewart v. Lane*, 70 F.3d 955 (7th Cir. 1995); *Enoch v. Gramley*, 70 F.3d 1490 (7th Cir. 1995); *Stewart v. Lane*, 60 F.3d 296 (7th Cir. 1995); *Smith v. Farley*, 59 F.3d 659 (7th Cir. 1995); *Burriss v. Farley*, 51 F.3d 655 (7th Cir. 1995); *Williams v. Chrans*, 50 F.3d 1356 (7th Cir. 1995); *Ruiz v. Norris*, 71 F.3d 1404 (8th Cir. 1995); *LaRette v. Bowersox*, 70 F.3d 986 (8th Cir. 1995); *Parker v. Norris*, 64 F.3d 1178 (8th Cir. 1995); *Battle v. Delo*, 64 F.3d 347 (8th Cir. 1995); *Nave v. Delo*, 62 F.3d 1024 (8th Cir. 1995); *Oxford v. Delo*, 59 F.3d 741 (8th Cir. 1995); *Jones v. Delo*, 56 F.3d 878 (8th Cir. 1995); *Sloan v. Delo*, 54 F.3d 1371 (8th Cir. 1995); *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995); *Fairchild v. Norris*, 51 F.3d 129 (8th Cir. 1995); *Feltrop v. Delo*, 46 F.3d 766 (8th Cir. 1995); *Sidebottom v. Delo*, 46 F.3d 744 (8th Cir. 1995); *LaRette v. Delo*, 44 F.3d 681 (8th Cir. 1995);

O'Neal, II v. Delo, 44 F.3d 655 (8th Cir. 1995); *Castro v. Oklahoma*, 71 F.3d 1502 (10th Cir. 1995); *Stafford v. Ward*, 59 F.3d 1025 (10th Cir. 1995); *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995); *Smith v. Reynolds*, 56 F.3d 78 (10th Cir. 1995); *Brewer v. Reynolds*, 51 F.3d 1519 (10th Cir. 1995); *Smith v. Kerby*, 50 F.3d 801 (10th Cir. 1995); *White v. Singletary*, 70 F.3d 1198 (11th Cir. 1995); *Glock v. Singletary*, 65 F.3d 878 (11th Cir. 1995); *Mills v. Singletary*, 63 F.3d 999 (11th Cir. 1995); *Marek v. Singletary*, 62 F.3d 1295 (11th Cir. 1995); *Medina v. Singletary*, 59 F.3d 1095 (11th Cir. 1995); *Lonchar v. Thomas*, 58 F.3d 590 (11th Cir. 1995); *Upshaw v. Singletary*, 54 F.3d 718 (11th Cir. 1995); *Kennedy v. Herring*, 54 F.3d 678 (11th Cir. 1995); *Weeks v. Jones*, 52 F.3d 1559 (11th Cir. 1995); *Felker v. Thomas*, 52 F.3d 907 (11th Cir. 1995); *Stano v. Butterworth*, 51 F.3d 942 (11th Cir. 1995); *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); *Kight v. Singletary*, 50 F.3d 1539 (11th Cir. 1995); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995); *Horslet v. Alabama*, 45 F.3d 1486 (11th Cir. 1995).

1994 circuit cases. See *Story v. Kindt*, 26 F.3d 402 (3rd Cir. 1994); *Deputy v. Taylor*, 19 F.3d 1485 (3rd Cir. 1994); *Stockton v. Murray*, 41 F.3d 920 (4th Cir. 1994); *Adams v. Aiken*, 41 F.3d 175 (4th Cir. 1994); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994); *Huffstetler v. Dixon*, 28 F.3d 1209 (4th Cir. 1994); *Lawson v. Dixon*, 25 F.3d 1040 (4th Cir. 1994); *Spencer v. Murray*, 18 F.3d 237 (4th Cir. 1994); *Edmonds v. Thompson*, 17 F.3d 1433 (4th Cir. 1994); *Spencer v. Murray*, 18 F.3d 229 (4th Cir. 1994); *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994); *Mann v. Scott*, 41 F.3d 968 (5th Cir. 1994); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994); *Kinnamon v. Scott*, 40 F.3d 731 (5th Cir. 1994); *Williams v. Scott*, 35 F.3d 159 (5th Cir. 1994); *Wilkerson v. Whitley*, 28 F.3d 498 (5th Cir. 1994); *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994); *Drew v. Scott*, 28 F.3d 460 (5th Cir. 1994); *Blackmon v. Scott*, 22 F.3d 560 (5th Cir. 1994); *Ward v. Whitley*, 21 F.3d 1355 (5th Cir. 1994); *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994); *Clark v. Collins*, 19 F.3d 959 (5th Cir. 1994); *Crank v. Collins*, 19 F.3d 172 (5th Cir. 1994); *Anderson v. Collins*, 18 F.3d 1208 (5th Cir. 1994); *Motley v. Collins*, 18 F.3d 1223 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994); *Williams v. Collins*, 16 F.3d 626 (5th Cir. 1994); *Marquez v. Collins*, 11 F.3d 1241 (5th Cir. 1994); *King v. Dutton*, 17 F.3d 151 (6th Cir. 1994); *Williams v. Chrans*, 42 F.3d 1137 (7th Cir. 1994); *Barnhill v. Flannigan*, 42 F.3d 1074 (7th Cir. 1994); *Del Vicchio v. Illinois Dept. of Corrections*, 31 F.3d 1363 (7th Cir. 1994); *Jackson v. Roth*, 24 F.3d 1002 (7th Cir. 1994); *Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994); *U.S. v. Cooper*, 19 F.3d 1154 (7th Cir. 1994); *Albanese v. Peters III*, 19 F.3d 21 (7th Cir. 1994); *Davis v. Greer*, 13 F.3d 1134 (7th Cir. 1994); *Williams v. Clark*, 40 F.3d 1529 (8th Cir. 1994); *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994); *Murray v. Delo*, 34 F.3d 1367 (8th Cir. 1994); *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994); *Griffin v. Delo*, 33 F.3d 895 (8th Cir. 1994); *Pollard v. Delo*, 28 F.3d 887 (8th Cir. 1994); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994); *Bivens v. Goose*, 28 F.3d 62 (8th Cir. 1994); *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994); *Nave v. Delo*, 22 F.3d 802 (8th Cir. 1994); *Fairchild v. Norris*, 21 F.3d 799 (8th Cir. 1994); *Battle v. Delo*, 19 F.3d 1547 (8th Cir. 1994); *Chambers v. Armontrout*, 16 F.3d 257 (8th Cir. 1994); *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir. 1994); *Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994); *Scott v. Singletary*, 38 F.3d 1547 (11th Cir. 1994); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *Glock v. Singletary*, 36 F.3d 1014 (11th Cir. 1994); *Spaziano v. Singletary*, 36 F.3d 1028 (11th Cir. 1994); *Routly v. Singletary*, 33 F.3d 1279 (11th Cir. 1994); *Roberts v. Singletary*, 29 F.3d 1474 (11th Cir. 1994); *Ingram v. Zant*, 26 F.3d 1047 (11th Cir. 1994); *Clisby v. Alabama*, 26 F.3d 1054 (11th Cir. 1994); *Weeks v. Jones*, 26 F.3d 1030 (11th Cir. 1994);

Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994); *Alderman v. Zant*, 22 F.3d 1541 (11th Cir. 1994); *Bolender v. Singletary*, 16 F.3d 1547 (11th Cir. 1994); *Porter v. Singletary*, 14 F.3d 554 (11th Cir. 1994); *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994); *Walker v. Jones*, 10 F.3d 1569 (11th Cir. 1994).

1993 circuit cases. See *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993); *Lawson v. Dixon*, 3 F.3d 743 (4th Cir. 1993); *Watkins v. Murray*, 998 F.2d 1011 (4th Cir. 1993); *Pruett v. Thompson*, 996 F.2d 1560 (4th Cir. 1993); *DeLong v. Thompson*, 985 F.2d 553 (4th Cir. 1993); *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993); *Motley v. Collins*, 3 F.3d 781 (5th Cir. 1993); *Webb v. Collins*, 2 F.3d 93 (5th Cir. 1993); *King v. Puckett*, 1 F.3d 280 (5th Cir. 1993); *Knox v. Collins*, 999 F.2d 824 (5th Cir. 1993); *Russell v. Collins*, 998 F.2d 1287 (5th Cir. 1993); *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993); *Nethery v. Collins*, 993 F.2d 1154 (5th Cir. 1993); *Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir. 1993); *Harris v. Collins*, 990 F.2d 185 (5th Cir. 1993); *James v. Collins*, 987 F.2d 1116 (5th Cir. 1993); *Sawyers v. Collins*, 986 F.2d 1493 (5th Cir. 1993); *Beets v. Collins*, 986 F.2d 1478 (5th Cir. 1993); *Free v. Peters, III*, 12 F.3d 700 (7th Cir. 1993); *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993); *Foster v. Delo*, 11 F.3d 1451 (8th Cir. 1993); *Whitmore v. Lockhart*, 8 F.3d 614 (8th Cir. 1993); *Guinan v. Delo*, 7 F.3d 111 (8th Cir. 1993); *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993); *Bannister v. Armontrout*, 4 F.3d 1434 (8th Cir. 1993); *Pickens v. Lockhart*, 4 F.3d 1446 (8th Cir. 1993); *Guinan v. Delo*, 5 F.3d 313 (8th Cir. 1993); *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993); *Otey v. Hopkins*, 992 F.2d 871 (8th Cir. 1993); *Bolder v. Delo*, 985 F.2d 941 (8th Cir. 1993); *Devier v. Zant*, 3 F.3d 1445 (11th Cir. 1993); *Duest v. Singletary*, 997 F.2d 1336 (11th Cir. 1993); *U.S. v. Chandler*, 996 F.2d 1073 (11th Cir. 1993); *James v. Singletary*, 995 F.2d 187 (11th Cir. 1993); *Johnson v. Singletary*, 991 F.2d 663 (11th Cir. 1993); *Bush v. Singletary*, 988 F.2d 1082 (11th Cir. 1993); *Burger v. Zant*, 984 F.2d 1129 (11th Cir. 1993); *Hance v. Zant*, 981 F.2d 1180 (11th Cir. 1993).

Attachment C

ATTACHMENT C: CHART

**STATE-BY-STATE CHART OF STATUTES, PENDING LEGISLATION, CASE LAW AND
POLICY APPLICABLE TO DNA TESTING**

State	Time Limit	Specific DNA Post Conviction Statute	General Post Conviction Statute or Rule	Specific DNA Post Conviction Pending Legislation	Post Conviction DNA Case Law or Policy
Alabama ☆				2002 Ala. Acts House Bill 245; Senate Bill 420	Administrative Policy
Alaska			Alaska Statutes 12.72.010 -.020		
Arizona ☆		Arizona Revised Statutes § 13-4240 13-4240			
Arkansas ☆		Arkansas Code Annotated § 16-112-201 to 205, 207			
California ☆		California Penal Code § 1405			
Colorado ☆			Colorado Revised Statutes 16-12-203; 18-1-410		
Connecticut ☆	3 yrs		Connecticut General Statutes § 52-582		Case by Case
Delaware ☆	3 yrs	11 Delaware Code Annotated § 4504			
Florida ☆	2 yrs	2001 Florida Laws ch. 925.11			
Georgia ☆			Official Code of Georgia Annotated § 9-14-40 (2002)		
Hawaii			Hawaii Rules of Penal Procedure, Rule 40	House Bill 42	
Idaho ☆	1 yrs	Idaho Code § 19-4902 & 19-2719			

Illinois ☆		725 Illinois Compiled Statutes Annotated 5/116-3			
Indiana ☆		Indiana Code 35-38-7-5 1 (§ 1-19)			
Iowa			Iowa Code Annotated § 822.2	Senate File 229	
Kansas ☆		Kansas Statutes Annotated § 21-2512			
Kentucky ☆	2 yrs	Kentucky Revised Statutes Chapter 422 House Bill 4			
Louisiana ☆	Aug. 31, 2005	Louisiana Statutes Annotated Code of Criminal Procedure Art. 926.1			
Maine		15 Maine Revised Statutes §§ 2136 - 2138			
Maryland ☆		Maryland Code Annotated Criminal Procedure § 8-201			
Massachusetts			Mass. Rules Criminal Procedure, Rule 30		
Michigan	Jan. 1, 2006	Michigan Compiled Laws § 770.16			
Minnesota		Minnesota Statutes § 590.01 - 590.06			
Mississippi ☆			Mississippi Code Annotated § 99-39-1	Mississippi House Bill 217	<i>Ellis v. State</i> , No. 97--M--01326
Missouri ☆		Vernon's Annotated Missouri Statutes 547.035			
Montana ☆	1 yr		Montana Code Annotated § 46-21-102(2)		
Nebraska ☆		Nebraska Revised Statutes §§ 29-3001, 4118, 4120-4125			

Nevada ☆			Nevada Revised Statutes Annotated § 34.726		Case by Case; Clark County Review
New Hampshire ☆				New Hampshire House Bill 1258 Senate Bill 30	
New Jersey ☆		New Jersey Statutes Annotated 2A:84A-32a			
New Mexico ☆		New Mexico Annotated 1978, § 31-1A-1			
New York ☆	* 1996	New York Criminal Procedure § 440.30		Assembly Bill Number A09250	
North Carolina ☆		North Carolina Statutes Annotated § 15A-269			
North Dakota			North Dakota Century Code, § 29-32.1		
Ohio ☆					Capital Justice Initiative, a voluntary AG Program
Oklahoma ☆	July 1, 2005	22 Oklahoma Statutes §§ 1371, 1371.1			
Oregon ☆	Jan. 1, 2006	Oregon Statutes Title 14, Ch. 138,			
Pennsylvania ☆		42 Pennsylvania Consolidated Statutes § 9543.1			
Rhode Island		Chapter 10-9.1-10 (RI General laws)			
South Carolina ☆			South Carolina Code Annotated § 17-27-160		Case by Case
South Dakota ☆					<i>Jenner v. Dooley</i> , 590 NW 2d 463, (1999)

Tennessee ☆		Tennessee Code Annotated § 40-30-401-413			
Texas ☆		Texas Code Criminal Procedure art. 64.01-03 thru 05			
Utah ☆		Utah Code Annotated § 78-35a-301-304			
Vermont			13 Vermont Statute Annotated § 7131 - 7137		
Virginia ☆		Virginia Code Annotated § 19.2-327.1			
Washington ☆	Dec. 31, 2004	Revised Code of Washington § 10.73.170			
West Virginia			West Virginia Code § 53-4A-7		
Wisconsin		Wisconsin Statutes § 974.07 (2001)			
Wyoming ☆			Wyoming Statutes § 1-27-101		

☆ Death Penalty State

* Applies only to crimes committed before 1996

ATTACHMENT C:SUMMARY

STATE-BY-STATE SUMMARY OF STATUTES APPLICABLE TO DNA TESTING

Alabama

Pending Legislation in Alabama – (2002 Ala. Acts HB245; SB420)

An individual serving a term of imprisonment or waiting execution for a capital offense to file a motion to obtain forensic Deoxyribonucleic acid (DNA) testing must meet the following criteria:

1. The individual must make an assertion of actual innocence.
2. A prima facie evidence demonstrating that the identity of the defendant was at issue in the trial that resulted in the conviction of the applicant and that DNA testing of the specified evidence would, assuming exculpatory results, exonerate the applicant of the offense for which the applicant was convicted.
3. The chain of custody is sufficient to establish that the evidence has not been altered in any material aspect.
4. The motion must be made in a timely manner and for the purpose of demonstrating actual innocence of the applicant and not to delay the execution of sentence or administration of justice.

Alaska (AS 12.72.010 -.020)

A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief based on newly discovered evidence if (among other requirements):

1. The applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible.
2. The evidence was not known within two years after entry of the judgment of conviction if the claim relates to a conviction; two years after entry of a court order revoking probation if the claim relates to a court's revocation of probation; or one year after an administrative decision

of the Board of Parole or the Department of Corrections is final if the claim relates to the administrative decision.

3. The evidence is not cumulative to the evidence presented at trial; is not impeachment evidence; and establishes by clear and convincing evidence that the applicant is innocent.

Arizona (§ 13-4240)

Convicted felon may at any time request DNA testing of evidence in control of the state that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence. The statute allows for both mandatory testing and discretionary testing.

The court is required to allow for testing if the court finds that all of the following apply:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.
3. The evidence was not previously subjected to DNA testing or was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing.

The court may order DNA testing if the court finds that all of the following apply:

1. A reasonable probability exists that either: the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction; or DNA testing will produce exculpatory evidence.
2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.
3. The evidence was not previously subject to DNA testing or was not subjected to the testing that the petitioner is requesting and that may resolve an issue not previously resolved by the previous testing.

If the results are unfavorable, the court may make further appropriate orders, including requesting that the petitioner's sample be added to CODIS (i.e., matching to unsolved crimes).

Arkansas (§§ 16-112-202-205)

Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of DNA testing, or other tests which may become available through advances in technology, to demonstrate the person's actual innocence if:

1. Identity must have been an issue at trial
2. The testing is to be performed on evidence secured in relation to the trial which resulted in the conviction.
3. The evidence was not subject to the testing because the testing was not available as evidence at the time of trial.
4. Must meet the standard that testing has scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence.
5. The motion is filed with the court in which the conviction was entered.
6. The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

California (Penal Code § 1405)

In order to obtain DNA testing a petitioner must make a motion, under penalty of perjury, that establishes the following:

1. The motion must explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
2. The evidence has not been previously subjected to the requested DNA testing for reasons

beyond the petitioner's control, or a different type of DNA test must be requested having a reasonable likelihood of providing a more probative result.

3. The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material aspect.
4. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
5. The motion is not solely for the purpose of delay.

Colorado Colo. Rev. Stat. 16-11-401.5 ; C.R.S. 18-1-410

Colorado allows post-conviction review, however, the burden of establishing a basis for post-conviction relief rests upon the petitioning defendant. Crim. P. 35(b) enables trial courts to review a sentence to ensure that it is proper before making it final. *Ghrist v. People*, 897 P.2d 809, 812 (Colo. 1995). A court's review of a Crim. P. 35(b) motion focuses on the fairness of the sentence in light of the purposes of the sentencing laws. *Id.* Any decision to reduce a sentence based on a Crim. P. 35(b) motion remains within the sound discretion of the trial court. *Id.* In its analysis, the trial court may consider all relevant and material factors, including new evidence as well as facts known at the time the court pronounced the original sentence. *Spann v. People*, 193 Colo. 53, 55, 561 P.2d 1268, 1269 (1977).

Connecticut (Conn. Gen. Stat. § 52-582 (2001))

Provides an exception to three-year time limit for petition for a new trial, where the petition is based on DNA evidence that was not discoverable or available at the time of the original trial. Therefore, the petition may be brought at any time after the discovery or availability of such new evidence.

Delaware (11 Del. C. § 4504)

A motion for DNA testing must be filed within three years of final judgment, and must be requested to demonstrate the person's actual innocence. The motion may be granted if:

☆ The testing is to be performed on evidence secured in relation to the trial which resulted in the

conviction.

- ☆ The evidence must not have been previously subject to testing because “the technology for testing was not available at the time of the trial.”

- ☆ Identity was an issue in the trial.

- ☆ The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect.

- ☆ The requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person's assertion of actual innocence

- ☆ The relief available is limited to a new trial, and that relief may be granted only if the person establishes by clear and convincing evidence that no reasonable trier of fact would have convicted the person on consideration of the DNA test results in conjunction with all other possible evidence in the case.

Florida (2001 Fla. Laws. Ch. 97)

Any defendant who has been tried, convicted and sentenced by a Florida court may petition the trial court for DNA testing according to the following requirements:

1. Petition is filed within two years after a conviction become final, or petition by October 1, 2003, whichever comes later.

2. Evidence is available and was not subjected to tampering. Also the evidence must not have been tested previously or if it was, a proper explanation of why previous tests were inconclusive must be provided.

3. There is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

4. The defendant must claim innocence and explains how the DNA evidence would exonerate, or mitigate the sentence, received by him or her.

5. Identification must have been genuinely disputed at trial.

Georgia (O.C.G.A. § 9-14-40 (2002))

While there is no specific statute authorizing DNA testing, Georgia allows post-conviction statute permits DNA testing under certain circumstances. DNA testing is ordered by the court on a case by case basis, by filing a writ of *Habeas Corpus* petition.

Hawaii

Pending Legislation in Hawaii – HB 42

This legislation will allow a convicted person in custody access to DNA testing if certain criteria are met.

1. The petitioner must show that evidence to be tested is “related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state; and was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.”
2. DNA test should produce noncumulative, exculpatory evidence relevant to a claim of wrongful conviction.
3. Petitioners may apply at any time after conviction.

Idaho (*Idaho Code* § 19-4902)

A petitioner may, at any time, file a petition before the trial court for DNA testing of evidence collected by the state according to the following requirements:

1. Petition for DNA testing must be filed by July 1, 2002, or within a year of conviction.
2. Petition must request testing of evidence secured in relation to the trial resulting in conviction, which was not subject to the requested testing because the technology for the testing was not available at the time of trial.

3. Petitioner must present prima facie case that identity was an issue in the trial resulting in conviction, and the result of testing must have the scientific potential to produce new evidence showing that petitioner's innocence is more probable than not.
4. Petitioner must present prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.
5. Relief is to be ordered if DNA test results, in conjunction with all other admissible evidence, demonstrate that petitioner is not the person who committed the offense.

Illinois (ch. 725, § 5/116-3)

A petitioner may file a petition before the trial court that entered the judgment of conviction in his or her case requesting the performance of DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction. The defendant must present a prima facie case that:

1. Identity was the issue in the trial which resulted in his or her conviction.
2. The evidence must not have been subject to the testing which is now requested "because the technology for the testing was not available at the time of trial."
3. The results of the testing must potentially produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."

Indiana (§ 35-38-7, As added by P.L.49-2001, SEC.2.)

A person who was convicted of and sentenced for an offense may file a written petition with the court that sentenced the petitioner for the offense to require DNA testing and analysis of any evidence that establishes the following:

1. The evidence is in the possession or control of a court or the state; or otherwise contained in the Indiana DNA data base.
2. The evidence sought to be tested was not previously subjected to DNA testing, or was tested,

but the requested DNA testing and analysis will provide additional information as to the identity of the perpetrator or accomplice; or would have a reasonable probability of contradicting prior test results.

3. The evidence is related to the investigation or prosecution that resulted in the person's conviction.
4. A reasonable probability exists that the petitioner would not have been prosecuted for, or convicted of, the offense if exculpatory results had been obtained through the requested DNA testing and analysis.

Iowa (I.C.A. § 822.2)

“Any person who has been convicted of, or sentenced for, a public offense and who claims: (among other things) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; . . . may institute, a proceeding to secure relief.”

Pending Legislation in Iowa – SF 229

In order to gain approval for testing a petitioner must establish that:

1. Identity was an issue at trial,
2. DNA profiling was not obtainable because testing was not available at the time of the criminal proceedings.
3. The DNA evidence must have “the potential to produce material facts not previously presented and heard that would require vacation of the conviction or sentence in the interest of justice.”
4. Applicant or state has the right to appeal.

Kansas (K.S.A. § 21-2512)

Persons convicted of murder or a or for rape as defined by K.S.A. 21-3502, may petition court for DNA testing that:

1. Is related to the investigation or prosecution that resulted in the conviction;
2. Is in the actual or constructive possession of the state; and
3. Was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Kentucky (KRS Chapter 422)

Authorizes a person who was convicted of and sentenced to death for a capital offense to request, at any time, DNA testing, if the court finds that all of the following apply:

1. Identity was an issue at trial.
2. The biological evidence was not previously subjected to DNA testing or, if it was, the type of testing requested in the motion must be capable of resolving an issue not resolved in the previous test.
3. Applicant must show by a preponderance of evidence that “it is possible to subject the biological evidence to forensic DNA testing or retesting, and an exclusionary result would necessarily exonerate the applicant.”
4. There is a statute of limitations of 2 years.
5. A reasonable probability exists that either: the petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence.
6. The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted. The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.

Louisiana (Code Crim. Pro. art. 926.1 et al.)

A special remedy for post-conviction DNA testing is available until August 31, 2005 (except

that time limit does not apply to defendants sentenced to death prior to the Act's effective date), provides that:

1. The evidence to be tested is available and in a condition that would permit DNA testing.
2. Articulate doubt based on competent evidence must be shown as to guilt of petitioner, and reasonable likelihood that the requested DNA testing will resolve the doubt and establish petitioner's innocence.
3. Application for testing must include factual circumstances establishing the timeliness of the application, identification of the particular evidence for which DNA testing is sought, and affidavit under penalty of perjury that applicant is factually innocent of the crime for which convicted.
4. Relief to be granted only if the DNA test results prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which convicted.

Maine 15 M.R.S. §§ 2137, 2138 (2001)

Person incarcerated for offense potentially punishable by imprisonment for at least 20 years may file a motion for post-conviction DNA analysis of evidence in the case and for a new trial based on the analysis results. To secure testing (among other conditions) the person must:

1. Present a prima facie case that identity was at issue during the person's trial.
2. If the DNA analysis shows that the person is the source of the evidence, the person's DNA record must be added to the state DNA database and data bank.
3. The court must hold a hearing if DNA analysis shows that the person is not the source of the evidence. The person must establish by clear and convincing evidence at the hearing that: only the perpetrator of the crime could be the source of the evidence; the evidence was collected, handled, and preserved in such a way that the court can find that the DNA profile of the analyzed sample is identical to the DNA sample initially collected during the investigation; and the person's exclusion as the source of the evidence, balanced against the other evidence in the case, is sufficient to justify a new trial.

Maryland (Crim. Pro. § 8-201)

Persons convicted of specified homicidal or sexual offenses may petition for DNA testing of scientific identification evidence that the State possesses that is related to the judgment of conviction. A court shall order DNA testing if the court finds that:

1. The evidence has not been previously subjected to the requested DNA testing for reasons beyond the petitioner's control, or a different type of DNA test must be requested having a reasonable likelihood of providing a more probative result.
2. The scientific identification evidence to be tested must have been subject to a chain of custody that is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
3. Identity must have been an issue in the trial that resulted in the petitioner's conviction.
4. There must be a reasonable probability that the DNA testing has the scientific potential to produce results materially relevant to the petitioner's assertion of innocence.

Massachusetts (Mass.R.Crim.P.), Rule 30

Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

Post Conviction Procedure:

1. Any grounds not in the raised in the original motion are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.
2. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.
3. Where affidavits filed by the moving party establish a prima facie case for relief, the judge on motion of any party, be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

Michigan (Mich. Comp. Laws § 770.16 (2000))

Convicted felons may petition not later than January 1, 2006, for DNA testing of biological material identified during the investigation of crime if convict can show prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator to, the crime that resulted in the conviction. The petitioner must also establishes all of the following by clear and convincing evidence:

1. Evidence is available for testing but was not tested or was tested using inadequate technology.
2. If testing proves evidence not linked to convicted person, hearing determines whether new trial is warranted.
3. The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

Minnesota (Minn. Stat. § 590.01 (2001))

Motion for DNA testing must demonstrate the person's actual innocence. Additionally, the motion must meet the following conditions:

1. The evidence must have been secured in relation to the trial which resulted in the conviction;
2. The evidence must not have been subject to testing previously because the technology for the testing was not available at the time of trial or the testing was not available as evidence at the time of the trial.
3. Prima facie case must be shown that identity was an issue in the trial.

Mississippi (Miss. Code Ann. § 99-39-1)

Allows persons convicted of capital crime to petition for DNA testing that was not available at trial. *Ellis v. State*, No. 97-M-01326 which is and unpublished opinion.

Pending Legislation in Mississippi – (Miss. H.B. 217 (2002))

This bill will allow “all prisoners in custody for a capital death penalty conviction shall have

the right to file a post-conviction motion for DNA testing.”

Missouri (V.A.M.S. 547.035)

A person in custody claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person is in custody may file a postconviction motion in the sentencing court seeking such testing. The motion must allege facts under oath demonstrating that:

1. Testing must “have the scientific potential to produce new, noncumulative evidence materially relevant” to the “assertion of actual innocence.” For specific felonies listed in the bill, evidence shall be preserved for an unknown duration.
2. DNA test will demonstrate his innocence of the crime for which he is in custody.
3. There is evidence upon which DNA testing can be conducted; and the evidence must not have been previously tested because the technology for testing was not reasonably available at the time of trial, or the evidence to be tested was unknown or otherwise unavailable to both the movant and his lawyer.
4. Identity must have been an issue in the trial.
5. Granting testing requires judicial finding that a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

Montana (MCA 46-21-102(2))

MCA 46-21-102(2) was added in anticipation of a post conviction DNA testing request. It states “[A] claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.”

Nebraska (Neb.Rev.St. §§ 29-3001, 4118, 4120 - 4125)

At any time after conviction the inmate may file motion with trial court for DNA testing of material related to conviction in possession or control of the state which was not subject to testing or can be retested with greater accuracy using new techniques. Petitioners must meet a requirement that “testing was effectively not available at the time of trial,” with exceptions for “current DNA techniques that provide a reasonable likelihood of more accurate and probative results” and the standard that “testing may produce noncumulative, exculpatory evidence relevant to the claim.”

Nevada (Nev. Rev. Stat. Ann. § 34.726)

While there is no specific statute authorizing DNA testing, Nevada post-conviction statute permits DNA testing under certain circumstances. DNA testing is ordered by the court on a case by case basis, by filing a writ of *Habeas Corpus* petition. Additionally, Clark County, which include Las Vegas and surrounding communities, is reviewing every criminal case to determine whether DNA testing should be conducted.

New Hampshire

Pending Legislation in New Hampshire – (SB30) (HB 1258)

SB30

This bill expands the existing DNA testing program which requires testing of sexual offenders by including DNA testing of violent criminal offenders who have been convicted of the commission or attempted commission of murder, manslaughter, assault, kidnapping, robbery, or burglary. Testing would also be required for juvenile offenders who have been certified for trial as an adult and who are convicted of the commission or attempted commission of the same violent crimes.

HB 1258

This bill allows a person in custody pursuant to the judgment of court to, at any time after conviction or adjudication as a delinquent, apply to the court for forensic DNA testing of any biological material that:

1. Is related to the investigation or prosecution that resulted in the judgment.
2. Is in the actual or constructive possession of this state or the United States or has been retained

by any other person under conditions sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any respect material to the DNA testing.

3. Was not previously subjected to DNA testing, or can be subjected to retesting with different DNA techniques that provide a reasonable probability of reliable and probative results.

New Jersey (N.J.S.A. 2A:84A-32a-b)

Convicted felon claiming actual innocence may request DNA testing if favorable results of the testing could have resulted in acquittal. The court must determine that all of the following criteria has been established before the motion can be granted:

1. The evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion; and the evidence has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced or altered in any material aspect.
2. The identity of the defendant was a significant issue in the case.
3. The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the offender.
4. The requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted.
5. The evidence sought to be tested was not previously tested, or it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results.
6. The motion is not made solely for the purpose of delay.

New Mexico (NMSA 1978, § 31-1A)

A person may petition for DNA testing when such tests were not available at the time of trial

and will establish his or her innocence. The petition must be filed prior to July 1, 2002. To obtain testing, the petitioner must prove by clear and convincing evidence (among other conditions) that:

1. Identity was an issue in the trial.
2. The evidence was not tested previously because the technology for DNA testing was not available at the time of the trial, and if the evidence for which testing is sought had been admitted at trial, a reasonable judge or jury would not have been able to find him guilty beyond a reasonable doubt.
3. The evidence was secured and preserved by the law enforcement agency that investigated the case, and was subject to a chain of custody sufficient to establish that it was not substituted, tampered with, replaced or altered in any material respect.
4. testing must “be highly likely to produce evidentiary results that would have been admissible at the...initial trial; and if the evidence...had been admitted...a reasonable judge or jury would not have been able to find [the petitioner] guilty beyond a reasonable doubt.”

New York (Crim. Pro. Law § 440.30)

Post-conviction DNA testing remedy is limited to cases involving convictions occurring before 1996. Before the court can order testing, the court must find that there must be a reasonable probability that the verdict would have been more favorable to the defendant if such testing had been.

Pending Legislation in New York – A09250

This bill amends the criminal procedure law to authorize an order for DNA testing in support of a motion to vacate a judgment regardless of when the defendant’s conviction occurred.

North Carolina (N.C.G.S.A. § 15A-269)

A defendant may make a motion before a trial court for performance of DNA testing of any biological evidence that meets all of the following conditions:

1. The requested evidence is material to the defense.

2. Is related to the investigation or prosecution that resulted in the judgment.
3. The DNA was either not tested or newer testing will result in greater accuracy and probity or is likely to contradict prior results.
4. Granting post-conviction DNA testing requires reasonable probability that the verdict would have been more favorable to the defendant if the requested testing had been done.

North Dakota N.D. Cent. Code, § 29-32.1- (2002))

An applicant for post-conviction relief has the burden of establishing grounds for relief. Post-conviction proceedings are civil in nature and a trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. A party opposing a motion for summary disposition under the Uniform Post-Conviction Procedure Act must raise an issue of material fact. If the moving party establishes there is no genuine issue of material fact, the burden shifts to the non-moving party to show a genuine issue of fact exists. The resisting party may not merely rely on pleadings or unsupported conclusory allegations but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.

Section 29-32.1-12(2), N.D.C.C., authorizes denial of an application for post-conviction relief on the ground of misuse of process. A defendant is not entitled to post-conviction relief if the contentions are simply variations of previous arguments. An applicant for a post-conviction relief is only entitled to an evidentiary hearing if a reasonable inference raises a general issue of material fact.

Ohio

The State Attorney General's office has a voluntary program for death row inmates called the Capital Justice Initiative. A copy of the Capital Justice Initiative is available on the Ohio Attorney General's website: <www.ag.state.oh.us> This program allows the petitioner to make an application to the Ohio AG's office for DNA testing if:

1. The DNA was not subjected to previous testing.
2. The expected results must be exonerative in nature and outcome determinative.

3. The results are retained by the AG's office for use as evidence and are of public record.

Oklahoma (title 22, §§ 1371, 1371.1)

Makes provision, until July 1, 2005, for committed defendants to request DNA testing where the defendant is factually innocent. Factual innocence requires the defendant to establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence.

Oregon (OR ST T. 14, Ch. 138)

Motions for DNA testing of specific evidence must be filed by January 1, 2006. A person may file in court a motion requesting the performance of DNA testing if the person was convicted for an aggravated murder or a felony, and present a prima facie showing that:

1. The identity of the perpetrator was an issue in the trial resulting in conviction or, for a retarded person, identity should have been an issue in the trial or plea agreement.
2. DNA testing, assuming exculpatory results, would establish the actual innocence of the person or entail a mandatory sentence reduction.
3. A reasonable possibility that testing will produce exculpatory evidence that would establish innocence or a mandatory sentence reduction.

Pennsylvania (S.B. 589 pn 2169, effective September 8, 2002, 42 P.A.C.S. §9543.1)

TheA convicted felon claiming actual innocence may request DNA testing if the evidence is related to their conviction provided that:

1. The to individuals did not request DNA testing at trial, and was convicted after 1995.
2. Petitioner must make a prima facie case showing that the identity was at issue.
3. No right to appeal.

4. Applicant must assert “actual innocence of the offense” in order to meet the standard for postconviction DNA tests.
5. In a capital case, the motion must “assert the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance if the applicant's exoneration of the conduct would result in vacating a sentence of death; of, in a capital case, assert that the outcome of the DNA testing would establish a mitigating circumstance.”

Rhode Island Chapter 10-9.1-10 (RI General Laws)

Statute applies to any person “convicted of and sentenced for a crime and who is currently serving and actual term of imprisonment and incarceration pursuant to said sentence,” and authorizes a person to “file a petition with the superior court requesting the forensic DNA testing of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court.” The superior court shall order testing if it finds that:

1. A reasonable probability exists that the defendant would not have been prosecuted or convicted if the DNA results were exculpatory.
2. The evidence exists and is amenable to DNA testing.
3. The evidence or a portion of it was not previously tested using DNA testing or that the testing required will resolve an issue not addressed by previous testing.
4. The petition is presented in order to show actual innocence and not to delay the “administration of justice.”

South Carolina (S.C. Code Ann.§ 17-27-160)

Authorizes post-conviction DNA testing where inmate convicted of capital crime. The rules of discovery are applicable to DNA testing requests. It has been allowed when an appropriate showing has been made to the court on a case by case basis.

South Dakota (Case Law) - *Jenner v. Dooley*, 1999 SD 20; 590 N.W.2d 463,(1999);*Davi v. Class*, 2000 SD 30; 609 N.W.2d 107(2000).

Decisions allow persons access to DNA testing where they have been convicted of a capital crime and claim actual innocence.

Jenner v. Dooley, 1999 SD 20; 590 N.W.2d 463,(1999)

After careful consideration, the following guidelines apply to requests to post-conviction scientific analysis:

1. The evidence and test results must meet the Daubert standard for scientific reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A showing must be made that if the matter were presently tried the defendant would be entitled to the testing and the results would be admissible.
2. Because convicted defendants may not obtain reconsideration of their cases whenever some new technology promises to reveal another angle on the evidence against them, it must be shown that a favorable result using the latest scientific procedures would most likely produce an acquittal in a new trial.
3. Testing should not be allowed if it imposes an unreasonable burden on the State. See generally *State v. Fowler*, 1996 SD 78, P21, 552 N.W.2d 92, 96. An exorbitant cost may be grounds for denial, for example, especially if anticipated test results promise to be less than definite.
4. If testing is allowed, the court should impose reasonable safeguards to ensure the preservation and integrity of the evidence. With biological evidence, courts have generally found post-conviction testing most suitable when
 - (a) identity of a single perpetrator is at issue;
 - (b) evidence against the defendant is so weak as to suggest real doubt of guilt;
 - (c) the scientific evidence, if any, used to obtain the conviction has been impugned; and, (d) the nature of the biological evidence makes testing results on the issue of identity virtually dispositive.

Tennessee (Tenn. Code Ann. §§ 40-30-401-413,)

A person convicted of and sentenced for commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence. The court shall order DNA analysis if it finds that:

1. The evidence is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

2. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis.
3. The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis.
4. The application for analysis is made for the purpose of demonstrating actual innocence and not to unreasonably delay the execution of sentence or administration of justice.

Texas (Tex. Code Crim. Proc. art. 64.01-03)

A convicted person may submit to the convicting court a motion for DNA testing of evidence containing biological material if:

1. The evidence exists and is in a condition making DNA testing possible; and has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.
2. The evidence must not have been previously subjected to DNA testing: because DNA testing was either not available; or if it was available, the test was not technologically capable of providing probative results. However, if the evidence was previously subjected to DNA testing, it still can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.
3. Identity must be an issue in the case and convicted person must show reasonable probability that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
4. The request for the proposed DNA testing must not be made in order to unreasonably delay the execution of sentence or administration of justice.

Utah (Utah Code Ann. § 78-35a-301-304 (2002))

Person asserting actual innocence under oath may file a petition identifying specific evidence for DNA testing, the petition must allege that:

1. Evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted.
2. The chain of custody is sufficient to establish that the evidence has not been altered in any material aspect.
3. The petition identifies the specific evidence to be tested and states a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support.
4. The evidence was not previously subjected to DNA testing, or if the evidence was tested previously, the evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing.
5. The evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's actual innocence.
6. The court may not order DNA testing where DNA testing was available at the time of trial and the person did not request DNA testing or present DNA evidence for tactical reasons.
7. The defendant is entitled to relief only if the test results demonstrate by clear and convincing evidence that the defendant is actually innocent.

Vermont 13 V.S.A. § 7131 - 7137

According to the Vermont Attorney General's office there has yet to be a post-conviction challenge based on DNA testing.

A prisoner who is in custody under sentence of a court and claims the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or of the state of Vermont, or is otherwise subject to collateral attack, may at any time move the superior court of the county where the sentence was imposed to vacate, set aside or correct the sentence. The court may entertain and decide the motion without requiring the production of the prisoner at the hearing but the prisoner may attend if he so requests. If the court finds that the judgment was made without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to make the judgment vulnerable to collateral attack, it shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

Virginia (Va. Code Ann. § 19.2-327.1 (2001))

Convicted felon may petition to circuit court that entered the original conviction for new testing of biological evidence if:

1. The evidence was not known or available at the time of conviction.
2. The evidence was subject to chain of custody sufficient to establish integrity.
3. The evidence is materially relevant, non-cumulative, and necessary and may prove actual innocence.
4. The convicted person has not unreasonably delayed the filing of petition after the evidence or testing procedure became available.
5. There is no right to appeal.
6. In a writ of actual innocence, the petitioner must allege “the reason or reasons the evidence will prove that no rational trier of fact could have found proof of guilty beyond a reasonable doubt.”

Washington (Rev. Code Wash. (ARCW) § 10.73.170 (2002))

Until the end of 2004, imprisoned persons who have been denied post-conviction DNA testing may submit a request to the county prosecutor for post-conviction DNA testing, if:

1. The DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards, or DNA testing technology was not sufficiently developed to test the DNA evidence in the case.
2. Prosecutor must review the request based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis, and have the testing done if it is warranted.
3. Denial of a testing request by the county prosecutor may be appealed to the State Attorney

General.

West Virginia W. Va. Code § 53-4A-7

Post trial DNA test results, which were not introduced at trial, could be considered in ruling on habeas petition.

Wisconsin Wis. Stat. § 974.07 (2001)

Allows a convict at any time after being convicted, to make a motion in the court in which they were convicted for DNA testing if all of the following apply:

1. The evidence is relevant to the investigation or prosecution that resulted in the conviction.
2. The evidence is in the actual possession of a government agency. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.
3. The evidence has not previously been subjected to testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.
4. For applications involving claims of innocence, must be a reasonable probability that no prosecution or conviction would have occurred had exculpatory DNA testing results been available.
5. For applicants relating to wrongful sentencing, the conviction or sentence in a criminal proceeding would have been more favorable.
6. May order testing if the conviction or sentence would have been more favorable.

Wyoming Wyo. Stat. § 1-27-101 (2002)

No Statute and no provision for post conviction DNA testing.

Attachment D

ATTACHMENT D

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	No. of Death Row Inmates	
		As of 12/31/01	Denied DNA Test
FED	No Policy Because No Inmate Has Ever Requested a DNA Test	23	0
AL	Administrative Policy	181	0
AR	ACA § 16-112-201-205; 207	40	0
AZ	Az. St §13-4240	121	0
CA	Ca. Pen. Code § 1405	606	1
CO	Case By Case Basis	6	0
CT	Conn. Gen. Stat. § 52-582 (2001)	7	0
DE	Del. Code. Ann. Tit. 11 § 4504	15	0
FL	Fl. St. § 925.11	370	0
GA	No Statute	121	0
ID	Id. St. 1949.02 and 1927.19	22	1
IL	Il. St. Ch. 725 § 5/116-3	160	1
IN	In. 35-38-7-5	36	0
KA	KSA 21-25-12	4	0
KY	KRS Ch. 422 HB 4	37	0
LA	La. C.Cr.P. Art. 926.1	90	0
MD	Md. Crim. Proc. § 8-201	14	0

ATTACHMENT D

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	As of 12/31/01	No. of Death Row Inmates Denied DNA Test
MO	Rev. St. Mo. 547.035	70	1
MS	Judicially Created Standard in <u>Ellis v. State</u> , 97-M-01326.	66	0
MT	Can Be Provided By MCA 46-21-102	6	0
NE	Ne. St. § 29-4120	7	0
NH	No Statute or Provision	0	0
NJ	NJ St. 2a:84A-32a	14	0
NM	NM St § 31-1A-1	3	0
NY	NY C. Cr. P. § 440.30	5	0
NC	NC Gen. Stat. 15A-269	215	0
NV	By Court Order	87	3 ⁶⁹
OH	Voluntary AG Program	204	0
OK	OK Stat. Tit. 22 § 1371	103	1
OR	OR St. T. 14 Ch. 138	25	0
PA	42 P.A.C.S. 9543.1	244	0
SC	Case By Case Basis	73	1

⁶⁹Estimate.

ATTACHMENT D

DENIALS OF DNA TESTING TO DEATH ROW INMATES

Fed./State	Post-Conviction DNA Testing Procedure	No. of Death Row Inmates	
		As of 12/31/01	Denied DNA Test
SD	Judicially Created Standard in <u>Jenner v. State</u> , 590 N.W.2d 463 (S.D. 1999).	5	1
TN	Tn. Code Ann. 40-30-401	95	0
TX	Tx. Code Crim. Pro. 64.01-05	431	8
UT	Ut. Code Ann. 78-35A § 301-304	11	0
VA	Va. Code § 19.2-327.1	24	0
WA	R.C.W. 10.73.170	11	0
WY	No Statute	2	0
TOTAL		3554	18 (.51%)

Source: Committee telephone interviews with the Department of Justice and with Attorney Generals Offices for each State that has a capital punishment statute.

Attachment E

ATTACHMENT E

The Majority Report cites five cases to support its contention that incompetent and underfunded counsel resulted in “innocent” defendants being convicted. Majority Report at 19-20. A careful examination of the facts in these five cases does not support this assertion.

1. *Albert Burrell* Burrell was sentenced to death for the 1986 robbery-murder of an elderly couple in Louisiana. (All facts discussed herein are from a trio of investigative news stories about this case published by a local Louisiana newspaper. See Christopher Baughman and Tom Guarisco, “Justice for None”, THE BATON ROUGE SUNDAY ADVOCATE, March 18 - 20, 2001, at A-1.) In 2000, a state judge granted Burrell a new trial on the basis that prosecutors had concealed the fact that they had given a reduced sentence to a prison informant who had testified against him. Burrell’s codefendant also was given a new trial – in part on the basis that prosecutors had concealed evidence placing the murder weapon in Burrell’s hands rather than the codefendant’s. The principle evidence against Burrell was the testimony of Janet Burrell, his ex-wife and mother of his child. Janet Burrell stated at trial that she saw Burrell on the night of the murders with a large amount of cash and with blood on his clothing, and that Burrell admitted to her that he had committed the crime. Burrell’s brother also testified against him. Janet Burrell later recanted her testimony, but subsequently withdrew the recantation, explaining that she had been pressured to recant by a friend of the Burrell family. Burrell’s brother also recanted. The judge who ordered a new trial did not credit these recantations, and the original prosecutor has stated that he would try the case again. The current prosecutor, however, declined to retry the case. His office cited the lack of physical evidence – even the house where the crimes had occurred had been demolished. And as press accounts noted at the time, “[m]emories of witnesses and investigators have faded,” and key testimony is “tainted” – including that of Janet Burrell, who could easily be impeached with her prior recantation. Finally, although Burrell’s habeas counsel attacked trial counsel’s supposed “shocking incompetence” – a common postconviction petition tactic – press accounts have noted that counsel established an alibi for Burrell at trial, attacked the prosecution’s lack of physical evidence or percipient witnesses, and highlighted the inconsistencies in the prosecution testimony. Trial counsel’s performance was not a basis for the court’s 2000 grant of a new trial.

2. *Federico Martinez-Macias* Macias was sentenced to death in Texas for the 1983 home-invasion robbery and murder of an older couple for whom he had once worked. Macias’s codefendant, whom witnesses positively identified as being at the scene with an associate, testified that Macias was that associate and that Macias was the actual killer. *Martinez-Macias v. Collins*, 810 F. Supp. 782, 792-95 (W.D. Tex. 1991). A habeas court found that Macias’s trial counsel should have called a witness who would have given Macias an alibi, despite counsel’s concerns that the witness was not credible and that his testimony would have opened to the door to evidence of Macias’s past crimes. *Id.* at 797, 803-05. Macias had over two dozen prior arrests, including two robbery arrests and one conviction, and a recent burglary arrest. *Id.* at 819 n.75. The prosecution also was prepared to present evidence that, during the previous year, Macias had

assaulted and robbed at their home an elderly couple for whom he had once worked. *Id.* at 799-800. The habeas court second-guessed trial counsel's tactical decision and found that he should have deemed this last offense too dissimilar to the present crime to be admissible as to identity under Texas law. *Id.* at 802-03. That court concluded that defendant had received ineffective assistance, despite finding that trial counsel – who had ten year's experience as an assistant district attorney and had "tried seven or eight capital murder cases" – "is, and in 1984 was, one of the best attorneys in El Paso." *Id.* at 790. (Incidentally, the habeas court also found ineffective assistance in counsel's failure to present evidence at the sentencing phase that, among other things, Macias never shot heroin in front of his stepchildren, but "would [only] take heroin behind the closed bathroom door." *Id.* at 816.) Ten years after the murders, "[l]ocal prosecutors said they were unable to get a new indictment [of Macias] because a witness had died and the memories of others are fading." "Man Freed After 9 Years on Death Row", THE DALLAS MORNING NEWS, June 25, 1993, at 14D.

3. *Gary Nelson* The Majority Report describes Nelson as having been "exonerated" after 11 years on death row. Nelson was convicted in Georgia in 1980 of the rape and murder of a six-year-old girl. His conviction was reversed in 1991 when it was discovered that the prosecution had concealed evidence that undermined a hair analysis linking Nelson to the victim. Although the State had argued at trial that a limb hair found on the victim closely linked Nelson to the crime, prosecutors had failed to turn over an FBI report stating that limb hairs are generally unsuitable for identification purposes. *See Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991). Although this error required reversal, other evidence still pointed to Nelson. The victim was last known to have gone to a house that Nelson shared with a roommate; Nelson claimed to have been working on his car at the time, and a man was seen working on a car at the house when the victim arrived; Nelson had a history of violence towards women, and had recently killed a man in a fight outside of a bar; and a child witness identified Nelson as "look[ing] like" the man she saw with the victim. Jeanne Cummings, "Attorneys: Lies, Sloppy Defense Landed Client on Death Row – Testimony on Slaying Tainted, New Team Argues", THE ATLANTA JOURNAL-CONSTITUTION, August 15, 1989, at A1. Even the court that reversed Nelson's conviction on the basis of the withheld FBI report found that "the jury in this case might have arrived at the same verdict if the state had not suppressed this critical evidence." *Nelson*, 405 S.E.2d at 252. According to contemporaneous news accounts, local prosecutors were considering retrying Nelson but were having great difficulty locating key witnesses 13 years after the crime had occurred. *See* Mark Curriden, "Man Convicted of Rape, Killing Could Go Free – Court Cited Evidence Withheld in '80", THE ATLANTA JOURNAL-CONSTITUTION, October 28, 1991, at F1; Jeanne Cummings, "Murder Convict on Death Row Wins New Trial – 'Critical' Evidence Withheld, Court Says – 'Now a Very Old File'", THE ATLANTA JOURNAL-CONSTITUTION, at C1.

4. *Dennis Leon Fritz* Although the Majority Report discusses Fritz's case in the context of "innocent people [who] are sentenced to death" – and several tabloid-style news stories mistakenly refer to Fritz as having received a death sentence – the courts have made clear that Dennis Fritz "was sentenced to life imprisonment." *Fritz v. Champion*, 66 F.3d 338, No. 94-6327, September 11, 1995 (10th Circuit). At his trial, the strongest evidence used against Fritz was a state forensic chemist's opinion that numerous hairs found at the crime scene were linked to Fritz and his codefendant. *See Fritz v. Oklahoma*, 811 P.2d 1353, 1362 (Okla. Crim. App. 1991).

Since then, it has been discovered that prosecutors had suppressed a report by the first state chemist to analyze the evidence in the case; she had concluded that none of the hairs at the crime scene could be linked to Fritz or his codefendant. *See* Diana Baldwin, “Experts Disagree on Hair Analysis”, *THE DAILY OKLAHOMAN*, May 27, 2001, at 1A. It is not apparent why Fritz’s counsel should be faulted for neglecting to exploit evidence that prosecutors had failed to disclose.

5. *Dennis Williams* Alone among the five examples cited in the Majority Report, evidence shows that Williams is actually innocent, and Williams was in fact sentenced to death. Again, however, the flaws in Williams’s case have little to do with his public defender. Instead, Williams appears to be another victim of a culture of gross corruption and governmental misconduct in Cook County, Illinois. His case merits a thorough discussion of its facts and the context in which it arose.

The Special Case of Cook County

Dennis Williams was arrested after a neighbor who had a grudge against him linked him to the brutal kidnaping, gang rape, and double murder of a young couple in Chicago in 1978. *See People v. Williams*, 444 N.E.2d 136, 139-40 (Ill. 1983). Chicago police and prosecutors manufactured the rest of the case against Williams. Paula Gray, an illiterate and mildly retarded woman who testified against Williams, was taken by police to the abandoned townhouse where the crimes occurred. She later recounted, “They kept yellin’, ‘This is where she got raped and killed – Dennis shot her twice in the head, didn’t he? They takes me to a motel an’ says, ‘The same thing that happened to the lady, it will happen to you.’” William Freivogel, “Lessons from 13 Innocent Men”, *ST. LOUIS POST-DISPATCH*, April 30, 2000, at B3. When Gray nevertheless refused to testify at one of the trials, prosecutors brought murder and perjury charges against her; she was convicted and sentenced to 50 years in prison. Gray was later persuaded to testify against Williams at his retrial in exchange for having all charges against her dropped. Prosecutors allowed Gray to lie and testify that she had not been promised anything in exchange for her testimony. *See* Ken Armstrong, Maurice Possley, “Reversal of Fortune”, *CHICAGO TRIBUNE*, January 13, 1999, at 1. Williams’s prosecutors also concealed that burglary charges had been dropped against a jail informant who agreed to testify against Williams. The lead prosecutor also falsely stated to the jury that hair found in Williams’s car matched the victims. *Id.*

Seventeen years after the murders occurred, private investigators discovered records of a police interview conducted five days after the bodies were found – records that were never turned over to defense attorneys – which implicated other suspects. Two of those suspects confessed in 1995, their guilt was confirmed by DNA tests in 1996, they and a third new defendant were sentenced to long prison terms in 1997, and Williams and his codefendants were released. *See* Janan Hanna, “Man Convicted of Ford Heights Killings Gets 65 Years”, *CHICAGO TRIBUNE*, January 30, 2001, at 3. One possible reason why one new suspect so readily confessed in 1995, even before any DNA evidence was tested, is that he was already serving a long prison term. He

had murdered a woman in 1991, near the same location where the 1978 murders had occurred.

Appellate courts have reversed and remanded five Cook County murder and attempted murder convictions because of misconduct by the same assistant district attorney who prosecuted Williams. *See* “Reversal of Fortune”, *supra*. Yet two years after Williams’s trial, that prosecutor was made supervisor of Cook County’s south suburban office by then-State’s Attorney Richard M. Daley. In 1985, a death sentence secured by the same prosecutor was reversed by the Illinois Supreme Court, which accused him of “destroy[ing] the aura of dignity in the courtroom”; the prosecutor had personally attacked the defense attorney, judge, and a defense witness, and had physically intimidated the defense lawyer. *Id.* Yet six months after this reprimand, Daley promoted the same individual to direct Cook County’s felony division, and later placed him in charge of training prosecutors and monitoring misconduct. *Id.*

Nor is the case of Dennis Williams’s prosecutor an anomaly in Cook County. In 1984, a state appellate court reversed a conviction secured by another prosecutor, describing her actions as “a veritable hornbook of ‘do nots.’” As a result of that court’s rebuke, this person became one of only two prosecutors ever sanctioned for trial misconduct by the state’s lawyer disciplinary agency, which expressed wonder that she had not been disciplined internally by her office. Yet the same prosecutor was later elected a Cook County judge, after receiving the crucial endorsement of the local Democratic Party through the influence of her former supervisor, now-Mayor Richard M. Daley. *See* Ken Armstrong, Maurice Possley, “Break Rules, Be Promoted”, CHICAGO TRIBUNE, January 14, 1999. Another Cook County assistant district attorney, who had three convictions reversed for misconduct – including a reversal for knowingly using perjured testimony – has since been made a state appellate judge. *Id.* Yet another prosecutor had convictions for two murders, a rape, and an attempted murder reversed for what different appellate courts labeled “outrageous” courtroom behavior and “brazen misconduct.” Five months after another court described his conduct as “an insult to the court and to the dignity of the trial bar,” Daley promoted this man to supervise the Cook County narcotics unit. *Id.*

A Chicago Tribune investigation found that 42 Cook County prosecutors who have had convictions reversed for misconduct later were made judges. A prosecutor who had a murder conviction overturned for misconduct subsequently was appointed the City of Chicago’s Inspector General. Although many of these cases only involved improper argument – such as a prosecutor who told jurors that police “would have done us all a favor by killing [the defendant]” – many cases also involved failing to disclose evidence favorable to the defendant, allowing witnesses to lie, or racial discrimination in jury selection. “Break Rules, Be Promoted”, *supra*. The Tribune’s investigation described “a culture that fosters misconduct” in the Cook County State’s Attorney’s office. Notably, the same leadership also presided over what is one of the more horrific of the authentic “actual innocence” cases, the conviction of Anthony Porter. *See* John Kass, “With Porter Free, Who’s Sorry Now? Not Our Mayor”, CHICAGO TRIBUNE, February 11, 1999, at 3. When asked if he would apologize to Porter after his exoneration, the former State’s Attorney responded: “I’m not the person who has to apologize. America has to apologize.” *Id.*

With all due respect, all of America is not Cook County under the Daley Administration. The extraordinary level of corruption and abuse that appears to have infected government operations there is fairly unique in the United States. While all Americans should be concerned about the crisis of government in Chicago, the particular problems that Daley's leadership has entailed cannot be used to indict all of America. Nor can Cook County's problems be blamed on anything other than a basic failure to hold leaders accountable for their actions, and to insist on integrity in government. When civic ethics are not enforced, fair and efficient operation of government invariably fades. The changes that Cook County needs are specific to that area, and can only ever be implemented through local action. Cook County's problems cannot justify the national mandates of this bill, nor are those problems even remotely addressed by S. 486's provisions.