STATEMENT BEFORE THE UNITED STATES SENATE JUDICIARY

COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION

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The Adequacy of Representation in Capital Cases

Honorable Members of the United States Senate Judiciary Committee Subcommittee on the Constitution:

Thank you for the opportunity to appear before this Committee. There remains considerable doubt about America's system of capital punishment. Although we have now executed 1100 people in this country during the last 30 years,[1] there are fundamental problems with the fairness, reliability and propriety of the death penalty in state and federal courts. In the last few years, we have uncovered a shocking rate of error in death penalty cases. Nearly 130 death row prisoners have been released from death row after being proved innocent or exonerated.[2] Hundreds of other death row prisoners have had their convictions and death sentences overturned after it was established that they were illegally convicted or sentenced.[3] Most disturbingly, there has been evidence that innocent people may have been executed.[4] These problems with capital punishment have lead to a decline in the rate of executions and a decrease in the death sentencing rate in recent years.[5] A few months ago, New Jersey became the first state since the 1960's to completely abolish capital punishment. However, capital punishment remains a costly and dominant feature of the state and federal criminal justice system.

Many jurisdictions have implemented no reforms or review of their death penalty schemes and the practice of executing prisoners and imposing death sentences goes on without much reflection or review. Perhaps the single most significant problem with the administration of capital punishment is the inadequacy of indigent defense for capital defendants. Without competent and skilled counsel in death penalty cases, there can be no

reliability or fairness in the outcomes of these proceedings.

Last month, I testified as an expert in a death penalty case in Oklahoma where a court was examining whether James Fisher had received adequate legal assistance at his capital trial. It was my second trip to Oklahoma on this case. Ten years ago, a federal appeals court reversed Mr. Fisher's capital murder conviction and death sentence because his appointed counsel maintained a trial schedule "so heavy he sometimes would finish one case in the morning and begin trying a new case in the afternoon while the jury was still deliberating."[6] He was completely unfamiliar with the State's evidence and witnesses, conducted no investigation for Mr. Fisher, and called no witnesses. At the penalty phase, counsel called no witnesses and waived opening and closing arguments.[7] Not surprisingly, Mr. Fisher was sentenced to death.

At his new trial in 2005, Mr. Fisher was represented by counsel who was abusing alcohol and suffering from drug addiction. This attorney was suspended from the practice of law and entered a rehab facility three months after Mr. Fisher's trial. At trial, the lawyer presented none of the available evidence or witnesses who could have assisted Mr. Fisher. Prior to trial, the lawyer got angry at Mr. Fisher, called him derogatory names and asked the guards to remove Mr. Fisher's handcuffs so he could "kick his ass."[8] When Mr. Fisher complained to the court and insisted he would rather represent himself than be represented by his new counsel, he was barred from court during the trial. Mr. Fisher was therefore not present during his trial, when his impaired lawyer presented almost none of the available evidence and he was found guilty and sentenced to death.

Legal Assistance for Capital Defendants at Trial is Inadequate

Unfortunately, examples of inadequate representation are not exceptional. Alabama has no state public defender offices and trial judges appoint counsel, many of whom have little training or experience in capital litigation. Of the 203 people currently on Alabama's death row, more than half (59%) were represented by appointed lawyers whose compensation for preparing the case was capped at $1000 by state statute.[9] There are very few mitigation experts or investigative services available and even though compensation has improved in recent years, compliance with the ABA Guidelines on Adequate Representation in Capital Cases is almost never accomplished.

There are people on death row in Texas who were defended by attorneys who had investigative and expert expenses capped at $500.[10] In some rural areas in Texas, lawyers have received no more than $800 to handle a capital case.[11] People still on Virginia's death row were provided lawyers who were effectively paid an hourly rate of less than $20 an hour.[12] In Pennsylvania, there are currently death row prisoners who were sentenced to death in Philadelphia in the 1980s and 1990s when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1700 plus $400 for each day in court.[13] Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.[14]

Underfunded indigent defense has predictably caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. Indigent accused facing execution have been represented by sleeping attorneys,[15] drunk

attorneys,[16] attorneys who are almost completely unfamiliar with trial advocacy, criminal defense generally, or death penalty law and procedure in particular,[17] and attorneys who otherwise cannot provide the assurance of reliability or fairness in the client's conviction and death sentence.

Even in states where there are public defender systems, funding and compensation for attorneys remains low and resources for investigation and experts is scarce.

Lawyers who are appointed to capital cases often do not have the resources, training and experience necessary to defend such a case. Capital cases involve different and complex investigative, preparation, and trial methods than other criminal cases.[18] Lawyers who are not aware of these differences cannot be as effective. This becomes especially important during the penalty phase when defense counsel should present mitigating evidence. Lawyers with insufficient time, resources, or training will not know the best way to proceed in the penalty phase, denying indigent capital defendants an effective and compelling mitigation presentation.

The states with the most active death rows are those that have historically poor records of providing competent counsel to people accused of capital crimes.[19] In such a system, the risk of wrongful convictions and error is unacceptably high. I currently represent Anthony Ray Hinton who is an innocent man who has been on Alabama's death row for 21 years. Mr. Hinton was charged with two separate shooting murders that occurred during robberies at two fast food restaurants. There were no eyewitnesses and fingerprints found at each crime scene did not match Mr. Hinton. The only evidence linking Mr. Hinton to the murders was

a victim in a third shooting who misidentified Mr. Hinton. He was never charged with this third crime, but State lab technicians said that bullets recovered from all three crimes were fired from the same gun and matched a weapon recovered from Mr. Hinton's mother.[20] The State conceded at trial that there was no connection between the murders and Mr. Hinton other then the weapon match, and the State has repeatedly acknowledged that without a weapon match, Mr. Hinton should be released.[21]

Beyond that, at the time of the third shooting, Mr. Hinton was working in a locked warehouse 15 miles from the crime scene.[22] His supervisor and other employees confirmed his innocence when they testified to this, as did a polygraph test given by the police. However, Mr. Hinton was still prosecuted for capital murder and the judge would not admit the exculpatory polygraph test at trial.[23] Mr. Hinton, who is poor, received court-appointed counsel whose compensation for preparing the case was capped at $1000 by Alabama law.[24] This lawyer did not receive adequate funds to hire an expert to challenge the State's faulty gun evidence or to fully develop evidence of Mr. Hinton's innocence. Mr. Hinton was convicted and given two death sentences.

Since Alabama is the only state in the country that does not provide legal assistance to death row prisoners after their convictions are affirmed,[25] Mr. Hinton desperately tried to find his own volunteer legal assistance to prove his innocence, and my office ended up volunteering to take on his case.

At a State postconviction hearing in 2002, three of the country's top gun experts testified that they concluded that the crime bullets could not be matched to the weapon

recovered from Mr. Hinton's mother and that the State had erred in making that claim.[26] It was also revealed that the State pressured witnesses into giving false statements implicating Mr. Hinton.[27] The trial court, however, did not rule on Mr. Hinton's evidence of innocence for two and a half years and then signed an order prepared by the State denying relief, in part, because the evidence of innocence was presented too late.[28] The Court of Criminal Appeals upheld Mr. Hinton's conviction in a 3-2 decision.[29] This again shows how important it is that trial counsel be given the resources to hire experts and conduct thorough investigations. As a result of this inadequate representation, many people are illegally and wrongly convicted and sentenced to death.

The effort to provide adequate legal assistance to capital defendants has proved to be unobtainable in many states and there is a tremendous need for dramatic reform. The failure to provide consistent, reliable legal assistance to capital defendants has deeply compromised and weakened the integrity of the entire criminal justice system and more must be done to confront this problem.

Legal Representation on Direct Appeal

This week my office will file a motion in the Alabama Supreme Court begging that court to permit yet another death row prisoner's direct appeal to be heard after an appointed lawyer failed to file necessary appeal papers or a brief, potentially forfeiting all constitutional claims and appellate review for this condemned prisoner. This is the third case in the last two years where a death row prisoner's appointed lawyer has failed to file a brief or an

appeal in the initial review process.

As stated previously, Alabama has no state public defender or appellate defender offices and trial judges appoint counsel for death row prisoners in the initial direct appeal process, most of whom have little training or experience in appellate capital litigation. Compensation for these lawyers is capped at $2000.[30] This includes the appeal and the petition for writ of certiorari to the Alabama Supreme Court.[31] This low compensation, combined with insufficient training and experience, often leads to inadequate lawyering.

For instance, some appointed lawyers do not seek oral argument or file reply briefs in response to the State, which is represented by a unit of capital litigation specialists who are funded by the state to prosecute capital cases on appeal. In one case, last November, an 11-page brief was filed on behalf of a death row prisoner by appointed counsel with no discernible issues presented.[32] Although the Court of Criminal Appeals told counsel during oral argument that the brief was "scant," it would not accept additional briefing our office prepared when we tried to intervene.

This is not an isolated incident. Lawyers often fail to adequately represent their clients on appeal and fail to file the required and necessary paperwork. In another case in Alabama, a lawyer moved his office and failed to notify either the court or his client. Because of this, he did not receive notice that his application for rehearing had been overruled, and so he missed the deadline for filing an appeal to the Alabama Supreme Court, and consequently was denied appellate review.[33]

In the absence of a statewide public defender system, appointed lawyers who do not

receive adequate compensation often untimely forfeit their clients' rights. Appellate representation involves reading through the trial transcript, which can be thousands of pages, conferring with the client, and researching and writing legal pleadings. These tasks require hundreds of hours of work. Because of compensation limits, attorneys who represent inmates on direct appeal are forced to either work for free or refuse to provide critically important work.

After Congress passed the AEDPA in 1996, the primary responsibility for ensuring that capital murder convictions and death sentences are constitutionally imposed shifted to state appeal courts on direct review. Yet, in too many jurisdictions review of these cases is fundamentally undermined by the failure of states to provide adequate legal assistance to the poor.

No Right to Counsel in State Postconviction

Deficiencies in state systems result in wrongful convictions and unreliable verdicts and sentences that must be corrected and addressed in postconviction proceedings. However, state postconviction proceedings in many states are non-responsive to these problems and even less reliable than the state trial process. Alabama does nothing to provide any incarcerated person counsel for postconviction review. If a condemned prisoner can get a petition timely filed within the statute of limitations, the court has the discretion to appoint a lawyer, but the lawyer's compensation is limited to $1000 for the entire case.[34] Lawyers do not want, and generally will not accept, those appointments. Furthermore, there is no financial incentive for a lawyer to do voluntary, uncompensated work assisting a condemned

inmate to draft and file a postconviction pleading.

Despite the fact that Alabama now has the fastest-growing death row population in the United States,[35] it has no postconviction public defender office. Alabama appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It provides no paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts outside the trial record. It also maintains no central agency to monitor the progress of capital postconviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support.

Alabama's failure to provide any legal assistance to death-row inmates forces those inmates who cannot find volunteer lawyers to file State postconviction petitions *pro se.* Inadequate legal assistance is especially problematic because the Alabama postconviction process, which is governed by Rule 32 of the Alabama Rules of Criminal Procedure, is marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly-skilled counsel.[36]

The Alabama Attorney General's Office routinely moves to dismiss claims in petitions filed by death row prisoners on procedural grounds such as lack of specificity, lack of factual development, and failure to comply with complex procedural rules that are not well understood. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing, (let alone the legal skills to understand what form of allegations will

make a pleading "sufficiently specific" to satisfy Rule 32.6(b)(requiring a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds)) prisoners without skilled counsel are at risk of summary dismissal.[37]

Moreover, death row prisoners cannot typically obtain independent judicial factfinding or decisionmaking in State postconviction proceedings without the assiduous efforts of competent and dedicated counsel. Many prisoners executed by Alabama have had constitutional claims that were barred from federal review because they could not obtain adequate legal assistance in State postconviction proceedings.

Many prisoners currently on death row have faced similar situations. For example, Christopher Barbour was forced to file a State postconviction petition *pro se* on March 4, 1997. The judge then appointed counsel, who represented Mr. Barbour at an evidentiary hearing on March 18, 1998. Appointed counsel did not file a post-hearing brief or proposed order and never filed a notice of appeal after Mr. Barbour's petition was denied on April 21, 1998. The State did not provide counsel for an appeal, and Mr. Barbour therefore lost his State postconviction claims by default. It is important to note, however, that, in Alabama, the fact that a prisoner is without counsel when the default occurred does not excuse the default.[38] So, the Alabama Supreme Court ordered Mr. Barbour's execution on May 25, 2001.[39] Just two days before this date, volunteer counsel obtained a stay from the United States District Court for the Middle District of Alabama.[40]

Postconviction proceedings are often the first and only opportunity for prisoners to make many federal claims, including ineffective assistance of counsel, juror misconduct, and

Brady violations. These claims require discovery and pleading of facts not in the trial record, and they require familiarity with State postconviction procedure. It is very difficult for prisoners to bring these claims effectively without legal assistance.

The Supreme Court has consistently recognized the need for counsel in criminal proceedings. Starting in 1932 with *Powell v. Alabama*, the Court recognized counsel as "fundamental" to due process.[41] This should extend to postconviction proceedings where the constitutional rights that the claims are based on, such as effective assistance of counsel, are central to the criminal justice system. "Lawyers in criminal courts are necessities, not luxuries."[42] Without counsel to represent indigent people accused of capital crimes, justice is not served. Former Alabama judges acknowledged this fact as amici in support of Mr. Barbour after the 11th Circuit ruled there was no right to counsel in postconviction proceedings, which would have prevented defaults like Mr. Barbour's.[43] These four judges, three of whom had been Alabama Supreme Court justices, wrote to the court that it is not acceptable that innocent people are convicted and sentenced to death, which happens in Alabama due to a lack of sufficient counsel.[44] Without counsel in postconviction proceedings there are instances where justice simply is not served.[45] This is especially true when many of the people who are innocent are not exonerated until the later stages of the process that become increasingly hard for indigent Alabama inmates to get to. Thus, it is hugely important that there is a system in place to provide counsel to indigent people accused of capital crimes even in postconviction proceedings so that Constitutional claims are not lost due to lack of legal assistance.

Conclusion

Effective legal counsel is essential to a fair and reliable criminal justice system. Without it, countless number of people are convicted and sentenced to death without ever having a competent, fair, reliable trial. Currently, representation in capital cases is inadequate. Too often, prisoners are required to find their own volunteer counsel to right the errors that have been committed by trial counsel. When some of the most fundamental claims, including ineffective assistance of counsel and *Brady* violations, are left unheard because of ineffective counsel or lack of counsel, our criminal justice system cannot be fair and reliable. This leads to many innocent people being convicted and having no ability to seek relief. Federal habeas and State postconviction plays an important role in making sure that tragic errors in capital cases are not insulated from correction that is required by the United States Constitution. Competent counsel is necessary to navigating this appellate process.

Even before that point, though, it is imperative that trial counsel investigates and researches adequately and is given the resources and compensation to be able to do this thoroughly. It is also hugely important that trial counsel that is appointed is trained and experienced in capital cases and is not someone who is unwilling or unable to take on and do the work required of a capital case.

I appreciate this Committee's time and attention to these very important matters.

Endnotes

1. *See* Death Penalty Information Center, *Facts about the Death Penalty*, http://deathpenaltyinfo.org/FactSheet.pdf, last visited April 6, 2008.

2. *See* Death Penalty Information Center, *Innocence and the Death Penalty*, http://deathpenaltyinfo.org/article.php?did=412&scid=6, last visited April 6, 2008.

3. *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why is There So Much Error in Capital Cases and What Can Be Done About It* 11 (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf, last visited April 2, 2008.

4. *See* National Coalition to Abolish the Death Penalty, *Innocent and Executed: Four Chapters in the Life and Death of America's Death Penalty,* available at https://secure.democracyinaction.org/dia/organizationsORG/ncadp/images/InnocentAndExecuted.pdf, last visited April 7, 2008.

5. *See* Death Penalty Information Center, *The Death Penalty in 2006: Year End Report*, http://www.deathpenaltyinfo.org/2006YearEnd.pdf, last visited April 6, 2008.

6. *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

7. *Id.* at 1305.

8. *See* Brief for James T. Fisher, *Fisher v. Oklahoma* (Okla. Ct. of Crim. App. 2006)(No. D-2005-460)(affidavit of Brenda McCray). Mr. Albert apparently had a similar run-in with a previous client, whom he provoked into hitting him so that he could then get relieved because of a conflict. *Id.*

9. *See* ALA. CODE § 15-12-21(d)(1999). On June 10, 1999, compensation for appointed attorneys was increased to $50 per hour for in-court work and $30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases but fees for out-of-court work remained capped at $1000. Effective October 1, 2000, compensation for appointed attorneys increased to $60 per hour for in-court work and $40 per hour for out-of-court work and the $1000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d)(2002); *see also* Alabama Department of Corrections, *Alabama Inmates Currently on Death Row,* http://www.doc.state.al.us/deathrow.asp, last visited April 6, 2008.

10. Until 1995, Texas, which has one of the largest death row populations in United States (currently at 370), capped the entire amount defense counsel could request for investigative and expert expenses at $500. *Lackey v. State*, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982)(discussing Tex. Code Crim. Proc. Art. 26.05 (1980)); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 77-98 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf, last visited April 1, 2008; http://www.texasdefender.org/facts.asp, last visited April 1, 2008; Death Penalty Information Center, *Facts About the Death Penalty*, http://deathpenaltyinfo.org/FactSheet.pdf, last visited April 3, 2008.

11. *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 799 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, Nat'l L.J., June 11, 1990, at 34).

12. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993).

13. *See* Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995 at 22 (Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the State's death row population. *See* John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty*, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that, in 2000, Philadelphia is responsible for 55% (126/230) of the state's death row population; 88% (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).

14. For example, in Mississippi, counsel appointed to represent an indigent defendant faces a $1000 cap on compensation. In a capital case, two attorneys can be appointed for total compensation not to exceed $2000. MISS CODE ANN. § 99-15-17 (1980). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a $2500 cap on compensation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994)(citing The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

15. *See, e.g., Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005)(upholding death sentence where lead attorney slept through major portions of trial); *Ex parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995)(Maloney, J., dissenting)(denying death row prisoner's application for postconviction relief where lead attorney slept during trial); *Burdine v. Johnson*, 262

F.3d 336 (5th Cir. 2001); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 89-95 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf (discussing capital cases in which counsel slept through trial and the defendant was sentenced to death), last visited April 1, 2008.

16. *See, e.g.*, *Guy v. Cockrell*, 2002 WL 32785533 at *4 (5th Cir. July 23, 2002)(trial counsel conceded using cocaine during capital trial); *Haney v. State*, 603 So.2d 368, 377-78 (Ala. Crim. App. 1991)(affirming death sentence even though trial had to be suspended for a day because the appointed defense lawyer was too drunk to go forward); *see also* Texas Defender Service, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 38-39 (2002), http://texasdefender.org/chapters.pdf, last visited April 1, 2008.

17. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2104-2109 n.175-190(2000)(discussing numerous examples of incompetent lawyers appointed to handle capital cases and studies documenting the inexperience and incompetence of attorneys appointed to represent capital defendants in most death penalty states); Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 79-98 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf, last visited April 1, 2008.

18. *See* Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067, 1075 (2007)(book review)(reviewing *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* by Welsh S. White).

19. *Id.* at 1086 (citing James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why is There So Much Error in Capital Cases and What Can Be Done About It* 11 (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf, last visited April 2, 2008).

20. Trial Transcript, *Hinton v. State*, No. CC-85-3363, 3364 (Jefferson Co. Cir. Ct.) at R. 33-34, 423-24, 836, 1724; Postconviction Transcript, *Hinton v. State*, No. CC-85-3363.60, 3364.60 (Jefferson Co. Cir. Ct.) at PC. 2485-90. At trial, two Alabama Department of Forensic Science ("DFS") witnesses wrongly concluded that bullets recovered from the three crimes could be linked to a single weapon and that the weapon was found in the home of Mr. Hinton's mother. The State withheld DFS reports which made it clear that the DFS witnesses could not reliably match the recovered bullets in this case to a single weapon or to Mr. Hinton. The suppressed evidence would have clearly impeached the DFS witnesses and prevented a wrongful conviction. Postconviction Transcript, *Hinton v. State*, No. CC-85-3363.60, 3364.60 (Jefferson Co. Cir. Ct.) at PC. 2485-90.

21. *Id.* at R. 33-34, 423-24, 836, 1724, 827-28, 836.

22. Mr. Hinton presented evidence that he was working when the crime took place at 12:14 a.m. His supervisor and other employees confirmed that Mr. Hinton arrived at work at 11:57 p.m. on the night of the third offense, clocked in at 12:00 a.m., was given his work assignment at about 12:10 a.m., was checked on by his supervisor around 12:40 a.m., and was closely supervised during his six-hour shift. *Id.* at R. 1023, 1345, 1350, 1396, 1398.

23. Trial Transcript, *Hinton v. State*, No. CC-85-3363, 3364 (Jefferson Co. Cir. Ct.) at R. 2025-28, 2150-53.The polygraph test exonerated Mr. Hinton of any involvement in any of the three crimes.

24. ALA. CODE § 15-12-21(d)(1999).

25. *See* Brief for the Constitution Project as Amicus Curiae in Support of Petitioners, at 2-3, *Barbour v. Allen* (2007) (No. 06-10605).

26. *See Hinton v. State*, __ So. 2d __, 2006 WL 1125605 at *13-15 (Ala. Crim. App. Apr. 28, 2006)

27. See *id.* at *21-22.

28. The State filed no legal response to Mr. Hinton's arguments after the evidentiary hearing. Instead, the State simply gave the judge a 144-page order to sign, which actually was a computer disk containing an order to be signed. After two and a half years, the judge signed the State's order without making any changes.

29. *Hinton v. State*, __ So. 2d __, 2006 WL1125605 (Ala. Crim. App. Apr. 28, 2006).

30. Ala. Code. Ann. 15-12-22(d)(3)(1975).

31. *Id.*

32. *See* Brief and Argument of Appellant, *Billups v. Alabama* (No. CR-05-0773). *See* Appendix A.

33. In August 2005, the Alabama Court of Criminal Appeals affirmed Michael Carruth's capital murder conviction and death sentence. *Carruth v. State*, 927 So.2d 866 (Ala. Crim. App. 2005). A timely application for rehearing was filed. While that application was pending, Mr. Carruth's appointed counsel, Steve Guthrie, moved offices and did not inform the Alabama Court of Criminal Appeals or Mr. Carruth of his change of address. Consequently, neither Mr. Guthrie nor Mr. Carruth learned that the court overruled Mr. Carruth's rehearing application in October 2005 and did not know that the time for appealing to the Alabama Supreme Court had expired fourteen days later.

34. Alabama law limits compensation to appointed counsel in State postconviction cases to $1000 per case. ALA. CODE § 15-12-23 (1975)(as amended by Act 99-427(1999).

35. According to the Bureau of Justice Statistics, Alabama has led the nation in the rate of new death sentences for the last five years. In 2006, Alabama sentenced six times more people to death than Texas. *See* Bureau of Justice Statistics, Capital Punishment 2006, Statistical Tables, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st04.htm, last visited April 1, 2008; Bureau of Justice Statistics, Capital Punishment Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm, last visited April 1, 2008.

36. This has lead to at least seven death row prisoners in the last few years in Alabama having to navigate state postconviction proceedings without the assistance of volunteer counsel. All of these prisoners either have their cases dismissed or are otherwise precluded from state court review as a

result of their inability to obtain adequate legal assistance.

37. Unrepresented condemned inmates may also fall afoul of technical rules. An example is the case of Joseph Smith. On September 27, 2002, Mr. Smith filed a *pro se* State postconviction petition in the Mobile County Circuit Court after he was unable to find volunteer counsel. The State moved to dismiss Mr. Smith's petition and sent a letter to the circuit judge asserting that it was unnecessary to appoint counsel for Mr. Smith: "Typically, the State would not file a motion to dismiss a Rule 32 petition when the petitioner is on death row until an attorney has been appointed. This case, however, is different because the statute of limitations has expired. While the State has no objection to the appointment of counsel for Smith, the appointment of counsel would not change to [sic] fact that Smith filed an untimely Rule 32 petition that is due to be summarily dismissed." State's Letter of Oct. 7, 2002, to Hon. James C. Wood, in *Smith v. State*, Mobile Co. Cir. Ct. No. CC-98-2064. Without appointing counsel, the circuit judge subsequently signed the State's proposed order dismissing Mr. Smith's *pro se* State postconviction petition as untimely. *Smith v. State*, order of Oct. 9, 2002.

38. *See Culotta v. Mitchem*, 2006 WL 752947 (M.D. Ala. March 22, 2006)(citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

39. *Barbour v. Haley*, 145 F. Supp. 2d 1280, 1282 (M.D. Ala. 2001).

40. *Id.*

41. *Powell v. Alabama*, 287 U.S. 45 (1932).

42. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

43. *See* Brief of Amici Curiae Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari, *Barbour v. Allen* (2007) (No. 06-10605)(on behalf of Former Alabama Supreme Court Justices Douglas Johnstone, Ernest Hornsby, and Ralph Cook, and former Alabama Court of Appeals Judge William Bowen); *see also Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006). The Supreme Court denied certiorari. *Barbour v. Allen*, 127 S.Ct. 2996 (2007).

44. *Id.* at 1, 18-20.

45. *Id.* at 19.

APPENDIX A

ORIGINAL

CR-05-0773

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

KENNITH EUGENE BILLUPS,

Appellant,

v.

STATE OF ALABAMA,

Appellee.

FILED
DEC 1 2006
CM Recd 12/4/06
CLERK
ALA COURT CRIMINAL APPEALS

On Appeal from the Circuit Court of Jefferson County, Alabama

Circuit Court Case Number: CC04-2451

BRIEF AND ARGUMENT OF APPELLANT

OA REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The appellant requests oral argument and believes that the Court will be aided in Its determination of the issues raised thereby.

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Flowers v. State, WL 435113, at *20 (Ala. Crim. App. 2005)	10.

STATEMENT OF THE CASE

The appellant was indicted by the Grand Jury of Jefferson County, Alabama, on October 22, 2004, charged with capital murder in a thirteen-count indictment:

Four counts of murder during the course of a robbery in violation of section 13A-5-40(a)(2)of the Alabama Criminal Code;

Four counts of murder during kidnapping in violation of section 13A-5-40-(a)(1) of the Alabama Criminal Code;

Four counts of murder during a burglary in violation of section 13A-5-40(a)(4) of the Alabama Criminal Code, and;

One count of murder, two or more people being killed in the same scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Alabama Criminal Code.

A previous indictment, returned on May 21, 2004, charged the appellant with one count each of murder in violation of section 13A-5-40(a)(10), murder in violation of section 13A-5-40(a)(1) and murder in violation of section 13A-5-40(a)(2).

Trial of the case begin on October 31, 2005 and, on November 14, 2005, the jury found the appellant guilty on all thirteen counts of the indictment. Thereafter, on November, 16, 2005, the jury recommended that the appellant

be punished by death. On January 19, 2006, the appellant was sentenced to death in accordance with the jury verdict. A motion for new trial was heard and denied on May 12, 2006. This appeal follows.

STATEMENT OF THE FACTS

Evidence presented at trial showed that in December, 2003, Osman Valladares called Pablo Stuart at his apartment and asked for a ride. (R-690) Stuart picked Valladares up and Valladares directed him to a house where the appellant was. (R-693) When Stuart entered the house, Valladares and some others were in the kitchen in the back of the house. Money and Marijuana were on the table in the kitchen. (R-699)

After a few minutes, a man he now knows to be Cooper, put a gun to Stuart's head. Then another man, he knows now as Parrish, came with a gun, a woman in the room pulled a gun and the appellant produced a gun. (R-704) The men drug Stuart to the floor and begin to tape his hands and legs. Valladares was also bound. The men threatened to kill Stuart and Valladares. (R-717) The appellant told Valladares that he wanted dope or he would kill Stuart. (R-731) The appellant forced Valladares to make a phone call for that purpose. (R-733) Then Stuart and Valladares were taken to the basement of the house and made to get into

Stuart's car which had been moved into the basement. (R-735)

As Parrish drove behind them in another car, Cooper drove Stuart, Valladares and the appellant to Valladares' apartment. (R-741) Once inside the apartment, Stuart and Valladares were untapped and Valladares was told to call again to obtain drugs. In about an hour, two Mexican males arrived at the apartment. (R-755) After looking at the money in the apartment, the two Mexicans said they could get about thirty-five pounds of marijuana and they left. (R-758)

The men in the apartment ordered a pizza and, while they waited for the pizza to be delivered, Parrish was stealing things from Valladares' apartment. (R-761)

Around eleven o'clock, the Mexicans returned to the apartment. They had a plastic container with them which contained marijuana. (R-773) (R-768) Now there were four Mexicans in the apartment. (R-770) Cooper was on the couch, Parrish was hiding in the closed. (R-774)

Then the appellant started shooting the Mexicans. (R-774) Parrish came out of the closet shooting. (R-776) The Mexican's had no time to defend themselves. (R-777) Stuart and Valladares were able to escape the apartment. Stuart ran into the woods. (R-779)

He saw the appellant, Cooper and Parrish leave the apartment with the container and leave the area in the car Parrish had driven to the apartment. (R-779) Stuart, after following the car for awhile, went to a police station and reported the incident. When police arrived at the apartment, they found four people dead. (R-674) The dead were identified as Rafael Salcedo, fifteen years old, Enrique Marquez, sixteen years old, Manuel Perez, twenty-seven years old and Wilbur Gomez, twenty years old.

STANDARD OF REVIEW

In all cases in which the death penalty has been imposed, the court of criminal appeals shall notice any plain error or defect in the proceedings under review…

Rule 45A, A.R.A.P

SUMMARY OF THE ARGUMENT

I. The appellant was convicted of all counts contained in a multiplicitous indictment which multiplicity was prejudicial to him and which caused him to be, in effect, convicted and sentenced for the same crime multiple times.

II. The appellant requested time and money to obtain a mitigation expert to help with the penalty phase of his trial which request was denied by the trial court.

III. Evidence of the appellant being charged with another murder was introduced, to his prejudice, in the penalty phase of the trial.

V. Recordings of illegally obtained telephone calls were introduced against the appellant in the trial of the case.

VI. Appellant's death sentence is unconstitutional in that Alabama's death penalty statute doesn't sufficiently narrow the group of offenders subjected to that penalty.

ARGUMENT

I.

Rule 13.2(d), Alabama Rules of Appellate Procedure, provides that "…Unnecessary allegations [contained in an indictment] may be disregarded as surplusage, and, on motion of the defendant, shall be stricken by the court if prejudicial or prolix."

In this case, the appellant is charged with the murder of four people. The indictment charges him with thirteen violations of the criminal code. The appellant contends that the excess charges in the indictment are prejudicial to

him in that it has a psychological effect, it gives the impression to the jury that he is an especially heinous criminal. The excess charges are prejudicial and prolix, wordy and, on motion of the defendant (R-309), the excess charges should have been stricken.

Appellant also argues here the double jeopardy issue which arises where he is convicted in several different ways for the commission of the same crime. In Ex parte Rice, 766 So.2d 143 (Ala. 1999), the Alabama Supreme Court held that, for example, §13A-6-2(a)(3), Ala. Code 1975, creates a single offense, even though it provides alternative methods of proving the offense. The supreme court also held that double jeopardy principles prohibit multiple convictions and multiple sentences for felony-murder if the convictions and sentences arise from a single killing.

II.

In this case the appellant's request for money and time to hire a mitigation expert was denied by the court. In a death penalty case, where, there being a conviction, the jury, and then the sentencing judge, will weigh aggravating and mitigating circumstances, to not allow the appellant every opportunity to search for mitigating factors is prejudicial and violative of his right to due process.

The appellant's trial counsel has a constitutional duty to thoroughly investigate into mitigating evidence. Williams v. Taylor, 529 U.S. 362, 369 (2000). In fact, in Brownlee v. Haley, 306 F.3d 1043, 1074, 1079 (11th Cir. 2002), the defendant's counsel was found to have been ineffective for failing to investigate and present mitigating evidence.

III.

In the penalty phase of the trial of this case, the trial court allowed into evidence testimony about a murder for the commission of which the appellant had been charged, but which case had not yet been tried. Such testimony was prejudicial to the appellant and violated his right to due process.

At first blush, appellant would base this argument on Rule 404(b), Alabama Rules of Evidence. "…Collateral conduct is not admissible when offered to prove the character of a person and that such person acted in conformity therewith on the occasion in question." Certainly that is the purpose of the State having introduced the evidence of the other murder, to show that the appellant is a bad guy.

But, the introduction of the evidence in the penalty phase of the trial puts a spin on the proposition; is the

fact that appellant is charged in another murder an aggravating factor to be weighed against any mitigating evidence to determine his punishment. (The trial court, in sentencing, chose not to consider this evidence in his weighing of factors, but the jury still heard the evidence in making its advisory decision and so the damage is still done.)

In any case, the evidence of a pending murder charge seems irrelevant to the penalty phase in this case. The rendition of such evidence seems far more prejudicial than probative to a determination of the proper sentence in this case.

IV.

In the trial of the case, tape recordings made of telephone conversations between the appellant, the appellant was in the Jefferson County Jail, and other parties were introduced into evidence to suggest that the appellant was attempting to manipulate the testimony of potential defense witnesses. (R-1880) The recordings were made without the permission of the appellant or any other party to the conversation. The appellant objected to the introduction of the recordings. The trial court made its ruling, apparently, based upon some case law which suggested that the appellant had no "right to privacy" while incarcerated.

Eavesdropping on a telephone by means of a wire tap or otherwise is a violation of the right of privacy. 41 Am.Jur., 946; Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46; 14 A.L.R.2d 771; McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga.App. 92, 2 S.E.2d 810. The evidence so obtained is therefore illegal.

Even if, for the sake of argument, the county authorities have the right to monitor telephone conversations from the jail for the purpose of protecting the integrity of the security there, the writer can find nothing to indicate that recordings made for that purpose are legal and relevant evidence in the trial of this case.

V.

Appellant is sentenced to death and argues that his sentence is violative of his right to due process in that Alabama's death penalty statute fails to narrow the class of death eligible offenders and , therefore, that sentence is arbitrarily administered.

"Because of the uniqueness of the death penalty...it [may not] be imposed under sentencing procedures that creat[e] a substantial risk that it would be inflicted in an arbitrary and capricious manner.". <u>Gregg v. Georgia</u>, 428 U.S. 153, 188 (1976). The United States Supreme Court has held that

states must meaningfully "narrow the class of murderers subject to capital punishment." Gregg, 428 U.S.196. Alabama has enacted eighteen capital offenses. Ala. Code, 13A-5-40. Virtually any murder in Alabama may and can be prosecuted capitally.

Approximately two-thirds of the death sentences imposed in Alabama involve cases of robbery/murder. Flowers v. State, WL 435113, at *20 (Ala. Crim. App. 2005) Such frequent application of this aggravating circumstance is a reflection of its inability to meaningfully distinguish between the relative degrees of offensiveness involved in various crimes.

CONCLUSION

For the reasons set out herein above, the appellant's convictions and sentence should be set aside and the case remanded for a new trial.

BRYAN A. STEVENSON

Bryan Stevenson is the Executive Director of the Equal Justice Initiative in Montgomery, Alabama and also a Professor of Law at the New York University School of Law. His representation of poor people and death row prisoners in the deep south has won him national recognition. He and his staff have been successful in overturning dozens of capital murder cases and death sentences where poor people have been unconstitutionally convicted or sentenced. Mr. Stevenson has been recognized as one of the top public interest lawyers in the country. His efforts to confront bias against the poor and people of color in the criminal justice system have earned him dozens of national awards including the National Public Interest Lawyer of the Year, the ABA Wisdom Award for Public Service, the ACLU National Medal of Liberty, the Reebok Human Rights Award, the Olaf Palme Prize for International Human Rights and the prestigious MacArthur Foundation Fellowship Award Prize. He is a graduate of Harvard Law School and the Harvard School of Government. He has published articles on race and poverty and the criminal justice system, and manuals on capital litigation and habeas corpus. Visit www.eji.org.