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S. HRG. 106–1061

[ERRATA] POST-CONVICTION DNA TESTING: WHEN IS JUSTICE SERVED?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JUNE 13, 2000

Serial No. J–106–88

Printed for the use of the Committee on the Judiciary

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Responses of Charles F. Baird to questions submitted by Senator Leahy

FAX

TO: JANE BUTTERFIELD, 202-228-1115

FROM: CHARLES F. BAIRD, 512-326-3471

RE: Answers to follow up questions to the June 13, 2000 DNA hearing.

DATE: July 12, 2000. PAGES: 5.

ANSWERS TO QUESTIONS SUBMITTED BY SENATOR LEAHY:

1. Please list and describe any legislation within your State, pending or enacted, relating to post-conviction DNA testing.

ANSWER: No such legislation has been enacted or introduced.

2. Please list and describe any legislation within your State, pending or enacted, relating to the preservation of biological evidence.

ANSWER: No such legislation has been enacted or introduced.

3. Please list and describe any legislation within your State, pending or enacted, relating to standards for ensuring competency of counsel in capital cases.

ANSWER: No such legislation has been enacted or introduced. However, Article 11.071, sec. 2 (c) of the Texas Code of Criminal Procedure does provide for the appointment of "competent counsel" to handle capital habeas cases.

4. Please list and describe any legislation within your State, pending or enacted, relating to compensation for wrongfully convicted individuals.

ANSWER: Legislation has been enacted which permits total recovery up to $50,000 ($25,000 for pain and suffering and $25,000 for medical expenses). *See* Tex. Civ. Prac. & Rem. Code sec. 103.006.

5. In her testimony, majority witness Enid Camps expressed concerns about the standard that the Leahy-Smith-Collins bill would establish for resolving requests for DNA testing. Could you speak to those concerns?

ANSWER: Ms. Camps was concerned that the standards were not sufficiently high to prevent frivolous litigation in DNA cases. In my opinion, those concerns are not well founded because the standard in the Leahy-Smith-Collins bill requires testing only if the test results have the potential to produce exculpatory evidence or evidence that the person was wrongly sentenced. In my opinion, this standard is sufficiently high to avoid frivolous litigation.

6. There appeared to be some confusion, during the hearing, as to whether Texas requires two lawyers in capital cases. Would you care to clarify your earlier response?

ANSWER: In Texas, a capital defendant does not have the right to the representation of two attorneys on either direct appeal or in the post-conviction process.

Article 26.052(e) of the Texas Code of Criminal Procedure provides for two attorneys at trial "unless reasons against the appointment of two counsel are stated in the record." This provision provides an "out" for the judge who does not wish to appoint two attorneys. Therefore, the statute is not truly mandatory. Additionally, the statute may be rendered toothless where the defendant requested two attorneys but the trial judge refused the request. On appeal, the Texas Court of Criminal Appeals would most likely hold the violation of the statute was harmless because it did not affect the substantial rights of the defendant. This conclusion would be reached because the defendant would not be able to establish what second counsel would have done prior to trial and/or during trial.

7. Please describe in detail the process by which counsel is appointed in your State for an indigent defendant charged with a capital offense.

ANSWER: I cannot describe in detail this process because there is no statewide process. Each county is left to its own devices in appointing counsel in capital cases.

1. Are there any State-wide performance standards for capital case representation?

ANSWER: No.

2. Is there a centralized, State-wide, independent authority responsible for administering the capital defense program?

ANSWER: No.

8. In the mid-1990s, the National Center for State Courts (NCSC) reported to the Conference of Chief Justices on "Competence of Counsel in Capital Cases." It concluded:

"The main problem facing the state courts is that the most common basis for post-conviction relief in capital cases has been incompetence of counsel, quite legitimately so in a number of cases. The reasons for this inadequacy of representation are well known - lack of standards and criteria for choosing defense counsel and lack of funding for this type of legal service."

Do you agree with this assessment?

ANSWER: Yes.

9. The NCSC report identified inadequate funding as a major cause of the prevalent inadequacy of representation in capital cases:
"Low fees discourage competent attorneys from seeking assignments in capital cases and expending the time and effort to provide an adequate defense. The low fees may result from policies that impose a cap on attorney compensation, set a flat rate per case, or simply set a very low hourly rate. Underlying the problem of low compensation to attorneys is a frequent reluctance on the part of appropriating bodies to provide funds for indigent defense."

Please comment on the adequacy of funding in your State for:

(a) Defense lawyers' time in both out-of-court preparation and in-court work.

ANSWER: It is impossible to comment because, as noted in my answer to question no. 7, each county is left to its own devices in appointing counsel in capital cases. Therefore, each county has different methods of determining the compensation for counsel.

(b) Defense investigation and expert consultants.

ANSWER: My understanding is that funding for investigation and experts is inadequate and that requests for such funding are often denied. *See* Griffith v. State, 983 S.W.2d 282 (Tex. Crim. App. 1998).

10. In 1996, Congress defunded the federal death penalty resource centers. How did this development affect the quality of capital representation in your State?

ANSWER: Texas has enacted Article 11.071 of the Code of Criminal Procedure which requires the appointment of counsel for habeas representation in capital cases.

11. Please comment on the quality of representation in your State's capital post-conviction proceedings, and the effectiveness of such proceedings in rooting out errors in capital trials.

ANSWER: As a judge on the Court of Criminal Appeals responsible for appointing counsel in post-conviction proceedings, I can state without hesitation or reservation that counsel was too often wholly ineffective in rooting out errors in capital trials. In many cases the habeas applications were filed after the required deadlines. Those applications, therefore, were not considered. *See* Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998). And in many of the cases where the deadlines were met, the applications were woefully lacking. *See* Ex parte Martinez, 977 S.W.2d 589 (Tex. Crim. App. 1998).

12. On June 12, 2000, the Chicago Tribune reported that in 43 of the last 131 executions in Texas, the defendant was represented at trial or on initial appeal by an attorney who had been or was later disbarred, suspended or otherwise sanctioned. Do you believe that the State of Texas has solved the problems that led to that disturbing record?

ANSWER: No. I am confident that the problem continues today.

13. Do you agree that a court in a capital sentencing proceeding should give a full and complete instruction to the jury on all of its sentencing options, including applicable parole eligibility rules and terms, and any options that would be presented to the court should the jury fail to agree on a sentence? Do courts in your State do this?

ANSWER: I agree that jurors should be provided truthful information regarding their sentencing options. This now required in Texas. *See* Tex. Code Crim. Proc. Ann. art. 37.071, Sec. 2 (e).

14. Attorney General Edmundson and others have argued that the federal government should not be mandating what States need to do regarding the death penalty. Why is federal action needed?

ANSWER: Federal action is needed because minimum national standards are required. While Oklahoma, New York and other states have taken affirmative steps to solve their capital problems, other states have not taken any remedial action. While Texas is the national leader in executions, has a very large death row population and continues to seek the death penalty in many cases, it has not taken the remedial actions necessary to ensure that capital punishment is administered fairly and justly to only those deserving of the ultimate punishment.

Response of Charles F. Baird to a question submitted by Senator Feinstein

ANSWER TO QUESTION SUBMITTED BY SENATOR FEINSTEIN:

QUESTION: To avoid any questions about whether DNA technology was "available" at the time of trial, do you think that putting a date certain in the bill would be appropriate – for instance, allow only cases tried before 1999 to qualify for post-conviction testing? Can we safely say that DNA technology is advanced enough to institute such a date cutoff?

ANSWER: While I am certainly not an expert on DNA technology, I am aware there have been great advances and I believe we can safely assume those advances will continue. Therefore, I would not put an arbitrary date in the bill as it may limit the application of the subsequent advances in DNA technology.

Responses of George Clarke to questions submitted by Senator Leahy

QUESTIONS from SEN. LEAHY

1. Prior to the hearing, did you read a draft or any portion of Chairman Hatch's proposed DNA legislation, which had not yet been introduced to the Senate at the time of your testimony? If yes, please respond to the following.

Yes.

(a) How did you obtain a copy of the proposal?

I received by facsimile transmission a draft of a portion of the proposal approximately May 8, 2000, followed by a draft of the proposed statute shortly after that date.

(b) When did you first obtain a copy of the proposal?

See above answer.

(c) Were you asked to comment on the Chairman's proposed legislation?

Yes. Chairman Hatch's staff requested that I examine his draft proposal and provide comments and suggestions.

(d) Were you asked to comment on the Leahy-Smith-Collins Innocence Protection Act?

Yes.

2. Please list and describe any legislation within your State, pending or enacted, relating to post-conviction DNA testing.

California State Senator John Burton has introduced Sentate Bill 1342, a post-conviction DNA testing statute. The bill has passed the California State Senate and is pending in the California Assembly.

3. Please describe in detail the process by which a death row inmate in your State currently may obtain post-conviction DNA testing.

A California capital defendant may seek DNA testing through the cooperation of the prosecuting agency. In addition, testing may be sought by the legal vehicle of a motion for new trial or petition for writ of habeas corpus.

4. Since 1990, in your State:
(a) How many individuals wrongfully convicted of a capital crime have been later exonerated through the use of DNA testing?

To my knowledge, no California capital defendant has been determined to be wrongly convicted through the use of DNA typing.

(b) What was the average number of appeals these individuals made before access to DNA testing was obtained?

Not applicable.

(c) What was the average number of years the above individuals were wrongfully incarcerated?

Not applicable.

5. Please list and describe any legislation within your State, pending or enacted, relating to the preservation of biological evidence.

California Senate Bill 1342, as described above, includes a provision requiring law governmental agencies to retain biological evidence, subject to destruction provisions similar to those contained in S.2073.

6. Please list and describe any legislation within your State, pending or enacted, relating to standards for ensuring competency of counsel in capital cases.

I am not aware of any legislation in California addressing standards for ensuring competency of capital case counsel.

7. Please list and describe any legislation within your State, pending or enacted, relating to compensation for wrongfully convicted individuals.

I am not aware of any legislation in California relating to compensation for wrongfully convicted individuals.

8. In your State:
(a) What is the average cost per case of post-conviction DNA testing?

The only cost estimates for forensic DNA typing with which I am familiar are those discussed in the Laboratory Funding Issues Working Group of the National Commission on the Future of DNA Evidence, upon which I sit. The cost estimates which we have calculated are approximately $3,000 to $5,000 per case for nuclear DNA testing.

(b) What is the average cost per inmate of incarceration for a year?

A common estimate presented in the State of California for per-year imprisonment in the California Department of Corrections is $22,000.00.

8. Chairman Hatch acknowledges in the "findings" section of his draft DNA bill that under current state law, "it is difficult to obtain post-conviction DNA testing because of time limits on introducing newly discovered evidence." He also notes that in 38 States, "motions for a new trial based on newly discovered evidence must be made not later than 2 years after the date of conviction." Despite the purported "federalism" concerns that some critics may raise, the Chairman also proposes a finding that "If post-conviction DNA testing produces exculpatory evidence, the defendant should be allowed to move for a new trial based on newly discovered evidence, notwithstanding the time limits on such motions applicable to other forms of newly discovered evidence."

I share the Chairman's concern about restrictive state time limits on newly considered evidence. Do you agree that even if State law imposes strict time limits for consideration of newly discovered evidence, that Congress has an important role to ensure that exculpatory DNA test results are considered in State courts to protect the innocent?

Yes.

A 1996 report by the National Institute of Justice, Convicted by Juries, Exonerated by Science, describes the case of David Vasquez, who pleaded guilty to second-degree homicide and burglary (Alford plea) and was sentenced to 35 years in prison. The guilty plea meant that Vasquez would not be subject to the death penalty upon conviction. The Virginia State laboratory, Cellmark Diagnostics, later performed DNA tests on the evidence from several rape/murders. All tests inculpated a man named Timothy Spencer as the assailant in the rape murders that were identical in modus operandi to the Vasquez incident. The Commonwealth's attorney then joined Vasquez' attorney in petitioning the governor to grant Vasquez an unconditional pardon. The governor granted the pardon, and Vasquez was released in 1989, having served 5 years of his sentence. Spencer was executed.

Under the bill proposed by Chairman Hatch, a defendant like David Vasquez who pleaded guilty to avoid a death sentence would have no right to DNA testing performed even if it could establish his actual innocence of the offense. Do you believe that this is an appropriate restriction?

Yes, in part. A defendant's plea of guilty should be an important factor in the determination whether post-conviction DNA typing would be appropriate. In California -- like federal jurisdictions -- a defendant may plead guilty to a crime yet also refuse to admit actual commission of the crime to which that defendant pleads guilty (in federal jurisdictions, an "Alford" plea; in California, a "West" plea). While a guilty plea, itself, should not

automatically disqualify an applicant from relief, a presumption that DNA typing would be inappropriate should accompany any request in which the defendant entered a full admission to commission of the underlying crime(s).

9. In his testimony, Barry Scheck described the case of Archie Williams, a Louisiana inmate who is serving a life sentence for aggravated rape. The prosecution took the position at the time of trial that the blood type from the semen matched Mr. Williams. He has asked for a DNA test, but the Louisiana courts will not let him have that test. Their rationale is that even if the prosecution's theory at trial was that Mr. Williams was the semen donor, it is possible that there was another consensual donor -- e.g., maybe the husband of the victim had sex with her. According to Mr. Scheck, courts have engaged in this sort of post hoc rationalization in case after case in which inmates have requested post-conviction DNA testing.

(a) Isn't it always possible to posit a theory of prosecution in which an exculpatory DNA test will not establish an inmate's "actual innocence"?

No. Cases must necessarily be categorized based on the exculpation potential of the biological evidence in question. A semen stain on a hotel bedspread, for example, may have little exculpatory value; a vaginal swab obtained from a very immature victim may have high exculpatory value. The National Commission on the Future of DNA Evidence post-conviction DNA recommendations and model statute/comments recognize the need for this categorization.

(b) If so, isn't an "actual innocence" standard too high?

I do not believe that standard is too high, although a standard based on the likelihood of a more favorable verdict or outcome at trial -- had exculpatory DNA results been available -- may also be appropriate.

10. What is your understanding of the threshold requirement in Chairman Hatch's draft bill that the evidence to be tested was not subject to the DNA testing requested because the technology for such testing was "not available" at the time of trial. In particular, would this requirement preclude testing:

(a) For an inmate convicted after DNA technology became available in the late 1980's?

Availability for purposes of this bill should depend on whether the DNA technology was readily available at the time of the defendant's conviction. For example, in my opinion, ready availability of both RFLP and PCR-based DNA typing in forensic science existed in 1990 and 1992, respectively.

(b) For an inmate whose incompetent defense lawyer failed to seek testing?

Incompetency of counsel claims involving DNA testing should be resolved by existing legal vehicles, including petition for writ of habeas corpus.

(c) For an inmate who requested pretrial testing but was denied testing by the court?

An inmate denied DNA typing by the court prior to trial should not automatically be disqualified from DNA testing under this proposed bill. Rather, testing sought under this bill by such an inmate should be evaluated based on the merits of the inmate's case and the remaining requirements of the bill for relief.

(d) For an inmate who was unaware that biological evidence had been collected in his case, due to the witholding of information by the prosecution?

An inmate denied discovery of otherwise qualifying biological evidence should be permitted to obtain DNA testing if the remaining requirements of the bill are met.

QUESTION from SEN. FEINSTEIN

To avoid any questions about whether DNA technology was "available" at the time of trial, do you think that putting a date certain in the bill would be appropriate -- for instance, allow only cases tried before 1999 to qualify for post-conviction testing? Can we safely say that DNA technology is advanced enough to institute such a date cutoff?

The designation of a date certain may be appropriate. However, changes in technology have -- and in the future will -- necessitate re-evaluation of some cases in which those changes permit typing of previously-untestable samples. Additionally, disagreement will exist as to appropriate date(s) to be determined for technology availability.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ELIOT SPITZER
Attorney General

(212) 416-8050

August 10, 2000

Senator Patrick Leahy
Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Thank you again for allowing me to participate in the June 13th Senate Judiciary Committee hearing on Postconviction DNA testing. I appreciated the opportunity to share with the Committee my thoughts and the experience of New York State on these important issues.

Attached are my answers to the follow up questions I received from you, Senator Hatch and Senator Feinstein.

If I can be of any further assistance on this or other matters, please let me know.

Very truly yours,

ELIOT SPITZER
Attorney General

Enclosures

FOLLOW-UP QUESTIONS TO THE JUNE 13, 2000 SENATE JUDICIARY COMMITTEE HEARING ON POSTCONVICTION DNA TESTING

Questions from Chairman Hatch

1. Do you believe it is appropriate to require prisoners to show that post-conviction DNA testing has "reasonable potential" to exonerate them, or should post-conviction DNA testing be required in any case in which it may produce relevant exculpatory evidence?

I advocate a standard similar to that adopted in New York, NY CPL § 440.30, in which prisoners are required to make some showing that the test results will produce relevant, exculpatory evidence. In evaluating requests for post-conviction DNA testing, New York state courts make a two-part inquiry. For those defendants convicted prior to January 1, 1996, New York's statute provides that the court shall grant the application for DNA testing upon a finding (1) that any evidence containing DNA was secured in connection with the trial resulting in the conviction; and (2) that if a DNA test had been conducted on such evidence, and the results had been admitted in the trial resulting in the judgment, there exists a "reasonable probability that the verdict would have been more favorable to the defendant."

New York's standard ensures that the state is not unduly burdened by requests for unnecessary testing . Under this standard, a defendant cannot obtain testing if the result would not produce relevant evidence. Compare People v. De Oliveira, 223 A.D.2d 766 (3d Dep't 1996) (testing denied when fact that homicide victim may have had sex with a man other than the defendant prior to her death would not prove that defendant was not her murderer) with Matter of Washpon, 164 Misc.2d 991 (Kings County 1995) (testing ordered when victim testified that she had not had sex with anyone but the rapist on the night of the crime).

New York's standard also appropriately allows a court to consider the nature of the trial evidence before ordering testing. Thus, for example, when a defendant admits having sex with the victim, but claimed it was consensual, the court may reject his post-conviction request for DNA testing. See People v. Kellar, 218 A.D.2d 406 (3d Dep't 1996). The court appropriately determined that the results of DNA would not have altered the verdict in any way.

2. Do you believe it is too difficult for prisoners to obtain post-conviction DNA testing under the standard in the New York statute? If so, would you urge the New York General Assembly to lower the requirements for prisoners to obtain post-conviction DNA testing in New York?

The New York standard, which requires a "reasonable probability that the verdict would have been more favorable to the defendant," is adequate. This standard is fair to defendants and workable for the State. I support a federal statute that requires defendants to meet similar requirements.

A concern I have about the New York post-conviction DNA testing statute is that it authorizes testing only for defendants convicted before January 1, 1996. The result of this provision is that for defendants convicted in New York after January 1, 1996, there is no statutory procedure authorizing post-conviction DNA testing. To assure access to testing in all necessary cases, I advocate that the state legislature establish standards for pretrial DNA testing and extend postconviction testing procedure to all defendants in appropriate cases regardless of when they were convicted.

3. Do you share any of Mr. Edmondson's and Ms. Camps' concerns about requiring post-conviction DNA testing in unnecessary cases?

I favor a standard that respects the rights of defendants to a fair trial while cognizant of the financial and practical burdens of increased DNA testing. As I stated in my June 13, 2000 testimony, "with an appropriate standard, not all requests will be granted." The New York standard accommodates concerns raised regarding unnecessary testing. See answer to question 1.

4. Once post-conviction DNA testing is ordered, under what procedure should courts consider the test results if post-conviction testing produces exculpatory evidence? For example, under my legislation, if post-conviction testing produces exculpatory evidence, the defendant is allowed to move for a new trial based on newly discovered evidence--notwithstanding procedural time limits. This legislation directs courts to consider a new trial motion based on post-conviction DNA testing results under established precedents for motions for a new trial based on newly discovered evidence. By contrast, other proposals create a new procedure in which courts must grant a hearing and are authorized to issue "any order that serves the interests of justice..." Should courts examine post-conviction testing results under the established procedures for considering a new trial, provided the time limits are waived, or is a new procedure needed? Isn't there an advantage in using an established judicial procedure?

Fundamentally, there must be a meaningful opportunity for defendants, prosecutors and ultimately the courts to evaluate the implications of DNA test results. Criminal justice systems and adjudicatory procedures vary from state to state. Each jurisdiction should be accorded the flexibility to determine whether current or different procedures for handling requests for a new trial should be used consistent with offering a meaningful opportunity to evaluate the test results.

5. In New York, is there a backlog of DNA samples from convicted offenders and DNA evidence from crime scenes to be analyzed? If so, do you support federal grants to help States such as New York analyze DNA samples and DNA evidence?

New York State has a significant backlog of DNA samples, which causes particular concern because the statute of limitations on prosecution is running while DNA samples remain untested. Analyzing this backlog of samples will involve the expenditure of several million dollars, and federal grants to enable states to complete their testing of samples submitted previously, and to expand the range of crimes for current testing, would aid greatly in realizing the full potential of DNA analysis for law enforcement.

6. Doesn't advanced DNA testing provide a powerful safeguard in many capital cases? In short, aren't we in a better position than ever before to ensure that only the guilty are executed?

In many cases, analysis of DNA samples can establish conclusively innocence or guilt, resulting in innocent individuals being exonerated and released and the guilty being held responsible. New York Criminal Procedure law §440.30 does not make any special provisions for DNA testing in capital cases. In New York State, post-conviction DNA testing has resulted in seven post-conviction exonerations. Such testing offers an invaluable tool to protect the integrity of our criminal justice system.

7. In your testimony, you stated that you "support a federal statute which requires states to adopt post-conviction DNA testing procedures." (Emphasis added) As you know, Section 104 of S.2073 would require States to conduct post-conviction DNA testing. I am convinced that Congress lacks the authority to enact such a requirement on the States, and recent Supreme Court decisions confirm my belief. Do you believe that Congress has the constitutional authority to require States to conduct post-conviction DNA testing? If so, how can Section 104 of S.2073 be distinguished from the following recent Supreme Court decisions? (New York v. United States, Printz v. United States, City of Boerne v. Flores)

I believe Congress has the authority to enact a requirement that states adopt appropriate measures to assure DNA testing in necessary cases pursuant to Section 5 of the Fourteenth Amendment which authorizes legislation to enforce due process. City of Boerne v. Flores, 521 U.S. 507, 518-19 (1997); Florida Prepaid, 119 S.Ct. at 2206-7. The Supreme Court has left open the possibility that prohibiting a convicted defendant from presenting exculpatory evidence could rise to a constitutional violation, for example, in capital cases where the defendant has made a "persuasive demonstration 'of actual innocence' after trial." Herrara v. Collins, 506 U.S. 390, 417-419 (1993). Although the Court has not yet addressed this issue, the denial of DNA testing by a state in those cases where a defendant can show that such testing would likely demonstrate innocence may well rise to the level of a constitutional violation. A legislative record demonstrating that states have been unwilling to reconsider convictions or sentences in the face of DNA evidence demonstrating likely innocence would aid in establish that the legislation is a proportional response to actual or threatened due process violations. Florida Prepaid, 119 S.Ct. At 2210-11.

Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992), may be distinguished on two basis: first, they address Congress' power to legislate pursuant to the Commerce Clause rather than Section 5 which is at issue here; and second, they do not apply to laws imposing obligations on state judiciaries.

Question from Senator Feinstein

To avoid any questions about whether DNA technology was "available" at the time of trial, do you think that putting a date certain in the bill would be appropriate -- for instance, allow only cases tried before 1999 to qualify for post-conviction testing? Can we safely say that DNA technology is advanced enough to institute such a date cut-off?

I do not support a cutoff date for the federal legislation. States currently have different practices and procedures for the use of DNA technology at both the trial and appellate levels. Scientific advancements in technology will continue and more sophisticated testing may be developed in the future. Thus, biological materials currently not testable may in the future provide relevant evidence. Any legislation that Congress enacts should permit testing if in the future, a test may produce relevant exculpatory evidence so that someone can provide proof of innocence.

Questions from Senator Leahy

1. Under the bill proposed by Chairman Hatch, a defendant like David Vasquez who pleaded guilty

to avoid a death sentence would have no right to have DNA testing performed even if it could establish his actual innocence of the offense. Do you believe that this is an appropriate restriction?

DNA testing should be made available to all defendants who can make the requisite showing, as required in New York, that had such testing been done and the results admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant." No New York court has denied such testing merely on the basis of a defendant having pleaded guilty. A defendant such as David Vasquez, who entered an Alford plea, can and should be entitled to post-conviction testing if he or she can make the necessary showing.

2. As you testified, New York has had legislation similar to the Leahy-Smith-Collins provision on DNA testing for many years. Has the cost of providing access to DNA testing been prohibitive?

New York State

New York State has not measured the expenditures specifically related to DNA testing on behalf of criminal defendants, but there is no indication that the cost has been prohibitive.

3. In your State, (a) what is the average cost per case of post-conviction DNA testing; and (b) what is the average cost per inmate of incarceration for a year?

(A) At a private laboratory, a typical post-conviction set of DNA tests for a defendant, costs between $2,500 and $5,000. At the New York City medical examiner's office, a typical crime-scene sample test, from a rape kit, costs much less --about $300 if it is positive, and only about $100 if is negative.[1]

(B) According to New York State data, it costs New York $29,678 a year to incarcerate one inmate in a State prison. [2]

4. A number of State Attorneys General joined in a letter on June 8, 2000, in which they opposed any legislation that would create new requirements concerning the experience, competency or performance of counsel beyond those required by the United States Constitution, as interpreted by the Supreme Court in *Strickland v. Washington*. Is that the best that the States could do?

New York and some additional states have procedures in place to assure competent assigned counsel in capital cases. Ultimately, the integrity of our criminal justice system rests on the assurance that criminal defendants have competent counsel. In New York, for example, the court appoints two trial attorneys selected from a roster of qualified attorneys designated by the Capital Defender Office, or appoint the Capital Defender Office itself. If neither of these sources is available, the court may appoint counsel qualified to try homicides under the state's Assigned Counsel Program. There are similar provisions for the appointment of appellate counsel and counsel on an initial post-conviction motion in a capital case. In addition to providing for the appointment of counsel in these situations, the New York Court of Appeals has approved minimum competency standards for capital counsel representing defendants at trial, on appeal, and in post-

[1]Source: Howard Baum, Assistant Director, Forensic Biology Department, Office of the Chief Medical Examiner of New York City.

[2]Source: Press Office, New York State Department of Correctional Services.

conviction motions. These standards include certain minimum experience handling criminal trials, appeals, and post-conviction motions, require familiarity with the practice and procedures of the trial and appellate courts in New York, and assure that appointed counsel previously had primary responsibility for the appeal of a number of felony convictions.

I believe that other states should follow New York's example. Unfortunately, not all states have followed New York's example; too many states have no standard for competent counsel. It is for this reason that I support a federal effort to get states to adopt competency standards for counsel in capital cases. States should be encouraged to consider certain features, such as an independent appointment authority to recruit and train capital counsel, a means to set qualification and performance standards, and reasonable compensation rates for attorneys, paralegals, experts, and investigators. While New York's procedure has assured that capital defendants in New York have received extremely competent counsel who far exceed the minimum constitutional requirements set forth in Strickland, it is not the only system that will meet that goal. The specific features of each state's system for providing competent counsel should reflect the specific configuration of that jurisdiction's criminal justice system and local circumstances.

5. Do you agree that a court in a capital sentencing proceeding should give full and complete instruction to the jury on all of its sentencing options, including applicable parole eligibility rules and terms, and any options that would be presented to the court should the jury fail to agree on a sentence? Do courts in your State do this?

The death penalty was re-enacted in New York in 1995, so our state's recent experience with capital sentencing is very limited. Unlike many other states, assessment of future dangerousness is not an aggravating factor in New York. In New York, the Criminal Procedure Law requires that the jurors deliberate between a sentence of life without parole or death; the statute also requires that the jury be told that, in the event that jurors do not agree, the court will sentence the defendant to a term of between twenty and twenty-five years to life. See N.Y. Crim. Proc. Law § 400.27(10).

6. On June 20, 2000, you testified before the House Subcommittee on Crime regarding H.R. 4167, the House version of the Leahy-Smith-Collins Innocence Protection Act. To the extent that your June 20th testimony went beyond your testimony before this Committee, please provide a detailed description of that later testimony.

The House Subcommittee invited me to address the issues of post-conviction DNA testing and competency of counsel in capital cases. Attached is a copy of my testimony of June 20, 2000.

SENATE JUDICIARY COMMITTEE
HEARING ON POSTCONVICTION DNA TESTING

Answers to Follow-up Questions

Bryan A. Stevenson

Senator Leahy:

1. *Please list and describe any legislation within your State, pending or enacted, relating to post-conviction DNA testing.*

   A bill to permit a defendant access to DNA testing was introduced in the Alabama state senate in the 2000 legislative session. The bill, which passed out of the Senate Judiciary Committee, was never voted upon by the full senate. Senate Bill 7, sponsored by state senator Hank Sanders, provided that a defendant could make a postconviction motion in the original court of conviction for DNA testing. The bill required the defendant to make a prima facie showing that identity was an issue in the case and that an appropriate chain of custody to preserve the evidence was established. The bill also explicitly contemplated that defendants who had been tried before advances in biological testing were available would be able to access DNA testing.

2. *Please list and describe any legislation within your State, pending or enacted, relating to the preservation of biological evidence.*

   Alabama's law authorizing use of DNA information is found in Ala. Code § 36-18-24 (1975). Alabama does not require preservation of biological evidence.

3. *Please list and describe any legislation within your State, pending or enacted, relating to standards for ensuring competency of counsel in capital cases.*

   In the 2000 legislative session, Senate Bill 7 sought to bring appointment of counsel in capital cases in line with the standards developed by the American Bar Association. Unfortunately, this bill was not voted upon by the state senate. Therefore, the sole standard for appointment of counsel in capital cases continues to be encompassed in Ala. Code § 13A-5-54 (1975), the statute that provides for the appointment of counsel for indigent persons charged with a capital offense. The statute requires that a capital defendant be afforded counsel with five years' prior experience in the active practice of criminal law. In practice, however, this

requirement has not been effective to ensure that capital defendants receive qualified and experienced representation. The statute, for example, does not require that counsel have any significant major felony trial experience, much less experience in murder or capital felony cases. In Alabama, where many attorneys have a general law practice that may include only the occasional DUI or criminal child support case, this omission has developed into a significant problem. Because hundreds of Alabama capital defendants are indicted each year, there is a shortage of experienced criminal defense attorneys available to handle all of the cases. To find counsel, trial judges must assign attorneys from a list of every potentially eligible practicing attorney in the county. Consequently, the defense advocate in a capital case may be a real estate or personal injury lawyer who suddenly finds himself holding a life in his hands. As a result, too often capital defendants are represented by attorneys who are unfamiliar with death penalty litigation and make avoidable and ultimately costly mistakes at trial. Exacerbating this problem is the fact that Alabama's low capital compensation rates drive away many experienced criminal defense attorneys. Until October 1999, compensation to represent a capital defendant at trial was capped at $2,000. Even with the lifting of the caps, Alabama's compensation rates, currently $30 per hour for out of court time and $50 per hour for in court time, remain among the lowest in the nation.

4. *Please list and describe any legislation within your State, pending or enacted, relating to compensation for wrongfully convicted individuals.*

Alabama has no statutory provision authorizing compensation to wrongfully convicted persons. Walter McMillian, was convicted of a capital offense and imprisoned for six years, including being sent to Alabama's death row for 13 months before his capital trial. He received neither an apology nor an offer of compensation from the State of Alabama.

5. *Chairman Hatch has proposed legislation on post-conviction DNA testing that is significantly narrower than the Leahy-Smith-Collins Innocence Protection Act. In your view, what are the most important differences between the two proposals?*

The two most important differences between the Leahy-Smith-Collins Innocence Protection Act and the proposal from Chairman Hatch relate to counsel and the limitations period for testing. Without counsel no postconviction DNA testing remedy will be meaningful. Every proposal for postconviction testing currently under discussion requires a convicted person to affirmatively show that DNA testing will be relevant and revealing of the convicted person's guilt or innocence. This

showing requires the assistance of counsel. Because Chairman Hatch's proposal does not provide for counsel, many innocent poor people who have been wrongly convicted will not be able to achieve testing which could exonerate them.

Chairman Hatch's proposol also limits the time-period in which postconviction DNA testing is permissible. This arbitrarily and unecessarily burdens wrongly convicted people with time restraints. In some cases, uncovering the physical evidence necessary to make DNA testing may take some time. Securing counsel will take time. Every innocent person in prison wants to be released as soon as possible. There is no need to create a time limit on DNA testing. Time limits will invariably create procedural obstacles to some innocent people proving their innocence.

6. *Is counsel necessary for innocent people to be able to obtain post-conviction DNA testing?*

Counsel is the most critical element in obtaining effective postconviction DNA testing that leads to an exoneration. The standards discussed in both proposals under consideration require a prisoner to make a particularized showing regarding the evidence and the utility of biological testing. Few people are sufficiently skilled to make such a showing without counsel. Many innocent prisoners have been wrongly convicted because of inadequate legal representation. Creating postconviction testing without affording indigent prisoners counsel would simply further compromise the effort to identify wrongly convicted persons in jail and prisons.

7. *Please describe in detail the process by which counsel is appointed in your State for an indigent defendant charged with a capital offense, and the adequacy of funding for this type of legal service. In particular:*

(a) Are there any state-wide performance standards for capital case representation?
(b) Is there a centralized, state-wide, independent authority responsible for administering the capital defense program?
(c) Is there adequate funding for defense lawyers' time in both out-of-court preparation and in-court work?
(d) Is there adequate funding for defense investigation and expert consultants?

Alabama provides its constitutionally required legal assistance to capital defendants through the appointment of private attorneys by county trial judges. There is no state funded agency to train or aid attorneys in representing Alabama's capital defendants at trial. The only performance standard for attorneys to represent a capital defendant is that they must have "no less than five years' prior experience in the active practice

of criminal law." Ala. Code § 13A-5-54 (1975). Alabama has no other minimum guidelines for the appointment of counsel. Currently, attorneys are compensated at the recently-increased rate of $30 per hour for out of court and $50 per hour expended in court for capital cases. However, with minimal compensation available for non-capital criminal work, few attorneys in Alabama build a career on the "active practice" of criminal law. Trial judges are forced to appoint attorneys whose bread-and-butter depend on completely unrelated areas of law and who may have limited experience in major felony cases. Much of the problem with capital defense resources in Alabama can be traced to state's funding structure: Financing for capital defense costs is expected to be covered by a Fair Trial Tax imposed on litigants in state court proceedings. Ala. Code § 12-19-251 (1975). This unpredictable financing scheme has resulted in shortfalls for indigent defense services; because every year costs exceed the revenues from the Fair Trial Tax Fund, the state legislature has been forced to find and authorize additional money to fund indigent defense. Trial judges who authorize adequate compensation and funds for defense experts must contend with both the small pool of money available and the frequent cutting of indigent defense expenditures by the State Comptroller's office. When defense compensation is cut, many attorneys begin to see appointments to represent an Alabama capital defendant as a burden to be avoided. In sharp contrast to the state's reliance on individual attorneys to bear the burden of indigent defense, Alabama's appellate judges are the highest paid in the country. Recently when arguing that the judges' pay should be increased even further, Alabama's governor stated that adequate compensation was essential to attract and retain the best talent.

8. *In 1996, Congress defunded the federal death penalty resource centers. How did this development affect the quality of capital representation in your State?*

The defunding of resource centers has had a devastating impact on the quality of representation to death row prisoners. When the resource center closed there were no death row prisoners without legal representation going into postconviction proceedings. There are currently 29 death row prisoners without postconviction representation. The effort to recruit private attorneys has been greatly compromised without the services provided by the Resource Center. The Alabama center also took on several cases each year. The absence of direct and indirect services by the Resource Center has created a serious crisis that has resulted in delays and increased unreliability in Alabama capital cases.

9. *One of the purposes of the federal resource centers was to encourage continuity of representation in capital cases, so that lawyers recruited in the state system would continue*

with the case in federal court. Is continuity of representation a problem in your State? Please explain.

Since we have no mechanism for managing counsel for death row prisoners in Alabama, our problem is less one of continuity than of finding competent counsel at all. In a couple of instances, lawyers appointed to death row prisoners failed to present any evidence at postconviction evidentiary hearings or failed to file a notice of appeal and further undermined the opportunity of death row prisoners to gain review and relief of wrongful convictions.

10. *There was some testimony at the hearing regarding a new study by Professor James Liebman of Columbia Law School, which reports that nationally, two-thirds of death sentences from 1973 to 1995 were reversed on appeal because of serious errors. One witness suggested that the study was methodologically flawed. I have also heard it said that the study shows the system is working, because mistakes have been caught. Please comment.*

The Columbia study answers a very simple question: in the thousands of death sentence cases that have taken place since 1975, what has happened when these cases have been reviewed on appeal? Were these cases ultimately affirmed and persons executed or were the convictions and death sentences reversed as a result of illegal conduct? There is not a lot of methodological manipulation possible in this straight forward analysis. The data reveal that capital cases have been replete with serious fundamental errors. Rather than proving that the system works, the study suggests that the system is in need of serious reforms. In Alabama, the reversal rate is seventy-seven percent. Why so many errors? Alabama has no state funded public defender system. Most of the 185 people currently on Alabama's death row were represented by state appointed attorneys whose compensation was limited by state statute to $2000 per case for the attorney's out-of-court time. What does that get you? It got Judy Haney nine years on Alabama's death row after a trial where her lawyer was held in contempt for being drunk during the proceedings and ordered to spend 24 hours in jail until sufficiently sober to continue. George Daniel spent nine years on death row after his two lawyers sued each other during the trial over who would receive the $2000 statutory payment. In dozens of other cases, Alabama's poorly funded indigent defense system has resulted in men, women and teenagers being sentenced to death in trials where no defense witnesses are called, no closing arguments are made, and nothing approaching zealous advocacy is offered. A system where these kinds of errors ever take place is not a system that can be defended as working.

11. *Advocates for the death penalty say the odds are extremely remote that an innocent person would ever be executed. Based on your experience, do you believe that this is true?*

The odds of executing the innocent have increased in the last several years because many critical protections which reduce the possibility of executing the innocent have been eliminated. Alabama now has the largest death row per capita in the South, and the third largest death row per capita in the United States. Alabama's death row population has doubled since 1988. In 1998, Alabama sentenced more people to death per capita than any other state in the country. During a recent 12-month period, Louisiana, who's population is slightly larger than Alabama's, sentenced nine people to death. Georgia, with a population nearly twice the size of Alabama, sentenced 11 people to death. Alabama sentenced 27 people to death during the same time period. Today there are over 300 people awaiting capital murder trials in the state.

Compensation for attorneys who represent death row prisoners in critical state postconviction proceedings in Alabama is still limited to $1000 per case, one of the lowest rates in the country. Not surprisingly, few lawyers will take these cases. Today, there are many people sitting on Alabama's death row who have no legal representation for their appeals or who have inadequate representation.

Some of these men and women are undoubtedly innocent. We already know that innocent people have been sentenced to death in Alabama. Walter McMillian spent six years on Alabama's death row for a crime he did not commit. Law enforcement officers were so convinced of Mr. McMillian's guilt that they placed him on death row for 13 months before his case ever went to trial. Randall Padgett was acquitted after his capital murder conviction and death sentence were overturned in 1994. Both of these men were aided by a federally funded defender agency that no longer exists because the funds were terminated by Congress in 1996.

In 1992, prosecutors were convinced that Anthony Embry had murdered Christopher Davis in a Birmingham pool hall. They even convinced Mr. Embry to plead guilty to the crime. Four years later, prosecutors decided that Embry had nothing to do with the murder, vacated his plea, and prosecuted Louis Griffin. After a trial where the jury was never told about Embry's guilty plea, Mr. Griffin was convicted, sentenced to death, and now awaits execution.

Without reform innocent people can and will be executed.

12. *A number of State Attorneys General joined in a letter on June 8, 2000, in which they*

opposed any legislation that would create new requirements concerning the experience, competency or performance of counsel beyond those required by the United States Constitution, as interpreted by the Supreme Court in Strickland v. Washington. The Texas Court of Criminal Appeals has said that a lawyer who sleeps through the entire trial satisfies the Strickland standard. In your view, does Strickland provide an adequate or appropriate standard for counsel at any phase of a capital case?

The standard articulated in *Strickland v. Washington*, has been interpreted in such a undemanding way that lawyering which does not assure a reliable verdict in a capital trial is considered constitutional. Consequently, rather than having a legal standard which has pushed attorneys in capital cases to aspire to the highest levels of performance and advocacy, virtually every practitioner knows that very little needs to be done to avoid a finding of ineffective assistance of counsel. Conduct that would constitute malpractice such as being drunk in court, sleeping in court, pursuing defenses which are not legally valid, calling no witnesses, conducting no investigation, making statements adverse to the client's interests has all been upheld as acceptable in capital case litigation under *Strickland*.

In death cases, a standard is needed that is very concrete and specific. Capital defense lawyers should be considered ineffective if they fail to adequately meet with clients, investigate the case, prepare a defense strategy, and otherwise actively assist an accused facing the death penalty. Prejudice should be presumed in a capital case when someone is sentenced to death after receiving assistance from counsel who does not demonstrate committed, invested and zealous advocacy from a well-trained professional.

13. *Do you agree that a court in a capital sentencing proceeding should give a full and complete instruction to the jury on all of its sentencing options, including applicable parole eligibility rules and terms, and any options that would be presented to the court should the jury fail to agree on a sentence? Do courts in your State do this?*

Yes, courts should fully instruct jurors on the relevant sentencing options and address the misconceptions that frequently exist with regard to early parole. Alabama's courts do not require that parole eligibility rules and terms be explained to the jury.

14. *Attorney General Edmundson and others have argued that the federal government should not be mandating what States need to do regarding the death penalty. Why is federal action needed?*

Federal action is needed on the death penalty because federal review of capital cases

has been critical to protecting against arbitrary and grossly unfair administration of capital punishment. The death penalty is a political issue. Many state court judges and prosecutors responsible for the administration of capital punishment are elected officials who must face partisan elections where the death penalty becomes an issue. These state actors consequently are required to act in a highly politicized arena where non-compliance with state and federal law is sometimes regarded as a positive. Federal laws protecting unpopular people accused of very disturbing crimes has been essential in areas where there is tremendous pressure to convict and execute those who are least powerful and most vulnerable to abuse of power.

The death penalty also represents a host of critical, core constitutional values which must be protected by the federal government. Our standing in the world as a leader on human rights issues is greatly undermined and compromised when states execute the poor in a racially discriminatory manner or employ methods of execution that are considered cruel and unusual. There are international treaties and obligations implicated by our execution of juveniles and the integrity of the review process employed to manage these cases. All of these factors establish compelling reasons why the federal government must be active in monitoring and enforcing constitutional law in the capital punishment area.

Senator Feinstein:

1. *To avoid any questions about whether DNA technology was "available" at the time of trial, do you think that putting a date certain in the bill would be appropriate -- for instance, allow only cases tried before 1999 to qualify for post-conviction testing? Can we safely say that DNA technology is advanced enough to institute such a date cutoff?*

   DNA technology has advanced tremendously in the last six years. Because this technology is still relatively recent, I don't believe it would be sensible to limit testing to only those cases tried before 1999. It is still possible that in the next couple of years, more reliable testing with smaller sample sizes may be possible. Moreover, there are cases currently being tried where the evidence necessary for DNA testing has been suppressed or has not been recovered prior to trial. Sometimes poor defense lawyering can be responsible for the failure to obtain DNA testing. None of these problems have currently been eliminated and it is therefore some innocent persons may be convicted after 1999 even though DNA testing might exonerate them. While it is unlikely that many postconviction tests will be needed for persons convicted after 1999, there is some value in making tests for these folks possible.

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