

Testimony of
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Tracy and Loretta Phillips lived, worked and raised a family. Their life was not unlike many in America. Tracy, a husband and father, had a small business and Loretta stayed home and raised children. They had purchased an older home and were in the midst of a 'do-it-yourself' renovation, when they planned to have a yard sale on Saturday May 9, 1998. On the Friday before, Loretta and her daughter were out hanging 'yard sale' signs when they encountered John Russell "Cody" Calhoun. Calhoun approached Loretta and asked where the yard sale was to be held. The signs gave the address of the Phillips home on Coffee Street. Calhoun inquired about the items they might be selling in the yard sale and actually rode to the Phillips home and spoke with Tracy about purchasing a television. Later that night Tracy and Loretta had popped popcorn and were sitting down to enjoy a rented movie. The house was cluttered with yard sale items to be displayed the following day. The children, along with sleep over company were upstairs in the couple's bedroom watching television. Around 10:30pm, a young girl in a house behind the Phillips's home called Loretta to report a man in their back yard looking into the house. Tracy investigated, but saw no one. Suddenly, John Russell Calhoun burst into the back door holding a pistol. Tracy fought Calhoun as Loretta ran upstairs to protect the children. Loretta hid the children on a second floor balcony and waited. The noise down stairs subsided. She heard foot steps coming gradually up the hardwood stairs. A knock on her bedroom door was followed by Tracy saying, "Loretta, open the door, he has a gun to my head". Crying, Loretta slowly opened the door to see a beaten and distraught Tracy. Standing behind Tracy was the man she had seen earlier that day. He had a pistol pressed to Tracy's head. Loretta, shaking and sobbing listened as Tracy pleaded for the family's life and said that they had children in the house. Tracy offered money and property in an effort to have Calhoun spare the lives of the family. Calhoun made it clear that he didn't come for property as he announced that he wanted Loretta. Loretta was a beautiful woman who had recently recovered from ovarian cancer and was finally in good health. She begged Calhoun to leave them in peace, but he refused. With the life of her family in the balance, Loretta removed her clothing and lay back on the bed. The children remained motionless on then balcony. As Loretta lay back onto the bed, Calhoun forced Tracy's face between Loretta's legs. As Calhoun exclaimed, "kiss it goodbye", he fired single gunshot into the back of Tracy's head. The blast exploded onto Loretta's body. The couple's 12 year old daughter ran into the bedroom calling out, "Daddy Daddy Daddy!" Calhoun then threatened to kill the children as Loretta begged for their lives. Leaving Tracy's lifeless body in a pool of blood Calhoun locked the children in an upstairs bedroom with no telephone. Calhoun drug Loretta down stairs where she was repeatedly raped and sodomized. During the horrific sexual assault, Calhoun bit Loretta, leaving distinctive bite impressions on her back. While pistol whipping Loretta during the attack, the cylinder on the revolver opened and the remaining bullets fell from the gun. Loretta repeatedly offered Calhoun jewelry if he would just leave the rest of her family

alive. Suddenly, he grabbed a handful of her jewelry, threw some to the ground and fled the home. Loretta ran to her children and made a desperate call to the police.

While Loretta was being assaulted, a patrol officer who was investigating a report of a gun shot in the neighborhood located Calhoun's red sports car on the street near the home. Calhoun's drivers' license was inside the vehicle. As the officer moved down the street, Calhoun made his way to his car and escaped. He was apprehended several days later hiding from the police.

Law enforcement responded to Loretta's call to find a home and family destroyed. Trained officers recovered Calhoun's DNA through semen from the scene and from Loretta's person. Bite mark and ballistics evidence was collected pointing to Calhoun. The physical evidence and the eyewitness testimony of the victims built a rock solid case that I prosecuted. He had two experienced and very capable appointed attorneys who defended him vigorously. Their fee in that one case was more than most prosecutors make in a year. Calhoun had retained expert testimony and consulted with many other experts in preparation of their defense. After a lengthy pre-trial period, the case was set for trial. After many days of testimony and argument, Calhoun was convicted and a jury of his peers recommended death. As Loretta testified about that night, Calhoun sat across the courtroom and smiled. At a full sentencing hearing (and after being afforded every right under our constitution), he was sentenced to death - the same sentence he gave Tracy Phillips.

I am a career prosecutor. My name is Barry Matson. I am the Deputy Director of the Alabama District Attorneys Association and the Chief Prosecutor for the Alabama Computer Forensic Laboratories. I want to thank this committee for the honor and privilege of appearing before you on such a vital issue facing the American System of Justice.

Prior to my current position, I was the Chief Deputy District Attorney in Talladega County, Alabama for over 16 years. One of my duties since taking my current position is to travel the state of Alabama and prosecute recusal cases in our 42 separate judicial circuits. In my career, have personally prosecuted every manner of criminal offense, from violent sexual assaults, narcotic trafficking, white collar and public corruption cases as well as many capital and non-capital murder cases. I have found that many people say they have an opinion on crime and punishment in America. It is easy to pontificate theories and ideals over a coffee cup in a diner or from a podium in some marbled column law school, but until you have seen the murdered bodies of an innocent family, held the hand of a grieving mother, felt the heartbreak of a community as it unravels under the weight of murder after murder, you really don't know. Until you have stood in the well of the court room and subjected yourself to the sting of criticism and felt the weight of the prosecutor's burden of proof, you really don't know.

I tell the story of Tracy, Loretta and their family, not just because it needs to be told, I tell it because I know the adulteration of the truth that will unquestionably arise in the post conviction process. The average death row tenure in Alabama is nearly 20 years or more. In these twenty years, most of the witnesses, attorneys and court officials will be retired, dead or dying. I know that some academician or some criminal defense lobbyist will select James Russell "Cody" Calhoun as their next project. They will claim he is 'innocent' and needs to be set free. I hope he is never freed. He may actually see true justice one day. But in the course of the coming appeals to both the criminal courts and the court of public opinion, the truth will be distorted, ravaged,

and intentionally misrepresented in a effort to feed the agenda driven anti-accountability anti-death penalty defense bar and lobbyist.

Truth and Justice

I am not sure when it happened. But somewhere along the way, a fundamental wrong occurred. A misconception brewed into a consciousness. A myth that is perpetuated by academics, talking heads and Hollywood do-gooders, that the criminal bar and their lobbyists are seekers of truth. This myth could not be farther from the real truth. As a prosecutor, my oath is to seek justice. The defense has no such burden. Please understand, I am not assaulting the American defense bar. I believe in a strong, well funded criminal defense bar and believe that competent defense attorneys make me a better and more effective prosecutor. A strong criminal defense bar is vital to the integrity of our criminal justice system. But I also know that the toughest criminal defense lawyer I ever knew once told me with a smile, "the last thing I want to find is the truth; I only want to get my client off".

In my testimony today I will endeavor to speak for the 'every day' prosecutor struggling for real truth in the courtrooms of this great country. I will attempt to bring light into the dark places of our adversarial system and call it like I see it. I speak of it, because I know. I have stood in that well and felt the sting of criticism and carried the heavy weight of the burden of truth. I know prosecutors everywhere continually face these challenges with integrity, a strong work ethic, and a deep seeded passion to protect the public and to do justice. Mr. Chairman and members of this committee, we, and no one else, are the only people in the criminal justice system charged with the responsibility of seeking justice. We know, "A prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function [we] perform in representing the interest, and exercising the sovereign power, of the state . . ."People v. Hill, 17 Cal 4th 800 (1988).

We applaud Congress for its hard work and deep concerns that led to the bipartisan passage of the Innocence Protection Act of 2004. We have benefited from much of the funding for training and I know that victims of crime have felt the embrace of its measures to insure that they are recognized and represented in the criminal justice process. We are grateful for the Initiatives that arose from this act, such as partnerships to create specialized trainings for trial judges, state and local defense counsel and prosecutors who litigate death penalty cases. These programs have sought to improve the reliability of jury verdicts in death penalty cases and ensure quality representation for the accused. The Department of Justice partnered with three lead agencies, the National District Attorneys Association (NDAA), the National Legal Aid & Defenders Association (NLADA) and the National Judicial College (NJC), to develop a training specific to each discipline. Training sessions were delivered at the state and local levels. These trainings focus on investigation techniques; pretrial and trial procedures, including the use of expert testimony and forensic science evidence; advocacy in capital cases; and capital case sentencing-phase procedures. We support all attempts to strengthen the integrity of our justice system and efforts to assure that no person is ever wrongfully convicted.

As for the use of DNA in criminal jurisprudence, let there be no mistake. It was the prosecutors and dedicated forensic scientists in this country who fought to see that the science of DNA was accepted in all the courts of our nation. As late as 1990 the National Academy of Sciences and

many others now associated with the Innocence Project fought against the admissibility of DNA evidence.

We know that the stories of those individuals freed by DNA science are powerful and we take pride that it was the American prosecutor who fought in court and supported statutes that made forensic DNA possible. We also know that a crucial part of the DNA story is yet to be adequately told. The tragic cases where DNA has served to exonerate are now over 20 to 25 years old. They were cases from the days of serology and blood typing only. Today we test all relevant and probative evidence and submit them for DNA testing. We look for the presence of DNA on all types of physical evidence. We know that the simple fact is that presence is more probative than absence. It tells us a lot more about a case when we find the presence of someone's DNA than when we find the absence of someone's DNA. And that's why DNA has proven so much more powerful in proving guilt than in proving innocence, and why we talk about a couple of hundred cases of DNA exonerations -- but there are hundreds of thousands of cases of DNA inculcation. The Myth of Atticus versus Goliath.

On September 22, 2009 the House Subcommittee on Terrorism, Crime and Homeland Security of the Judiciary Committee held hearings on the re-authorization of the Innocence Protection Act. Among those making presentations were criminal defense lobbyist Stephen Bright, President of the Southern Center for Human Rights in Atlanta, and Barry Scheck, Co-Director of the Innocence Project in New York. In his testimony, Mr. Bright said:

"The best protection against conviction of the innocent is competent representation for those accused of crimes and a properly working adversary system. Unfortunately, a very substantial number of jurisdictions throughout the country do not have either one . . . we must rely on a properly working adversary system to bring out all the facts and help the courts find the truth." He also cited the disparities between resources available to the prosecution and that available to the defense:

"There is no working adversary system in much of this country, particularly in the jurisdictions that condemn the most people to death. The disparities between the prosecution and the defense are so immense in some places that the prosecution's case is not subject to adversarial testing. . . . This significantly increases the risk of wrongful convictions."

Bright went on to say that, Alabama, which has the largest number of people on death row per capita in the United States, and pays lawyers only \$2000 per case for handling an appeal in a death penalty case. He further adds, the Alabama courts have held there is no right to counsel for this critical stage of the process. I site this rhetoric only to point out the inaccuracies and to set the record straight.

Facts

Alabama has 67 counties and 42 elected District Attorneys. The great state of Alabama has approximately 12,000 practicing lawyers and only a little over 300 part time and full time prosecutors. In 2008 there were 201,880 crimes reported in Alabama. Of that number 20,446 were violent Crimes. In that same year there was a 13 % increase in homicides from 2007 totaling 342. The state reported 358 suicides. The total property value stolen in 2008 was over

250 million dollars. And 265 law enforcement officers were assaulted in the line of duty. (Source: The Alabama Criminal Justice Information System, ACJIS).

Funding

In 1997, indigent criminal defense appropriations in Alabama were approximately 14 million dollars, while District Attorney's offices received about 17 million dollars. In 2007 the amount paid for indigent defense reached nearly 70 million dollars, while the District Attorney's offices received a little more than 44 million dollars from the state general fund. Any additional funds for the Prosecution must be made up through grants or collections. The funding by the State of Alabama for District Attorney's offices is a finite sum, but the funding for criminal indigent defense is open ended and growing at a rate of over 10% per year with absolutely no limitations on its maximum payout. This means any additional funding needed for indigent defense must be paid and any shortfall shall be made up by the state general fund budget.

In Alabama the average yearly salary of a full time prosecutor is approximately 40,000 dollars. It is not uncommon for an appointed criminal defense attorney to make in excess of 100,000 dollars in a single capital defense case.

Many small jurisdictions across this land are very similar to the small jurisdictions of Alabama. In one of our rural counties a lone prosecutor stands in the gap. He serves in a county with a large and active defense bar. He prosecutes District Court misdemeanors, violations, juvenile court, as well as child support and worthless checks. He also maintains a large Circuit Court criminal docket with every type of violent and non-violent criminal offense. He handles capital and non-capital murders as well. His office space and funding are wholly inadequate. Yet he diligently seeks the truth everyday in every case to the best of his ability. He has local and out-of-county defense attorneys that are often retained but many times are appointed by the court. Daily he prosecutes in every court in his jurisdiction. He is to the court system what a trauma doctor is to an emergency room. If it comes in the door, he deals with it in a professional and effective manner with the tools and skills he has available.

This local rural prosecutor also knows that an appointed attorney, through the payment of indigent representation fees can make three times a prosecutors salary by only accepting only appointed cases. They are able to recoup overhead expenses through the same indigent payment system.

Like many states, Alabama has a world class independent forensic sciences agency that will do any forensic analysis requested by the state OR defense at no cost to the defense. The court system in Alabama regularly approves the outside expert witness for all types of defense needs in both capital and non capital cases. The defense simply makes a motion for extraordinary expenses and the trial court can order the State to pay the expense directly to the expert.

Our Administrative Office of Courts, (AOC) recently conducted a training and recruitment of the top litigators in our state to begin the representation of capital litigants in post conviction proceedings. For years many high priced out of state civil firms have come into our state and many others to doggedly represent capital appellants. These civil law firms are able to write off hundreds of thousands of dollars in the representation of these defendants. It is simply not true that capital litigants in Alabama are not represented by counsel in the appeals process.

I also have difficulty following the logic that the way to free more innocent people is to pay lawyers more money to fight in court after someone has already been convicted. As Mr. Bright has said, we must strengthen our adversarial system. Somehow the defense 'projects' think the defendant and not the victim and community are the only ones who deserve a fair and vigorous litigation of the facts. By fully funding prosecutors' offices and supporting specialized training, you will ensure that prosecutorial charging decisions as well as litigation will be handled in manner consistent with professionalism and fairness

In Conclusion

Mr. Chairman, one thing that has been grossly overlooked in all of this process is the fact that prosecutors and forensic science professionals do more to free the innocent and safeguard the liberties of our citizens than any defense project or academician will accomplish in a career. Those entities have no burden or have taken no oath to seek the truth. Conversely, they are required to suppress the truth when it serves the best interest and needs of their client. We abhor injustice whether it comes in the form of a wrongful conviction or a wrongful acquittal.

In the story, *To Kill a Mockingbird*, Atticus Finch tells Scout that you never really know somebody until you crawl up in their skin and walk around for a while. Perhaps only another prosecutor can truly understand the burden that we carry. Likewise, only another prosecutor can understand the satisfaction we gain from our profession. We must as professional prosecutors remember our fundamental obligation to ourselves, our victims, and the public we represent. We are to be firm and uncompromising in our principles, with fairness and honesty as our standard.

With every good wish, I sincerely express my gratitude to this Committee for its passion and deep commitment to see that true justice is available for all the citizens of our great nation.

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