Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Opening Statement of U.S. Senator Russ Feingold Senate Judiciary Committee, Subcommittee on the Constitution Hearing "The Adequacy of Representation in Capital Cases"

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As a result of the litigation before the Supreme Court challenging the constitutionality of lethal injection as a method of execution, there is currently a de facto moratorium on executions in this country. This presents us with an opportunity while executions are paused to take stock of one of the most serious problems still facing many state capital punishment systems: the quality of representation for capital defendants. That is the purpose of this hearing.

Specifically, today we will examine the adequacy of representation for individuals who have been charged with and convicted of capital crimes at the state level. We will discuss the unique challenges of capital litigation, and the unique resources and training capital defenders need to be fully effective.

The Supreme Court held in 1932, in Powell v. Alabama, that defendants have the right to counsel in capital cases. The Court explained that an execution resulting from a process pitting 'the whole power of the state' against a prisoner charged with a capital offense who has no lawyer, and who may in the worst circumstances even be illiterate, 'would be little short of judicial murder.'

Those are strong but appropriate words. Over the following decades the Supreme Court continued to recognize the importance of the right to counsel, ultimately concluding in 1984 in Strickland v. Washington that the Sixth Amendment guarantees not just the appointment of counsel, but the effective assistance of counsel.

Yet as the witnesses today know from the variety of perspectives they bring to this issue, these constitutional standards are just the beginning. The work done by a criminal defense attorney at every stage of a capital case, and the experts and resources available to that attorney, can literally mean the difference between life and death.

This is not a hypothetical. The right to effective assistance of counsel is not just a procedural right; it's not just lofty words in a Supreme Court decision. Failing to live up to that fundamental obligation can lead to innocent people being put on death row.

Just last week an inmate in North Carolina, Glen Edward Chapman, was released after nearly 14 years on death row, bringing the number of death row exonerees to 128 people. A judge threw out Mr. Chapman's conviction for several reasons, including the complete failure of his attorneys

to do any investigation into one of the murders he was convicted of committing - a death that new evidence suggests may not have been a murder at all, but rather the result of a drug overdose. Local prosecutors decided not to retry Mr. Chapman, and dismissed the charges. According to North Carolina newspapers, Mr. Chapman's incompetent defense was mounted by two lawyers with a history of alcohol abuse. News reports indicate that one admitted to drinking more than a pint of 80-proof rum every evening during other death penalty trials, and the other was disciplined by the state bar for his drinking problems.

Yet despite all this, Mr. Chapman on the day of his release is quoted as saying, 'I have no bitterness.' This after nearly 14 mistaken years on death row.

Mr. Chapman's story is astounding, but it is not unique. The quality of representation in capital cases in this country is uneven, at best. And the story also illustrates a critical point: The right to counsel is not abstract. It absolutely affects outcomes. Supreme Court Justice Ruth Bader Ginsburg has stated it about as plainly as possible: 'People who are well represented at trial do not get the death penalty.'

Obviously, inadequate representation is not unique to capital cases. But the challenges presented in a death penalty case are unique, and the consequences of inadequate representation catastrophic. Capital cases tend to be the most complicated homicide trials, and the penalty phase of a capital case is like nothing else in the criminal justice system. To do these cases right, at the trial, penalty, appellate, and state post-conviction stages, requires vast resources and proper training - not only for the defense attorneys who need to put in hundreds of hours of work, but also investigators, forensic professionals, mitigation specialists and other experts.

Yet those resources are not available in all too many cases. We will hear more about that from our witnesses today. These realities have led people of all political stripes - both supporters and opponents of the death penalty - to raise grave concerns about the state of capital punishment today. Judge William Sessions, the former FBI Director appointed by President Reagan, was unable to join us in person today, but he submitted written testimony, which without objection I will place in the record. In it he notes that while he supports capital punishment, '[w]hen a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined.'

Unlike Judge Sessions, I oppose the death penalty. But as long as we have a death penalty, we owe it to those who are charged with capital crimes, we owe it to our criminal justice system, and we owe it to the principles of equal justice on which this nation was founded, to make sure they have good lawyers who have the resources they need to mount an effective defense.

This is not just the right thing to do. It is not just a high aspiration we should try to achieve at some point in the distant future. It is a moral imperative. And it is one that this country has failed to live up to, for far too long."