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SUBMISSION OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
TO THE
AD HOC COMMITTEE OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES ON FEDERAL HABEAS CORPUS REVIEW
IN CAPITAL CASES

May 31, 1989

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Introduction*

Founded in 1911, the National Legal Aid & Defender Association ("NLADA") is a private, nonprofit organization committed to the provision of high quality legal services for poor people in America. Death penalty cases -- which almost always feature an impoverished defendant and which are noted for their extreme complexity and the extraordinary professional demands they make upon lawyers -- particularly merit our commitment to high quality legal services.

To that end, NLADA is among those who have responded to the critical lack of quality representation in death penalty cases. NLADA recently adopted Standards for the Appointment and Performance of Counsel in Death Penalty Cases ("NLADA Standards") in an attempt to improve the representation afforded to poor defendants.¹ NLADA also publishes Capital Report, which features articles on trends in the trial, appellate, and post-conviction stages of death penalty

* The National Legal Aid & Defender Association gratefully acknowledges the work of the American Bar Association Task Force on Death Penalty Habeas Corpus. Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases (May 1, 1989) -- the task force's background and issues paper drafted by Reporter Ira P. Robbins -- has been a valuable resource in the preparation of this submission.

1 The NLADA Standards were recently adopted by the American Bar Association House of Delegates under the name Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

cases. In addition, NLADA earlier this year conducted a death penalty defense training conference for more than 200 lawyers from around the country. NLADA also offers death penalty defense training at the Annual Conference.

Sadly, a prominent failing of the system of capital punishment in the United States today is the lack of quality legal representation at each and every stage of death penalty cases. Too many lawyers who undertake representation in these cases lack expertise in an area of the law that all concede to be intricate and sophisticated even for the expert. Indeed, these lawyers sometimes enjoy only the most rudimentary experience in basic criminal law. Furthermore, these lawyers lack necessary assistance and are shockingly underpaid.

This critical lack of quality legal representation produces unfair and inequitable results. As a former law clerk to Justice Stevens has said, "the death penalty frequently results from nothing more than poverty and poor lawyering."² Poor legal representation in these capital cases also exacts a heavy toll from the criminal justice system. Because of the unique finality that comes with an execution, thorough appellate and post-conviction review of capital cases -- at both the state and federal levels -- is a moral and constitutional imperative. When truly quality

² Sloan, "Death Row Clerk," The New Republic, February 16, 1987.

lawyering is absent, each successive stage of that review is sure to be more complicated, protracted and disorderly.

From NLADA's perspective, it is simply impossible to bring order to post-conviction capital litigation unless and until the quality of legal representation at all stages of capital cases is improved. Such improvement is possible, but only if our criminal justice system is willing to make the commitment. Meaningful standards must be enforced to ensure that the lawyers who undertake these difficult cases are equipped for the task. And the resources necessary to provide quality legal representation must be guaranteed.

A. The Critical Need For High Quality Legal Representation At Trial And On Appeal

From practical, moral and constitutional standpoints alike, death differs qualitatively from all lesser punishments.³ Precisely because death is different, in no place is the need for high quality legal assistance more acute than throughout a capital case. Indeed, the special need for counsel in the unique circumstances of death penalty litigation was recognized at the time the republic

³ "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell and Stevens, JJ.).

was born. In § 29 of the Act of April 30, 1790, the same First Congress that proposed the Bill of Rights provided for the appointment of up to two counsel in capital cases.

But quality representation at each stage of a capital case has proved difficult to attain. In part, the problem inheres in the nature of a capital case. "The defense of a capitally charged individual involves an enormous undertaking. . . . Obviously, the job is not one for every member of the bar or even every member of the criminal defense bar."⁴ At issue is murder, the most heinous crime. Highly charged at every stage, these cases are not for the faint of heart or the unseasoned. As former Chief Judge John C. Godbold of the Eleventh Circuit has said:

The community is often inflamed.
The press is often inflamed. The
state trial judge is often inflamed
if you question what he did. The
trial counsel is often inflamed if
you must question what he did.⁵

Nor are these cases for the inexperienced, the unprepared, or the unsupported. Homicide law is itself a subtle and nuanced area of substantive criminal law, yet it is a model of simplicity when compared with the other legal

⁴ People v. Wade, 233 Cal. Rptr 48, 76, 43 Cal. 3d 366, ___, 729 P.2d 239, 258 (1987) (Bird, C.J., dissenting).

⁵ "You Don't Have To Be A Bleeding Heart" Representing Death Row: A Dialogue Between Judge Abner J. Mikva and Judge John C. Godbold, Human Rights, Winter 1987, at 22, 23. See also Note, Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts, 95 Yale L.J. 349, 361 (1985).

challenges awaiting the defense lawyer in a capital case. Counsel must be current in the ever-changing law of constitutional criminal procedure and, moreover, intimately familiar with the extraordinary rules and principles unique to capital litigation. Of course, there are special federal constitutional rules which govern or might govern discovery⁶, trial preparation⁷, jury voir dire⁸, the taking of evidence⁹, closing arguments¹⁰, jury instructions at the guilt phase of the trial¹¹, jury instructions at the sentencing phase of the trial¹², the use of aggravating circumstances¹³ and evidence to support such circumstances¹⁴, the threshold level of culpability

6 E.g., Neelley v. Alabama, 57 U.S.L.W. 3450 (U.S. January 9, 1989) (Marshall, J., dissenting from denial of certiorari).

7 E.g., Ake v. Oklahoma, 470 U.S. 68 (1985).

8 E.g., Ross v. Oklahoma, 486 U.S. ___, 108 S. Ct. 2273 (1988); Turner v. Murray, 476 U.S. 28 (1986); Wainwright v. Witt, 469 U.S. 810 (1985).

9 E.g., Skipper v. South Carolina, 476 U.S. 1 (1986); Green v. Georgia, 442 U.S. 95 (1979); Gardner v. Florida, 430 U.S. 349 (1977).

10 E.g., Caldwell v. Mississippi, 472 U.S. 320 (1985).

11 E.g., Francis v. Franklin, 471 U.S. 307 (1985); Beck v. Alabama, 447 U.S. 625 (1980).

12 E.g., Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987).

13 E.g., Maynard v. Cartwright, 486 U.S. ___, 108 S. Ct. 1853 (1988).

14 E.g., Johnson v. Mississippi, 486 U.S. ___, 108 S. Ct. 1981 (1988).

necessary to sustain the death penalty¹⁵, and the very method of deciding the question of life or death.¹⁶ What is more, equally unusual rules unique to capital litigation exist under state law. No less discomfoting for counsel is the further realization that a failure to preserve the client's claims in strict accordance with state procedural law might well lead to the client's death in spite of the merits.¹⁷

Yet sound litigation skills and the mastery of sophisticated law are not enough. Counsel must also build a case on the facts, and the facts that are relevant to effective capital litigation are extensive indeed. The circumstances of the crime -- including any facts suggesting diminished culpability -- must be thoroughly investigated, but so too must be the defendant's character and background.

In short, "death penalty jurisprudence and post-conviction law bedevil the practitioner and the theoretician. In combination, the two areas are a minefield for the unwary."¹⁸ As the highest court of one state noted, "death penalty litigation has become highly specialized and

¹⁵ E.g., Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

¹⁶ E.g., Blystone v. Pennsylvania, cert. granted, 57 U.S.L.W. 3635 (March 28, 1989) (No. 88-6222).

¹⁷ E.g., Smith v. Murray, 477 U.S. 527 (1986).

¹⁸ Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 Am. U. L. Rev. 513, 531 (1988).

. . . few attorneys have 'even a surface familiarity with seemingly innumerable refinements put on [the Supreme Court's Eighth Amendment decisions since 1976].'"¹⁹

Befitting the complex and specialized nature of capital litigation, one would expect that lawyers with sufficient expertise, experience and resources would be called upon to do the work. That, however, is not in fact the case. The vast majority of capital defendants find their counsel appointed for them. In some jurisdictions, that may entail appointment of an overworked public defender office. But other jurisdictions, including virtually all the counties in Texas, lack any indigent defense institution and instead rely upon a pool of local attorneys available for appointment by the court.

In far too many of these cases, the lawyer receiving the appointment lacks the expertise, experience and resources necessary to responsibly conduct a capital defense. Indeed, some of these lawyers have no particular expertise in criminal matters at all. A first-year intern, or even an experienced family practitioner, would never be permitted to perform open-heart surgery. In a capital case, the defendant's life is no less at stake -- yet his life is too often placed in the hands of an ill-equipped or

¹⁹ Irving v. State, 441 So. 2d 846, 856 (Miss. 1983), cert. denied, 470 U.S. 1059 (1985) (quoting Evans v. State, 441 So. 2d 520, 528 (Miss. 1983) (Robertson, J., dissenting), cert. denied, 467 U.S. 1264 (1984)).

inexperienced lawyer. Justice Thurgood Marshall bore witness to the point in his 1985 remarks to the Judicial Conference of the Second Circuit:

[C]apital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases. Death penalty litigation has become a specialized field of practice. . . . And even the most well-intentioned attorneys often are unable to recognize, preserve and defend their clients' rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases.

Counsel, whether appointed or retained, often are handling their first criminal cases, or their first murder cases. When confronted with this, the prospect of a death penalty is ominous.

Though acting in good faith, they often make serious mistakes. Thus, in capital cases I have read, counsel have simply been unaware that certain death penalty issues are pending before the appellate courts and that the claims should be preserved; that certain findings by a jury might preclude imposition of a death penalty; or that a separate sentencing procedure or phases of the litigation must follow a conviction. The federal reports are filled with stories of counsel who presented no evidence in mitigation of their client's sentences, simply because they did not know what to offer or how to offer it, or had not read the state's sentencing statute. I kid

you not, that has happened time and time again.²⁰

The consequences of sub-par legal representation at the trial level are disastrous to the defendant and to the criminal justice system. As the Supreme Court recently noted, our adversarial system of justice "is premised on the well-tested principle that truth -- as well as fairness -- is 'best discovered by powerful statements on both sides of the question.'"²¹ So long as unqualified -- well-meaning but still unqualified -- lawyers continue to represent capitally accused defendants, it will be the defendant's side which will lack the powerful statements on its behalf that truth and fairness demand. There is a decided risk

²⁰ Remarks of Justice Marshall at Judicial Conference of United States Court of Appeals for the Second Circuit, September 6, 1985.

For some examples of ineffective assistance, see Tyler v. Kemp, 755 F.2d 741 (11th Cir.), cert. denied, 474 U.S. 1026 (1985); Dillon v. Duckworth, 751 F.2d 895 (7th Cir. 1984), cert. denied, 471 U.S. 1108 (1985); Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984); House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462 (1984), cert. denied, 471 U.S. 1016 (1985); and Young v. Zant, 677 F.2d 792 (11th Cir. 1982). Other examples are discussed in, among other sources, Tabak, The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & Soc. Change 797, 803-05 (1986), and Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299 (1983).

²¹ Penson v. Ohio, 57 U.S.L.W. 4020, 4022 (November 29, 1988) (citations omitted).

that an unjust trial or sentencing hearing will produce an unjust conviction or an unjust death penalty.

Poor representation at trial continues thereafter to tax the criminal justice system. Often, time and effort are later spent on appeal and in post-conviction to determine not so much whether counsel's performance was poor, but instead whether it was poor enough to offend the Sixth and Fourteenth Amendments.²² But considerable time and effort also are spent making up for counsel's initial shortcomings. Appellate judges and appellate lawyers alike know the impediments to sound decisionmaking that arise from a deficient trial record left by a poor attorney. When a trial attorney fails to investigate facts which might prove critical in defense or in mitigation of the offense, the competent and loyal appellate or post-conviction attorney has no choice but to perform the investigation. Similarly, it is not uncommon to find significant time and effort in post-conviction devoted to the development of factual records which the trial court -- in part because of inadequate defense counsel -- neglected to fully develop earlier.²³

²² The reporters contain numerous examples of very poor quality representation found to satisfy the constitutional minimum under Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Mitchell v. Kemp, ___ U.S. ___, 107 S. Ct. 3249 (1987) (Marshall, J., dissenting from denial of certiorari); Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985), cert. denied, 474 U.S. 1088 (1986).

²³ E.g., Smith v. Zant, 855 F.2d 712 (11th Cir. 1988) (factual record concerning whether mentally retarded

As Georgia Attorney General Michael Bowers has said, "If you can get death row inmates good lawyers at trial, I guarantee you these cases will move a lot faster."²⁴

Poor lawyering is not uncommon at the state appellate level either. Frequently, the same attorney who tried the case poorly undertakes the appeal as well. Such attorneys have been known to file inadequate, unreadable, poorly researched and unreasoned "briefs" that shed virtually no light on the real issues in the case.²⁵

**B. The Critical Need For High Quality
Legal Representation In Post-Conviction
Proceedings**

As difficult and complicated as the trial of a death penalty case is, matters can be even more intricate and

defendant intelligently waived Fifth Amendment rights); Spencer v. Zant, 781 F.2d 1458 (11th Cir. 1986) (ordering evidentiary hearing concerning jury challenge); Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983) (ordering evidentiary hearing concerning extent of pretrial publicity).

²⁴ "Lack of Public Defenders Cited in Costly Death Row Appeals," Atlanta Journal & Constitution, Nov. 12, 1988, at C1, col. 1. Justice Harold Clarke of the Georgia Supreme Court concurred: "The better the [trial] lawyer, the less likely there is to be a long appeal." Id.

²⁵ A lawyer who filed shockingly inadequate briefs in two death penalty cases in North Carolina (each brief under fifteen pages in length) recently was removed from the cases on the state supreme court's own motion. See State v. Wayne Alan Laws, No. 653A85 (N.C. S. Ct. July 28, 1987) (order removing counsel and appointing successor counsel); State v. Ricky Lee Sanderson, No. 125A86 (N.C. S. Ct. July 28, 1987) (order removing counsel and appointing successor counsel).

demanding in the post-conviction phase of a capital case.

NLADA has warned practitioners:

Representing a death-sentenced client in post conviction proceedings is as demanding as -- or, if that is possible, even more demanding than -- the tasks faced by other capital counsel. Especially when a death warrant has been signed, counsel is subjected to demands virtually impossible to meet physically, economically, temporally and emotionally. Seeking to ward off imminent execution while continuing to challenge the validity of the client's conviction and sentence may require filing pleadings almost simultaneously in several courts (often some distance apart). Investigation of factual issues may be necessary, and consultation with the client will require counsel's time and presence at yet another location.²⁶

The complex of doctrines relating to procedural default and the exhaustion of state remedies make the post-conviction lawyer's job more difficult still. Justice Stevens was surely right to label these doctrines a "procedural maze of enormous complexity."²⁷ To NLADA, the wisdom of continued maintenance of this maze -- at least in capital cases -- is highly questionable. Not long ago, Justice Black wrote for a unanimous Court that habeas corpus "is not now and never has been a static, narrow, formalistic

²⁶ Commentary, NLADA Standard 2.1, at 15.

²⁷ Murray v. Carrier, 477 U.S. 478, 497 (Stevens, J., concurring in the judgment).

remedy."²⁸ It is not easy to square that historic vision of the writ with a practice which today permits the execution of one individual while sparing the life of another solely because one lawyer neglected to present the issue in the precise manner that another did.²⁹ Furthermore, application of these doctrines in capital cases imposes a great cost on the federal courts that outweighs the largely theoretical gains made in the name of federalism.³⁰

²⁸ Jones v. Cunningham, 371 U.S. 236, 243 (1963).

²⁹ Such results happen today. Compare Stanley v. Kemp, 737 F.2d 921 (11th Cir.), application for stay denied, 468 U.S. 1220 (1984) (defendant executed notwithstanding claim of unconstitutional jury instruction), with Thomas v. Zant, 800 F.2d 1024 (11th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (Stanley's more culpable codefendant granted relief for the unconstitutional instruction).

³⁰ See, e.g., Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1221-22 (1986):

One might argue that when life is at stake, constitutional claims should not be forfeited unless the state can prove a deliberate bypass by the client himself or, when participation by the client is not feasible, an intentional waiver by his counsel. By stressing the personal nature of constitutional rights and their vindication, such a standard would reflect the heightened solicitude generally shown capital defendants.

See also Brown v. Grammer, 665 F. Supp. 773, 777 (D. Neb. 1987) (Lay, C.J., sitting by designation) (questioning the costs and benefits of adherence to procedural obstacles to habeas corpus).

All agree that there is today a counsel crisis in capital post-conviction proceedings:

[T]he post-conviction capital defendant who cannot afford a lawyer is left to the mercy of volunteer lawyers. If voluntary representation is not available, the defendant must act pro se or accept death without attempting habeas proceedings. The shortage of volunteer attorneys and the ever-growing death row population raises the spectre of pro se defendants lacking adequate skill to present the issues in habeas proceedings, or worse, executions of defendants unable ever to marshal such an effort.³¹

While death penalty "resource centers" have in some jurisdictions undertaken the chore of recruiting volunteer counsel to handle post-conviction cases, the evidence suggests that continued reliance on volunteer counsel will be unavailing:

[T]he pool of volunteer lawyers cannot expand rapidly enough to meet the growing need. As all of the . . . studies demonstrate, the time and effort required for the representation of the indigent defendant on death row is enormous, and the rewards are intangible. No study can document the emotional cost associated with the representation of a person whose sole lifeline may be the volunteer attorney. Comments submitted by volunteer attorneys . . . reflect the frustration and disenchantment of some of these practitioners.

³¹ Committee on Civil Rights, The Death Penalty, 39 Rec. A.B. City N.Y. 419, 425 (1984).

While a valuable asset to representation of death row inmates, a system of volunteer counsel cannot be a long-term solution.³²

The importance of high quality legal representation at the post-conviction stage of a capital case cannot be overemphasized. Without such representation -- and an effective system to deliver that representation -- chaos has reigned and will continue to reign. Indeed, it is not hard to see how the process as it now exists invites disorder. Reliance on volunteer attorneys necessarily entails initial delays while a volunteer is found. That delay, in turn, breeds a further delay while the volunteer attorney gathers the record and begins the post-conviction investigation (an investigation which, as already noted, may require extensive effort in cases where trial counsel was neglectful). Moreover, the volunteer counsel who finally undertakes the case is all too frequently unversed in the substantive and procedural intricacies of capital litigation. Substantial claims for relief, accordingly, may be raised poorly or not raised at all. These failings are in neither the defendant's nor society's interest, yet they are entirely predictable when reliance is placed on attorneys who lack expertise, experience and resources.³³

³² Wilson & Spangenberg, State Postconviction Representation of Defendants Sentenced to Death, at 19 (1988).

³³ As Justice Powell has observed, the State of Florida turned to a system of state-supported counsel in

What these failings naturally generate are further problems and further delay. Complicated questions will arise as to whether particular claims were properly exhausted in the state courts. If they were not exhausted, more complications will follow. Where unexhausted claims are presented in a federal habeas corpus petition³⁴, the case might be dismissed or might be held in abeyance while unexhausted claims are submitted to the state tribunals.³⁵ If the unexhausted claim is not discovered until after a habeas petition has been adjudicated, the problems associated with successive petitions may arise.

Simply put, poor quality post-conviction representation needlessly complicates and protracts the litigation. It is perhaps time to heed the advice of Chief Judge Donald Lay of the Eighth Circuit. In 1972, Judge Lay in a different context wrote:

Courts directly benefit from the fact that most potential litigants first present their problems to

post-conviction capital proceedings "because of the inadequacy of using volunteer lawyers." Remarks of Justice Lewis F. Powell at the Eleventh Circuit Judicial Conference (May 12, 1986), at 8-9.

34 "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." Lambert v. Barrett, 159 U.S. 660, 662 (1895).

35 See, e.g., Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988); Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983), reh'g denied with opinion, 739 F.2d 529 (11th Cir. 1984), cert. denied, 469 U.S. 1127 (1985).

competent lawyers who then engage in the necessary investigation and legal research to properly counsel the client in the merits of his case.

There would be much merit if we could emulate this practice in the area of post-conviction litigation.³⁶

C. The Critical Need For Standards And A System Designed To Continuously Deliver High Quality Legal Representation

Several factors work together to bring about the poor quality of legal representation that plagues capital litigation both at trial and after trial. In each instance, improvement will not come until serious standards are instituted to ensure that only truly qualified lawyers undertake these difficult cases, until a system to ensure continued adherence to those standards is in place, and until the resources necessary to provide quality legal representation are committed.

There are typically no fixed standards employed to determine who is well-equipped to handle a capital case and who is not. A civil practitioner with little to no criminal litigation experience -- let alone experience in capital litigation -- ought not be charged with the heavy responsibility of a capital case, but such attorneys have

³⁶ Lay, Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved, 21 De Paul L. Rev. 701, 734 (1972).

been known to undertake the representation.³⁷ More importantly, an indigent defendant who is forced to rely on the state to appoint competent counsel is all too frequently at the mercy of an attorney who has neither the experience nor the skills necessary to effective representation in a capital case.³⁸

The NLADA Standards seek to rectify this situation. Among other things, they prescribe that at each stage of a capital case (i.e., trial, direct appeal, and post-conviction) two qualified attorneys should be assigned to represent the defendant³⁹, and they contain stringent minimum qualifications that attorneys must meet before they are appointed in capital cases. Those qualifications include a demonstration by the attorney that he or she has

³⁷ See House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984) (two real estate lawyers who represented defendant on retained basis held to have provided ineffective assistance of counsel).

³⁸ See, e.g., King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (assigned counsel never discussed the defendant's background with him, did not investigate for helpful sentencing phase evidence, and made a closing argument in which he indicated to the jury that he was representing the defendant reluctantly).

³⁹ NLADA Standard 2.1. Some states require the appointment of two attorneys by rule or statute. E.g., Ill. Rev. Stat. Ch. 110A, § 607 (1978); N.C. Gen. Stat. §7A-450(b1); Rule 65, Qualifications for Eligibility to be Court-Appointed Counsel for Indigent Capital Defendants in the Courts of Ohio, adopted by the Ohio Supreme Court on October 14, 1987.

the necessary proficiency and commitment necessary to effective representation in a capital case.⁴⁰

There also is typically a lack of procedures designed to ensure the recruitment, appointment, and monitoring of attorneys who do capital punishment litigation. In many jurisdictions, trial lawyers are culled by a clerk or a resident judge from the rolls of attorneys available for court appointment with little to no consideration given to the attorney's actual qualifications to handle a capital case. The process for securing post-conviction counsel is often similarly unstructured.

The NLADA Standards also address this problem, calling upon each jurisdiction to formulate a "legal representation plan" that follows one of two equally acceptable approaches for formalizing the process of appointment. In general, the authority to recruit and select competent attorneys should:

- * Be centralized in the defender office or assigned counsel program of the jurisdiction; or
- * In jurisdictions where such centralization is unfeasible, be lodged in a special appointments committee made up of no fewer than five attorneys

⁴⁰ NLADA Standard 5.1. The federal Anti-Drug Abuse Act of 1988 also mandates minimum qualifications for the appointment of counsel in federal capital cases and in federal habeas corpus proceedings arising from both state and federal death penalty verdicts. Pub. L. No. 100-690, 102 Stat. 4181, 4394 (1988).

knowledgeable and experienced in the practice of capital cases.⁴¹

Regardless of which method is chosen, the appointing body should adopt standards and procedures for the appointment of counsel. Moreover, specific and serious performance standards relating to various aspects of capital representation must be established and maintained.⁴² The appointing body also should set forth standards and procedures for the continued monitoring of counsel and, where necessary, the removal of counsel.⁴³ Furthermore, the legal representation plan for each jurisdiction should include sufficient funding to provide frequent training programs for counsel in capital cases and for those lawyers who desire to be placed on the roster of counsel available for assignment.⁴⁴

It is no secret that capital defense attorneys are tremendously undercompensated, in some cases making less than the minimum wage for defending someone on trial for his or her life.⁴⁵ At trial, "[f]ees are so ridiculously low in

41 NLADA Standard 3.1.

42 NLADA Standards 11.1-11.9.

43 NLADA Standard 7.1.

44 NLADA Standard 9.1.

45 In two Virginia cases, for instance, the attorneys received effective hourly rates of \$0.58 and \$3.30 respectively. The Spangenberg Group, Study of Representation of Capital Cases in Virginia, November 1988. In a Mississippi case, the lawyer worked 400 hours and was paid \$1,000 -- \$2.50 per hour. Elvin, "Where Are The

death cases that one of two things will happen: either the lawyer or the client will be fundamentally shortchanged."⁴⁶ Compensation for post-conviction attorneys, where it exists at all, is equally woeful.⁴⁷ Compounding the problem of inadequate compensation is the lack of resources necessary to preparation and presentation of an effective defense.⁴⁸ The resources made available to the defense are substantially below those available to the prosecution.⁴⁹

As one court has noted, the result is inevitable:

The link between compensation and the quality of representation remains too clear. See the dissent in Mackenzie [v. Hillsborough County], 288 So.2d [200 (Fla. 1973)] at 202 ("The adage that 'you get what you pay for' applies not infrequently. In our pecuniary culture the calibre of personal services rendered usually has a

Lawyers; Representation at Trial," Journal of the National Prison Project, No. 12, Summer 1987, at 5. See also Tabak, The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & Soc. Change 797, 801-03 (1986).

⁴⁶ Gradess, "The Road from Scottsboro," Criminal Justice, Summer 1987, at 2, 46 (noting that several states limit trial counsel's fee to \$1,500 or less).

⁴⁷ See The Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases 11 (February 1987).

⁴⁸ E.g., Tabak, The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & Soc. Change 797, 801-10 (1986); Gradess, "The Road from Scottsboro," Criminal Justice, Summer 1987, at 2, 46.

⁴⁹ See, e.g., Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 17 U.C. Davis L. Rev. 1221, 1254 n. 158 (1985).

corresponding relationship to the compensation provided.").⁵⁰

This of course makes the search for qualified attorneys more difficult, particularly since these attorneys know that judges and prosecutors in capital cases do not work for reduced compensation. The NLADA Standards accordingly provide that capital counsel should be compensated for actual time and service performed, with the goal being to provide a reasonable hourly compensation that "reflects the extraordinary responsibilities inherent in death penalty litigation."⁵¹

Finally, the quest for high quality legal representation in capital cases is made difficult by the simple fact that the law relating to capital punishment litigation is constantly and rapidly evolving. Resource centers -- when staffed by lawyers with expertise and when adequately funded -- can help to meet this practical problem by providing to capital litigators essential backup

⁵⁰ Makemson v. Martin County, 491 So.2d 1109, 1114-15 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987).

⁵¹ NLADA Standard 10.1(a). Standard 10.1 also prescribes full reimbursement for reasonable incidental expenses and for periodic billing and payment.

The Anti-Drug Abuse Act of 1988, it should be noted, eliminates the maximum limits on fees and expenses that a judge may award to an attorney who handles a federal death penalty trial or a federal habeas corpus proceeding arising from either a state or a federal death penalty verdict. Pub. L. No. 100-690, 102 Stat. 4181, 4394 (1988).

support.⁵² The NLADA Standards also are responsive to the problem, for they require that attorneys who wish to remain eligible for capital representation periodically attend and successfully complete approved training or educational programs.⁵³

D. The Critical Need For Meaningful Federal Habeas Corpus Review

It is only appropriate to counsel caution to those who search for ways to bring more order to federal habeas corpus practice as it applies to death penalty cases. It would be tragically irresponsible to "experiment" with the scope of the writ only to thereafter discover that its function as the guardian of federal constitutional rights had been compromised.⁵⁴

Thorough federal review of these cases on habeas is morally and constitutionally indispensable. The dramatic success rate of capital defendants who have sought relief by

⁵² See Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988) (discussing advent of resource centers).

⁵³ NLADA Standard 9.1.

⁵⁴ In that respect, Chief Justice Rehnquist recently noted that "we are not talking about wholesale reshaping of the nature of [habeas corpus] jurisdiction, but about modest changes which will impose some structure on a system which at present often proves to be chaotic and drawn out unnecessarily." Remarks of Chief Justice William H. Rehnquist at the American Bar Association Mid-Year Meeting (February 6, 1989), at 13.

way of habeas corpus in federal court has been documented.⁵⁵

The significance of those figures is profound:

In every one of these cases, the inmate's claims had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings; the Supreme Court had usually denied certiorari at least once and sometimes twice; and a federal district court had then rejected the inmate's claims of federal constitutional error infecting his conviction and/or death sentence. Yet in over 70% of the cases, a federal court of appeals found merit in one or more of the inmates' claims.⁵⁶

This "experience suggests that federal courts stand in a better position to adjudicate constitutional rights."⁵⁷ To be sure, federal judges are insulated from the pressures of the political will of the majority in ways that many state judges are not. While the precise value which Article III independence contributes to the fair and thorough review

⁵⁵ "Between 1976 and 1983 federal appellate courts ruled in favor of the condemned inmate in 73.2% of the capital appeals heard, compared to only 6.5% of the decisions in non-capital habeas cases." Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 Am. U. L. Rev. 513, 521 (1988) (footnotes omitted) (also noting that figure appears to have declined somewhat since 1983). See also Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., app. E, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

⁵⁶ Amsterdam, In Favorem Mortis, 14 Human Rights, 13, 51 (Winter 1987).

⁵⁷ Coleman v. McCormick, No. 85-4242, slip op. at 4725 n. 8 (9th Cir. May 5, 1989) (Reinhardt, J., concurring).

of capital cases is no doubt impossible to quantify, there is good reason to believe it makes a contribution we cannot do without. Even routine death penalty cases are highly charged and hotly emotional contests. State judges are prone to those exigencies precisely because they are not benefitted by the genius of Article III. Indeed, it is inconceivable to think that a federal judge would experience a removal from office because he or she was willing to stand up for constitutional rights in capital cases. Yet that happened to Chief Justice Rose Bird of the California Supreme Court⁵⁸ and nearly happened to Chief Justice James Exum of the Supreme Court of North Carolina.⁵⁹

Because "curtailing the federal habeas corpus procedures in death penalty cases would seriously undermine our commitment to constitutional values,"⁶⁰ any proposed reforms must be scrutinized carefully. Given the need for

⁵⁸ See "Bird Hunting in California," Newsweek, December 9, 1985, at 30; "As Voters Try to Overrule a Top Judge," U.S. News & World Report, December 2, 1985, at 30; "Shaking the Judicial Perch," Time, September 15, 1986, at 76; "A Vote on the Quality of Mercy," Newsweek, November 3, 1986, at 63.

⁵⁹ See "Death Penalty Emerges as Key Issue in Campaign for NC Chief Justice," The News and Observer, September 21, 1986, at A1, col. 3; "Martin Says 'Nothing Wrong' with Group Assailing Exum," The News and Observer, October 3, 1986, at C8, col. 1; "GOP May Push Death Penalty More," The News and Observer, October 4, 1986, at A1, col. 1; "Heated Race Puts Partisan Judicial Election in Question," The News and Observer, November 2, 1986, at A35, col. 1.

⁶⁰ Coleman v. McCormick, No. 85-4242, slip op. at 4719 (9th Cir. May 5, 1989) (Reinhardt, J., concurring).

flexibility in the handling of cases that every federal district judge experiences, and the fact that capital cases can differ markedly in the particular litigation needs they present, it also would seem that rigid timetables for the disposition of capital cases would prove unjust and unworkable.

Conclusion

Capital litigation in the United States today too often begins with poor legal representation. Thereafter, society pays the price as each successive stage of the case -- including the federal habeas stage -- becomes more complicated, more protracted, and more costly. Poor representation after trial is also not uncommon, and it too imposes a cost on society at each successive stage of the litigation.

Accordingly, orderly federal habeas corpus litigation in capital cases will come only when the quality of legal representation at all stages of capital cases is improved. With a serious commitment to quality and a serious commitment of resources, this goal can be attained.