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PROMOTING INMATE REHABILITATION AND SUCCESSFUL RELEASE PLANNING

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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PROMOTING INMATE REHABILITATION AND SUCCESSFUL RELEASE PLANNING

THURSDAY, DECEMBER 6, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:23 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Scott, Johnson, Jackson Lee, Forbes, Gohmert, and Coble.

Staff present: Bobby Vassar, Subcommittee Chief Counsel; Gregory Barnes, Majority Counsel; Rachel King, Majority Counsel; Michael Volkov, Minority Counsel; Caroline Lynch, Minority Counsel; and Veronica Eligan, Majority Professional Staff Member.

Mr. SCOTT. The Committee will now come to order, and I am pleased to welcome you today for the hearing on the Subcommittee on Crime, Terrorism, and Homeland Security on promoting inmate rehabilitation and successful release planning.

I find it frequently said that when it comes to crime, we have a choice: We can reduce crime or we can play politics. The politics of crime deals with the emotional approach, which has dominated the crime legislation policy for several years. It has done little to reduce crime, but we have to assess our crime policy and focus on what actually works.

One of the worst get-tough sound bites that we passed in Virginia was the sound bite, "Let's abolish parole." In 1993, we elected a governor who promised to and eventually did after his election abolish parole; called it truth in sentencing. I like to call that half truth in sentencing because, when you have parole, everybody says the fact is you cannot release anybody early. That is a half truth. The whole truth is you cannot hold anybody longer.

So we had 1½ to a nominal 10-year sentence. People were getting out in an average of 2½ years. When we abolish parole, everybody thinks you are talking about let everybody serve 10 years. No, 2½. Everybody gets the same average sentence. That was so bizarre that they had to double the average time served to pass the bill to make it look like it made sense. So you get 5 years, you serve 5 years.

Well, when your heartbeat goes back down, you might notice that if everybody is getting out in 5 years, while some are actually serv-

ing 10, why are Willie Horton and Charles Manson smiling? Because now those who could never make parole, who would pull the whole 10, are now getting out in 5 like everybody else.

The Virginia legislature estimated the cost of that sound bite to be about $2.2 billion construction, about $1 billion a year operating, but the study of the proposal released by the supporters of the legislation said that even if it worked the way they envisioned, they would reduce crime by 2.2 percent. Since we are talking politics; it is appropriate to note that that is within the margin of error of a political poll.

That analysis involves counting as reductions in violent crimes those that would have been committed during the time that they would have been on parole. It did not take into account those committed by people after they completed what might have been a longer sentence so that those crimes would be delayed but not saved, nor did it consider the violent crimes that would be more likely to be committed because you do not have the incentive for parole.

That is since you know the day you are going to get out the day you go in, there is no incentive to get education and job training so you can convince the parole board to release you. Those, we know, reduce recidivism. Under the parole plan, there is no incentive to take that action, nor is there any incentive to get a parole plan together so you can tell a parole board what you are going to do and where you are going to go. All they know is when your date comes, ready or not, here you come.

Now, if you add back in those ready-or-not-here-I-come, those that did not get education or job training, those that were not saved but just delayed—remember you only started off with a 2.2 percent reduction—it is unclear whether or not you are increasing crime or decreasing crime with this proposal.

Now, it is a dubious plan if it had been free—$2.2 billion construction, $1 billion a year operating, per congressional district, that is $200 million construction and $100 million operating that you could have spent on something worthwhile—$200 million, you can build about $45 million Boys and Girls Clubs. We only spend a couple of million in Head Start. You would run out of kids before you ran out of money providing summer jobs, college scholarships, all the kinds of things, the continuum of services from teen pregnancy prevention, dropout prevention, early childhood education, after school programs. You could not spend $100 million on those kinds of programs that have been proven to actually reduce crime.

But where has this tough-on-crime approach gotten us over the last few years? It has the United States at the point where we are the number one incarcerator in the world. We have about 750 adults per 100,000 population. When everybody else in the world is locking up people at the rate of about 50 to 200 per 100,000, we are at 750.

China locks up about 119; Great Britain, 145; Canada, 100. In some minority communities, not the 50 to 200. In some minority communities around the country, the rate exceeds 4,000 per 100,000. Eight percent of young African-American males are in jail today—8 percent—so that we are looking at a situation that has us in that situation.

Focusing more money on incarceration cannot possibly reduce the crime rate. What we have to do is invest money where it makes some sense.

Now one of the major problems we are looking at and one issue in abolishing parole is the problem of locking up juveniles on sentences of life without parole. Throughout the world, we have found 2,200 people serving life without parole for crimes committed as juveniles, 2,200 around the world. All but 12 are in the United States.

There are better alternatives, and we are going to examine those alternatives today, in particular offering education and vocational training in prison and reinstating a well-developed parole plan at some point for juvenile offenders and for others.

H.R. 4283, the "Literacy, Education, and Rehabilitation Act of 2007," will offer inmates incentives to become productive citizens upon release by offering reductions in sentences for participating in education programs. H.R. 261, the "Federal Prison Bureau Nonviolent Offender Relief Act of 2007," offers early release for prisoners over 45 years of age who have shown no propensity of violence. The Juvenile Justice Accountability and Improvement Act of 2007 offers every individual sentenced to life without parole as a juvenile the right to have a parole hearing at least after 15 years in jail.

Finally, H.R. 4063, the "Restitution for the Exonerated Act of 2007," authorizes the attorney general to award grants for carrying out programs that provide support services, such as education, employment services, legal services, and health care to exonerees. We have found that the portion who have been exonerated from crime actually have less support than those who have served their time for what they had actually done.

These bills would begin reversing the prison population explosion, wasteful spending, and recurring crime that the get-tough approach to crime has caused, and I encourage my colleagues to support these important legislative proposals.

It is now my pleasure to recognize the esteemed Ranking Member of the Subcommittee, my friend and Virginia colleague, the honorable Randy Forbes, who represents Virginia's Fourth Congressional District, for his comments.

Mr. FORBES. Thank you, Mr. Chairman.

And, Mr. Chairman, I would like to, first of all, ask unanimous consent to just have my written statement submitted for the record.

Mr. SCOTT. Without objection.

[The prepared statement of Mr. Forbes follows:]

PREPARED STATEMENT OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Chairman Scott. I want to thank our witnesses for taking time out of their busy schedules to be with us today. I wish I could say that I am excited about today's topic but I cannot because we are here to discuss how to release thousands of convicted felons from prison.

My good friend and colleague from Virginia expressed his support for a parole system. Over twenty years ago, Congress enacted the Sentencing Reform Act and created the U.S. Sentencing Commission to replace the federal parole system. Parole had proven unworkable. Similarly situated defendants received wildly-disparate

sentences; indeterminate sentencing meant offenders could not anticipate their release; and a confusing array of statutes and regulations created two mechanisms for determining an inmate's release date.

Whether you believe the Sentencing Guidelines should be mandatory or advisory, these guidelines provide a framework for determinate sentencing and equal treatment of offenders. We would be remiss to erase the last twenty years in favor of a system that lacks this fundamental principle.

Four pieces of legislation will be discussed today and I want to take just a moment to comment on each. The Literacy, Education, and Rehabilitation Act of 2007, sponsored by the Chairman, provides additional good time credits for inmates who participate in educational, vocational, and treatment programs.

While I support providing these programs in our federal prison facilities, this legislation raises several concerns. First, federal law currently mandates literacy programs in each federal facility and requires each inmate to have a high school degree or make satisfactory progress toward earning a degree for the good time credits to vest.

Second, each prisoner is currently eligible for up to 54 days per year of good time credits—or roughly 15% of their sentence. This bill would more than double that amount to nearly four months or one-third of a prisoner's sentence. Lastly, this bill would return us to disparate treatment of offenders by denying additional good time credit to those inmates who do not need these various programs.

H.R. 261, the Federal Prison Bureau Nonviolent Offender Relief Act, authorizes the release of federal prisoners over the age of 45 who have served half of their sentence and who have not been convicted of a crime of violence nor disciplined for violence while incarcerated.

This bill will grant the release of 12,400 felons from the federal system, including those convicted of drug trafficking, larceny, fraud, racketeering, money laundering, civil rights violations, immigration violations, and perhaps most alarmingly, possession of child pornography and online sexual solicitation of a minor.

H.R. 4063, the Restitution for the Exonerated Act, authorizes a federal grant program for re-entry services for exonerees. Unfortunately, this bill goes well beyond the truly exonerated. The bill provides federal grant money not only to individuals found to be factually innocent but also to anyone pardoned at the state level and anyone whose conviction is reversed or vacated, regardless of whether they are later retried and convicted.

The House recently passed legislation authorizing $330 million for prisoner re-entry programs and services. I supported the Second Chance Act and I support extending these programs to people who are wrongfully convicted. We should explore this approach rather than creating a new, expansive grant program.

Finally, today we will discuss the Juvenile Justice Accountability and Improvement Act. This legislation creates an unfunded mandate by requiring states to provide a parole hearing to juveniles sentenced to life without parole but does not provide any funding for this requirement. The bill even goes a step further by penalizing states that fail to comply by withholding 10 percent of a state's criminal justice funding.

The bill requires states to provide the opportunity for a parole hearing within 15 years of a juvenile's incarceration and provide subsequent parole hearings every 3 years thereafter.

Sixteen states have abolished parole board authority for all inmates, and another four states have abolished parole board authority for certain violent offenders. How will these states comply with this legislation? The bill also requires the federal government to provide similar parole hearings, despite the fact that parole was abolished in 1987 and despite the fact that, according to a report by Amnesty International and Human Rights Watch, there is currently just one juvenile inmate serving life without parole in a federal prison.

Finally, this legislation also returns us to the days of disparate treatment by requiring parole hearings to juveniles sentenced to life without parole but not to adults. Under this bill, a seventeen-year-old tried for murder as an adult and sentenced to life without parole will be provided a parole hearing. But his nineteen-year-old co-conspirator will not.

I look forward to hearing from today's witnesses.

Mr. FORBES. Then I would like to make some comments in response to some of your statements.

Yesterday, in this Committee, we had four bills that were handled on the floor. At the end, at the completion of those bills, the Chairman of the Committee, Chairman Conyers, thanked me for

the cooperative way in which we had been able to get through those four bills and handle them on the floor and, indeed, it was an exemplary day, I think, in getting bills passed.

The Chairman of this Committee is someone I have a great deal of respect for, and I consider him a dear friend.

But I will have to agree with this: I do not think it is politics, but I do think there is an enormous disparity on the vision between the two political parties when it comes to the criminal justice system, and this hearing is an example of that, greater than perhaps any that I have seen this year, any that we will probably see after this particular hearing.

I want to begin by thanking all of the witnesses for your expertise and your time in being here, but I want to tell not you and not the people in the audience today, but any of those people who may be listening to this on TV or may perhaps be writing something about this in an article somewhere across the country that these hearings are important, one, for the substance of the bills that we hear, but they are also important because the very bills that we bring up show the priorities that we have when it comes to the criminal justice system.

I will tell you the way it works, and I have said it before. If any of you saw the classic movie "Casa Blanca" where at the end they say, "Round up the usual suspects," we round up the usual witnesses, and we bring in the witnesses who are going to testify about the particular bills that we want. The majority gets the overwhelming amount, and I think we get a couple, you know, that are in there.

But let me just tell the differences between the two of us. I am going to take a little bit longer than usual because I think this is such an important hearing.

Yesterday, we had people who were shot and killed in a shopping mall in this country. Are we having a hearing to look at that today? No, because we do not have time to do that.

The number one espionage problem in this United States, without any controversy, number one espionage problem, is China, talked about by the Attorney General. I have written letters. We have pleaded, "Let us have a hearing on that to see what we can do to help stop some of that espionage." Have we had time to do that? No.

Mr. SCOTT. Would the gentleman yield?

Mr. FORBES. Yes, I will yield.

Mr. SCOTT. We are working on that now.

Mr. FORBES. Well——

Mr. SCOTT. It is scheduled for next month.

Mr. FORBES. Well, Mr. Chairman, all due respect, if it is scheduled for next month, I have not been apprised of that, and we have been asking for it, and we are not having it today.

The third thing is when we are looking at gang networks and trying to bring gang networks down, are we having a hearing on that? No.

The Ranking Member of this Committee and I have brought out a bill that would get tougher on sexual predators. Are we looking at that? No.

And let me tell you what we have time to do. We have time to look at these bills, and we have had enormous time to look at how we can bring contempt actions against people who have problems with the Administration who might be viewed as our political enemies.

Let me take a look at the substance of these bills. He is my good friend, you know, but he was not there when that bill was put in—in Virginia to abolish parole, so he did not see the hours and hours of testimony.

One of the little facts that was not brought out to you is the projections of the 2.2 percent decrease in the crime rate did not take into account the fact that the statistics brought to us and the big concern in Virginia was that when you looked at the crime-prone population in Virginia, the crime-prone population was going down and crime was going up. And the big fear people had in Virginia was we were right at a point where that crime-prone population was going to spike, and the criminologists were coming and telling us, and they were saying, "Look, you might only have a 2.2 percent decrease in what you had before, but the big thing is what you are going to be able to stop that is going to come down the road when that crime-prone population hits up if you do not do something to stop it."

What also was not stated when it was talked about, truth in sentencing, I do not care what the average group of people out here think about truth in sentencing in that trial. What we were concerned about is we were having people sentenced in Roanoke to 15 years and people in Norfolk to 2½ years, and we did not think that was fair. And what we were concerned about with truth in sentencing was when people walked out of that courtroom, did the victim know how many years had been given to that defendant? Did the defendant know? Did the defendant's family know? Did the jury know? Did the judge know? Did the prosecutor know? And when they walked out, they knew. They knew after the establishment of truth in sentencing that when they got 2½ years, it was going to be basically 2½ years.

Before that, they did not know. It was up to the whim of some parole board whether they liked the person or did not like the person that was charged. When you talked about minorities, the head of the state NAACP in Virginia fought me tooth and nail on that bill and later came up afterwards and said, "That bill has done more for my community to help with crime and create fairness than any piece of criminal legislation I have ever known."

Now let me look at the four bills that we have. Literacy, Education, and Rehabilitation Act. Let me tell you what this bill does, if you are listening at home. It creates two lines of people when they come into jail. The first line are the people who have done what we tell them to do. If you are not addicted to something, if you are literate, then you get in this line. If you are addicted to something and if you do not know how to read and you have not ever taken the effort to do that, you get in this line. And to the line number two, we are going to give you coupons where if you correct those problems, we are going to let you out of jail free. I am saying that is not fair.

But the most egregious one is this get-out-of-jail free act. Over and over again, the Chairman of this Committee has said, "We need to trust our judges. We need to trust our juries." They spend a lot of time looking at pre-sentence reports, looking at what they are doing in sentences, and we are saying, "We do not care what you did, Mr. Judge, what you did, Mr. Jury. If this person is over 45 and has completed the requisite number of years, we are going to let him out of jail."

Now let me tell you who this includes because there is no definition of violence in here. This includes spies who betrayed the United States, terrorist organizations, gangsters, major drug traffickers, defrauders, people who have swindled elderly people out of their money, child pornography offenders, and corrupt public officials. Where we normally look at those people and say, "My gosh, they committed a crime when they were young. They made a mistake," we are going to say, "You serve your whole sentence." But if you are 40 years old or 35 years old and you should have known better and you commit the same crime, we are going to let you walk out of jail free after that third time? That makes no sense.

And the last two things that I want to just point out, the Juvenile Justice Non-Accountability and Improvement Act where we are basically taking some States that have taken juveniles and sentenced them to life without parole and we are now saying to those States, "You are going to have to have a hearing after 15 years and every 3 years after that."

Now let me just tell you how interesting this bill is. The alleged murderer of Sean Taylor that has been in the paper recently is 17 years old. He is being tried in Florida. Florida, undoubtedly, I would imagine, is going to go for life without parole for that murderer.

Interestingly enough, he will be able under this act to get a parole hearing after 15 years and every 3 years after that. But his co-conspirator who did not do the killing, who may only get 20 years or 22 years, will get nothing. It makes no sense.

And the last and final thing, this restitution for exonerees, sounds great, but this includes people who are pardoned by governors. Being pardoned by a governor does not mean you are innocent. Over and over again, we see people pardoned for a number of different reasons, and they are going to be included the same as people who are determined to be factually innocent.

So, Mr. Chairman, in all due respect, I appreciate the hearing because I think it shows a huge dichotomy. I appreciate all the witnesses and what they are going to testify, but I really wish we were spending our time dealing with the shootings in the mall, the Chinese espionage, gang networks, sexual predators, those kind of things because I think they are the things that the people watching at home really want us to be about and be doing.

And I yield back the balance of my time.

Mr. SCOTT. Thank you.

The gentleman from Michigan, the Chairman of the Committee, do you have a statement?

Mr. CONYERS. I had a statement, but it has now turned into some new comments. But I would like to have my statement introduced into the record.

Mr. SCOTT. Without objection.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The need to promote inmate rehabilitation is undeniable. Too often, we witness inmates being released from prison only to find two-thirds of them returning in as little as three years later.

This constant cycle of "catch and release" undermines public safety, has led to a substantial expansion in our Nation's total prison population, and is reflective of a larger problem that unfortunately has become far too synonymous with our criminal justice system. The problem, simply put, is the current system fails to meet the rehabilitative needs of our growing prison population.

According to a recent Bureau of Justice Statistics study, for example, only 33 percent of Federal inmates who suffered from some type of substance abuse received inpatient treatment in the 12 months prior to his or her release. Equally disturbing is the fact that of those inmates diagnosed with a mental or physical disability, less than 25 percent of them receive adequate treatment.

Today's hearing will provide Members with an opportunity to examine some of these issues. It will also provide Members with an opportunity to:

1) consider establishing periodic parole hearings for juvenile offenders who've been sentenced to life in prison;
2) debate the need for creating a federal grant program tailored exclusively to exonerees;
3) examine the possibility of establishing an early release program within the bureau of prisons that would allow older, non-violent offenders to be considered for early release from prison; and
4) consider the possibility of expanding the current "good time behavior credit" to provide additional benefits to those inmates who participate in designated educational, vocational, and developmental programs.

Each of the aforementioned concepts has been included in various bills that have been introduced in the current Congress, and each idea would go along way towards promoting meaningful rehabilitation.

Just last month, Members of this body took up and passed H.R. 1593, the "Second Chance of Act of 2007." That landmark piece of legislation (which currently awaits action in the Senate) represented an important first step in our efforts to lower rates of recidivism and decrease prison overcrowding. The four bills under consideration today represent the next step in that effort.

Mr. SCOTT. The gentleman is recognized.

Mr. CONYERS. Because both gentlemen from Virginia recognize the importance of this subject—I am glad Mr. Forbes is here, and I do agree with him that our cooperativeness on four consecutive bills in a row were very important, and they all came out of this Committee. And the reason this hearing becomes important over and beyond the four recommendations that will be coming forward for legislative consideration from our distinguished panel of witnesses is overshadowed by this huge difference in opinion and perspective from those who create the Federal laws in this country.

As a matter of fact, this difference goes beyond just the D's (Democrats) and the R's (Republicans), but it goes to the whole notion of whether or not we have a humane system of criminal justice, including the judicial system and the trial and the incarceration.

So I am going to be planning a discussion that we may be able to have amongst ourselves that, Mr. Chairman and Mr. Ranking Member and to my friend Howard Coble and, of course, Henry C. "Hank" Johnson, and the distinguished gentlelady from Texas, Sheila Jackson Lee. I want to have a public discussion amongst us

without, Chairman Scott, the necessity of witnesses, but in which we exchange some of these views.

I have noted some of the things that Ranking Forbes has talked about, and I think I have four of them, there may have been more, and I want to address those. I think they are important and need to be considered. I have to confess that I have not thought much about them before now, but now is the time. I appreciate the hearing for bringing this publicly to my attention. I know you were not talking to me, but I get the message and I think that something should be done about it, and if something is not, that there ought to be a public description of why.

Now the thing that moves me about this hearing—and in a way, the whole idea of a Crime Committee in Judiciary—is that public opinion is so shaped and influenced, and I was thinking of a witness that we might want to have—George Lakoff, the linguist—come in and talk about how we frame subjects around something as inflammatory as criminal justice and what to do with prisoners. You never get too far down a discussion trail when someone drags out the old herring, soft on crime, or why are we opening up the doors and letting out this flood of prisoners and so forth.

But I want to begin this examination of four modest proposals from the point of view of how do we think about and deal with this huge highly inflamed opinion that exists around the subject. And it is my hope that we include this in the hearings of this very important Committee.

I will not go over the statistics here, we will probably get them more than once before we get through with four, six, seven people contributing to this, but we have a problem that needs to be addressed. I think the Chair and the Ranking Member are doing an honorable job from their perspectives as to how to address this circumstance that causes us to have a Crime Committee in the first place.

When I first got here, we had a Crime Committee, and the problems were even more difficult to address here because we could not have the free exchange of opinions, Mr. Forbes, that we do have here now. I mean, you know, there was only one view, and that was it. If you did not like it, you know, do not come to the hearing. Here we encourage this interchange because we see this as the only way we are going to be able to move forward with a greater understanding and consideration for how and why people end up incarcerated in the American justice system.

Thank you so much.

Mr. SCOTT. Thank you.

And without objection, the gentlelady from Texas is recognized for a brief statement on her bill.

Ms. JACKSON LEE. Let me say good morning to the witnesses and thank them very much for their presence here today and thank both Chairman Scott and full Committee Chairman Conyers for the opportunity, Mr. Conyers, for what you have just articulated, to have an enhanced perspective, to look at a broader view. And I welcome the informal discussion that you have suggested, or formal discussion without witnesses, because I think the intent of all of us who have offered legislative initiatives is, frankly, to look at a system that is all prisoned up. It is all incarcerated up. We have spi-

raling crime rates, as we speak, but yet we have the most incarcerated country, both State and Federal, I would imagine, in the world.

So it is important for a Committee with this broad jurisdiction to take a look-see, to take an assessment of where we are.

Frankly, I, too, welcome my good friend. I went to the University of Virginia School of Law, so I welcome my good friend from Virginia, and his legislative work, I am sure, I have studied or it is being studied, let us put it that way—it is to be studied now—at the University of Virginia School of Law, and he raises a critique that I think, frankly, should be addressed.

I look forward to Professor Turley's testimony because he has worked quite extensively with a number of these issues. He would know that it is specifically for nonviolent offenders. This is the 261 that the Chairman has graciously allowed me to speak very briefly on, and that is, of course, the Nonviolent Federal Offender bill.

But it is nonviolent offenders who have attained the age of at least 45 years of age, have never been convicted of a violent crime, have never escaped or attempted to escape from incarceration, have not engaged in any violation involving violent conduct or institutional disciplinary regulations.

We know for a fact that it takes $70,000 a year to incarcerate older prisoners. Now we also know that when someone is rehabilitated or has the opportunity to transition, for example, in a second-chance sort of structure, they can return back to society, return back to the community, provide a constructive, if you will, economic opportunity, may be able to provide restitution to those that they have offended, and may as well be able to be constructive.

Now I am glad to note that my good friend, the Ranking Member, has a great interest in Houston because he is quoted in the Houston paper, our local paper, and if I might use the description, it indicates that "an anonymous Republican staff member" has defined what they believe this bill actually means. They did note that the Federal Bureau of Prisons did not comment, and they also noted in the article that I am willing to work across the aisle to ensure that we have the kind of initiative that is productive.

They are provocative, of course, because they cite a number of individuals like Jack Abramoff and Mr. Fastow and others that would be welcomed out of this process. But it would also be Mr. Jones, a nonviolent perpetrator, maybe committed some kind of fraud, whose family is now languishing between disaster and disaster, who if he was released in a rehabilitation program, he or she, would be able to provide for that family, to come off of the Federal system, and maybe even provide restitution.

This article suggests that this bill, without thought and analysis, would provoke the release of those who would have perpetrated, be it an embezzler, a burglar, a money launderer, people convicted of possessing child pornography. Who is to say that those in some way could be defined as violent acts, if you will? Certainly, none of us would want to have child pornographers, child predators, arsonists and others that are alleged to be able to be released under this bill. That is not what this bill says.

It is an opportunity for us to assess whether an overly imprisoned State and Nation is, in fact, the best way for us to go, and

just as an aside, one of the more conservative States of which I happen to have come from has an early release program, and it is based upon good time. Pennsylvania has one, Connecticut has one, and Kentucky has one. And there are many other States that likewise have an early release program. And I would venture to say that Texas is not known to be liberal when it comes to incarceration of those who perpetrate a criminal act.

So this bill gives us the opportunity for constructive thought, and it is not a bill that is to give comfort to the Jack Abramoffs of the world or others who have been incarcerated for various very public and publicized crimes that would, of course, provide injury to the society, albeit that they might not be violent crimes.

This is an important discussion. I would ask my colleagues as we go forward not only that we listen to the testimony, but let us look forward to a bill that may ultimately be modified, but addresses the question that many Federal judges have asked us to address, which is, if we cannot address it from the perspective of the mandatory sentencing, help us balance by looking at these inmates, these incarcerated persons, as they try to rehabilitate themselves and constructively come back to society and help those who they may have harmed, but also help their families and relieve us of an imprisoned prisoned society that does not work.

I thank the gentleman for his time, and I yield back.

Mr. FORBES. Mr. Chairman, will the gentlelady yield?

Ms. JACKSON LEE. I would be happy to yield if the gentleman——

Mr. FORBES. I just want to make sure that I have the right bill before me, and the gentlelady was referencing the fact that this bill would give people an opportunity. Look, as I read the bill, that release would be mandatory. The word "shall" is in there. Am I misreading that? Is there some discretionary format that is in the bill, or does not it say that they "shall" be released?

Ms. JACKSON LEE. The bill presently, Mr. Ranking Member, says that on the grounds of being 45 and the criteria that I have mentioned, which is not a nonviolent offense, no nonviolence, no escape, no other indications of being a continued bad actor, that it is a mandatory release. However, there is no definition in it as well that lists, as you were quoted in the newspaper, a litany of offenses that would automatically suggest that they would easily qualify to be released.

Mr. FORBES. And if the gentlelady would be kind enough to yield for one additional question——

Ms. JACKSON LEE. I will yield.

Mr. FORBES [continuing]. The fact that there is no definition would mean that they would not be viewed as violent crimes. For an individual who defrauded elderly people, there is no definition by which that would be determined to be violence, a violent criminal. Corrupt public officials are not determined to be violent by any definition I have ever seen in the Federal code, and, in fact, I do not know of any definition in the Federal code that would list spies, members of terrorist organizations, or even individuals in organized crimes who have done racketeering. If the gentlelady——

Ms. JACKSON LEE. If I can——

Mr. FORBES. Yes, go ahead.

Ms. JACKSON LEE. If I can reclaim my time, it might be, Mr. Forbes, that we have a philosophical disagreement because I happen to believe in rehabilitation, and I do believe that there are instances where you will find that a large percentage of older, nonviolent——

Mr. SCOTT. The gentlelady's time has expired.

Ms. JACKSON LEE [continuing]. Inmates, Mr. Chairman, have been rehabilitated and could be considered a viable, if you will, candidate for this release. Again, this bill is subject to amendment, and we welcome working with Mr. Forbes on this bill.

And with that, I yield back.

Mr. SCOTT. Details of the bill will be debated later, but we have a distinguished panel of witnesses before us.

Our first witness is Professor Jennifer L. Woolard, assistant professor of psychology at Georgetown University. She has written about adolescent development in the family and legal context, including juvenile delinquency, mental health, and violence. Her research with juvenile defendants addresses police interrogation, culpability, the attorney-client relationship, and the role of parents in adolescents' legal decision making. She has a BA in sociology and psychology and an MA in community development psychology and a Ph.D. in community and development psychology from the University of Virginia in Charlottesville.

Our next witness is Debra LaBelle. She is a human rights attorney from Ann Arbor, Michigan. In addition to her private practice, she is the project director of the ACLU's Juvenile Life Without Parole Initiative and author of "Second Chances: Juveniles Serving Life Without Parole in Michigan's Prisons." She has an MA in philosophy from Barnard College and a juris doctorate from Wayne State University Law School.

Our next witness is Jonathan Turley of George Washington University Law School. He teaches courses on constitutional law, constitutional criminal law, environmental law, litigation and torts. He is the founder and executive director of the Project for Older Prisoners, or POPS. He has a BA in international relations from the University of Chicago and a juris doctorate from Northwestern School of Law.

Our next witness will be Mr. Fred Mosely, president and founder of Justice Affiliates in Cleveland. He is a former trial attorney and judge who operates the Justice Project which provides assistance to those recently released from incarceration and counseling to their family members, and he operates Justice Ministries which conducts teaching seminars and publications on spiritual law. He has a BA from Wilberforce University, his juris doctorate from Cleveland Marshall College of Law, and a master of law also from Cleveland Marshall.

The next witness is Ray Krone whose experience that brings him here today is one that we hope one day to eliminate. He lost 10 years of his life sitting on Arizona's death row accused of a murder he did not commit. He is the 100th person whose innocence has been proven by DNA evidence.

Our next witness is Drew Wrigley, U.S. attorney for the District of North Dakota, and I just want to point out that the gentleman from North Dakota, Mr. Pomeroy, wanted to be here, but could not

be here to introduce you. He has over 10 years' experience as a prosecutor in State and Federal prisons. He has a BA in economics from the University of North Dakota and a juris doctorate from American University School of Law in Washington, DC.

Our final witness is Mr. Lance Patrick Ogiste of the Office of the District Attorney of Kings County in New York. He oversees the appeals bureau, community relations bureau, and the ComALERT program. He has a BA in political science from Columbia College of Columbia University and a juris doctorate from Georgetown University Law Center in Washington, DC.

We will begin with Ms. Woolard.

There is a timing device in front of you that tells you when your time is about to expire. The light will go from green to yellow, and, hopefully, you will start finishing up when the light turns to red.

Ms. Woolard?

TESTIMONY OF JENNIFER L. WOOLARD, Ph.D., ASSISTANT PROFESSOR, DEPARTMENT OF PSYCHOLOGY, GEORGETOWN UNIVERSITY, WASHINGTON, DC

Ms. WOOLARD. Thank you, Mr. Chairman. I will do my best to pay attention to it turning to red.

Mr. Chairman, Ranking Member Forbes, and Members of the Subcommittee, thank you for the opportunity to speak with you about inmate rehabilitation and successful release planning. Today, I want to briefly share with you some of what behavioral science research, particularly psychology, can contribute to your policy deliberations about responses to youth, particularly the discussion of juvenile life without parole and rehabilitation.

I want to make two perhaps obvious statements, but then tell you why they might not be so obvious. First, adolescents are developmentally different from adults in ways that are relevant to delinquency and crime and rehabilitation. This statement is not based in stereotype or intuition, but in science.

Although the belief that adolescents are different may not be longstanding, the news is that advances in behavioral and brain research support this fundamental tenet of developmental psychology and of the rehabilitative approach in the justice system. This research has important implications for juveniles' culpability for the offenses that they commit as well as for their prospects for rehabilitation.

To illustrate, I am going to briefly focus on two major aspects of adolescents' brain and behavior functioning.

The socio-emotional network refers to brain systems responsible for emotion, rewards, and social processing, perhaps the same systems that underlie our emotional discussions of crime policy. These tend to undergo major changes in adolescence, also a time of increased sensation-seeking, increased emotional arousal, and increased attentiveness to social information. So adolescence is characterized by a socio-emotional system that is easily aroused and highly sensitive to social feedback from others.

At the same time, adolescence is characterized by a still-immature cognitive control system. Although intellectual ability peaks by about age 16, the capacity for planning and future orientation and the ability to regulate oneself involve sections of the brain known

as the prefrontal and anterior cingulate portions that continue to develop well into young adulthood.

Sometimes called the CEO of the brain, these areas activate during what we might consider mature or deliberate thinking—the abilities to identify and consider future consequences of our acts, to understand possible sequences of events, and control impulses. So, as a result, adolescents are less able to control impulses, less able to resist peer pressure, less likely to think ahead, and more driven by the thrill of rewards. Moreover, the effects of immaturity are probably even greater outside the control of the laboratory.

So, compared to adults, juveniles' cognitive capacity is undermined by that socio-emotional system in circumstances that are not controlled or deliberate or calm, circumstances that might encompass much of juvenile crime. Our theory suggests that with maturation comes the integration of these two systems, bringing their influence into greater balance, perhaps contributing to the reduced risk in crime and delinquency that we see in adulthood and, also, underscoring the potential for change during those years as well.

So let me be clear. Advances in brain imaging are exciting, offering a window into the structure and function of the brain. It is still at early stages, though. I cannot tell you that certain regions of the brain are responsible for crime, or I cannot scan one person and tell you that that person is fully developed or not fully developed.

But we can tell you that this initial brain research is consistent with the decades of behavioral research documenting important differences in the cognitive capacities, psychosocial development, and behavior of adolescents compared to adults.

Now there are certainly adults who engage in risky behavior or act immaturely and commit crime. The crucial distinction I want to make for you based on science, though, is that adolescents as a class are more likely to demonstrate these deficiencies due to normative development that is incomplete, not necessarily a completely formed personality. Most of those adolescents will mature into law-abiding, productive adult citizens.

So, as a result, our research challenges us and challenges you how to sort and manage a population that can appear simultaneously adult-like and immature.

The importance of considering rehabilitation and amenability to treatment as we consider youth in long-term incarceration is a critical issue. Youths' foreshortened time perspective, for example, can mean that time in isolation or a life-without-parole sentence can have a more severe or excessive impact upon youth.

It is incumbent upon us as researchers and policymakers to ask questions about outcomes that extend beyond recidivism to include pathways of development and positive engagement in the larger society, the prospect for employment and positive contributions. The emphasis on and the possibility for rehabilitation is crucial.

Our research findings, at a minimum, support the importance of considering these factors as we reduce offending and augment the opportunity for youth to follow a successful and productive developmental pathway.

Thank you.

[The prepared statement of Ms. Woolard follows:]

PREPARED STATEMENT OF JENNIFER L. WOOLARD

Mr. Chairman and members of the Subcommittee on Crime, Terrorism, and Homeland Security, thank you for the opportunity to speak with you this afternoon about inmate rehabilitation and successful release planning. Today I share with you some of what behavioral science research can contribute to the policy discussion about responses to youth.

First, adolescents are developmentally different from adults in ways relevant to delinquency and crime. This statement is not based in stereotype or intuition but in science. Although the belief that adolescents are different may not be different longstanding, the news is that advances in behavioral and brain research support this fundamental tenet of the juvenile justice system and its approach to rehabilitation. To illustrate, I will focus on two major aspects of adolescents' brain and behavior functioning.

The socio-emotional network refers to brain systems responsible for emotion, rewards, and social processing, which undergo major changes in early adolescence, also a time of increased sensation-seeking, increased/easier emotional arousal, and increased attentiveness to social information. So, adolescence is characterized by a socio-emotional system that is easily aroused and highly sensitive to social feedback.

At the same time, adolescence is characterized by a still-immature cognitive control system. Although intellectual ability peaks by about age 16, the capacity for planning, future orientation, and the ability to regulate oneself involve prefrontal and anterior cingulate portions of the brain that continue to develop well into young adulthood. Sometimes called the "CEO" of the brain, these areas activate during what we might consider mature or deliberate thinking—the abilities to identify and consider future consequences, understand possible sequences of events, and control impulses.

As a result, adolescents are less able to control impulses, less able to resist pressure from peers, less likely to think ahead, and more driven by the thrill of rewards. Moreover, the effects of immaturity are probably even greater outside the control of a laboratory. Compared to adults, juveniles' cognitive capacity is undermined by that socioemotional system in circumstances that are not controlled, deliberate, and calm—circumstances that may encompass much of adolescent delinquency risk. Theory suggests that with maturation comes the integration of the two systems, bringing their influence into greater balance and perhaps contributing to the reduction in risky behavior we see in adulthood.

Let me be clear—the advances in brain imaging techniques are exciting and offer windows into the structure and function of the brain. However, research is still at the early stages. We cannot definitively tell you that certain regions are "responsible" for risky behavior, immature thinking, or delinquent acts. We can tell you that our initial brain research is consistent with the decades of behavioral research documenting important differences in the cognitive capacities, psychosocial development, and behavior of adolescents compared to adults.

Now, there are certainly adults who engage in risky behavior or act immaturely. The crucial distinction, though, is that adolescents as a class are more likely to demonstrate these deficiencies due to normative development that is incomplete; most will mature into law-abiding, productive adult citizens. As a result, the research on developmental differences challenges policymakers and practitioners to sort and manage a young population that can appear simultaneously adult-like and immature. So, what guidance can developmental research provide?

I believe the body of behavioral and brain research calls into question assumptions made by some that juveniles are simply "miniature adults" incapable of, or unlikely to change, simply because they are capable of committing certain offenses. Prior to age 16, they are different intellectually and emotionally. After age 16, they are still different emotionally.

The importance of considering rehabilitation and amenability to treatment as we consider youth in long-term incarceration is a critical issue, particularly for youth incarcerated as adults. Youths' foreshortened time perspective, for example, can mean that the same amount of time in isolation imposed for disciplinary sanctions for adults can have a more severe or excessive impact on youth. One study comparing the perceptions of youth transferred to the adult system with those retained in the juvenile system found youths reported that juvenile sanctions had an effect because they gained something (e.g., skills, hope, services); adult sanctions tended to have an effect on attitudes and behavior because they cost something (e.g., loss of hope, safety, respect). Sanctions imposed on juvenile offenders should hold them responsible, but should not harm them in ways that imperil their development.

It is incumbent upon researchers and policymakers to ask questions about outcomes that extend beyond recidivism to include pathways of development (e.g., ap-

propriate relationship formation, individual capacities) and positive engagement in the larger society (e.g., employment, contributions to society). The emphasis on, and possibility for, rehabilitation is crucial. These research findings, at a minimum, support the importance of a developmentally appropriate juvenile justice system that simultaneously works to prevent and reduce offending while augmenting the opportunity for youth to follow a successful and productive developmental pathway.

Mr. SCOTT. Thank you.

Ms. LaBelle?

TESTIMONY OF DEBORAH LaBELLE, J.D. DIRECTOR, JUVENILE LIFE WITHOUT PAROLE INITIATIVE, ANN ARBOR, MI

Ms. LABELLE. Thank you, Mr. Chairman and Members of the Subcommittee. I, too, would like to address the bill that I think brings some equity back to juveniles who are sentenced to life without any possibility of parole.

As Mr. Chairman mentioned, there are over 2,000 juveniles serving this sentence in this country, and there are nine now in the rest of the world, Australia having recently released their three children that were serving that sentence and altered the way that they have begun to treat and consider children.

I think it would also add equity because in many of the 38 States that have this punishment, it is the harshest punishment that can be given for anyone who does any crime so that if an adult at 45 years commits multiple murders, they will get the same punishment as a 14-year-old child who, in one of my States that I work in, commits a felony murder.

And it is not only the same punishment. In fact, it is a harsher punishment for the child because if you look at the sentence that we are talking about, by virtue of its very sentence, a juvenile who is 14 or 15 who receives a life-without-possibility-of-parole sentence will serve many more years in that prison cell than an adult, a mature adult, who receives that sentence. So not only are you not having a consideration of the youthful status, but you are actually punishing a child harder for what may be the same crime.

And as Justice Kennedy recently recognized in striking down the juvenile death penalty, he said that as any parent knows and as the science and sociological studies confirm, that this lack of maturity and underdeveloped sense of responsibility, peer pressures, are qualities that result in impetuous and ill-considered actions and decisions much more often in youth than they do in adults.

Youth is a time and condition of life when a person is susceptible to influence and psychological damage, and that explains in part why the prevailing circumstances that juveniles have less control, less experience and less control over their own environment, which often adds to impetuous crimes.

But we now have a system in which these youth, these children ranging from the age of 13 to 17, are placed in a cell without ever a second look until they die and without any consideration of their youthful status. And I think that one of the things that no one can say with assurance is what a child will be when they grow into adulthood. Yet in the United States, we stand virtually alone in rejecting the youth's unique potential to grow, to change, to learn and to contribute to our society and our future. And we do that uniquely in the criminal justice system because in all of our civil and political laws, we recognize that children are less responsible. We rec-

ognize that they do not have the wherewithal to vote until they are 18, that they can only drive when they are 16, that they cannot do contracts, that they cannot serve on the very juries that we allow to convict them and send them to prison for life without any second look at them.

And so when we talk about equity and we talk about instilling a kind of discretion in our criminal justice system, what we have with regard to youth is a total disregard, just with a game of semantics, that we will treat youth as if they were adults. And neither judges nor jury in the majority of these States have any discretion to do otherwise, because for a whole range of crimes for many States, once you are the age of 14 and you commit a crime, which may be a felony murder, meaning that you have an adult who does the actual homicide, you are mandatorily automatically sent to an adult court. And once you are convicted, it is a mandatory sentence. Neither a judge nor a jury has the ability to look at that child's status and make any determination.

And what this bill simply does is it says we will look again. We will acknowledge that you are a child, and when you grow up, you may be an adult that may or may not be able to join society, and we will not arbitrarily say that we will sentence you from cradle to the grave at a cost of approximately $2 million per child without at least considering the concept of whether punishment has been served, whether you are a risk to public safety, and whether you can now as an adult rejoin our society.

So I think that when you are looking at this bill, this really puts back in place some of the equities that are missing in the kind of reactive sentences that have occurred over the last 10 years with regard to our children, and I think that this matter is an issue not as much as criminal justice, but a consideration of how we are going to treat our children and how we are going to look at them in terms of whether they can be part of our future.

Thank you.

[The prepared statement of Ms. LaBelle follows:]

STATEMENT OF DEBORAH LaBELLE, ESQ.

A child, cannot leave school or home, decide to marry, get medical treatment, drive a car, vote, enter a contract or sit on a jury in this country, yet in thirty-eight states they may be tried and sentenced as if they are an adult and punished with life in prison without the possibility of parole.

Although it may take time to fully register in a child's mind, the life without parole sentence sends an unequivocal message to children that they are banished from society forever. This unforgiving sentence to die in prison for an act committed during a time of immaturity does not enhance public safety and burdens us all both morally and fiscally.

When the sentencing of youth to life without parole, became the subject of significant press coverage over the last few years, it revealed that few members of the public were aware that the United States issues such a punishment to children. Subsequent polls and survey groups have demonstrated overwhelming opposition to this sentence.

I am here to testify in support of legislation that will right the course of over ten years of a law that has committed over 2,225 children, to be sentenced to serve life in adult prisons in the Untied States without any possibility of parole. In the rest of the world there are nine (9).

The sentencing of children to a life sentence without ever looking at them again, serves neither the goals of fair punishment nor protection of public safety that are the twin essences of our criminal justice system. The current laws mete out disproportionate punishment on youthful offenders without any opportunity to demonstrate that they have

matured and grown into adults that pose no risk to the public.

The child's right to special protection is a well-established principle of international law and is reflected in all major human rights treaties concerning the rights of the child. For instance, Article 19 of the American Convention establishes that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." According to the Inter-American Court, the special protection of children derives "from the specific situation of children, taking into account their weakness, immaturity or inexperience."[1] Other treaties and international instruments also recognize a child's rights to special measures of protection. The International Covenant on Civil and Political Rights [hereinafter ICCPR], Art. 24, for example, provides that "[e]very child shall have . . . the right to such measures of special protection as are required by his status as a minor." And Article 3 of the CRC provides that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."

Like the American Declaration, international law also recognizes that the right to special protection applies to children who come into conflict with the law. For example, Art. 37(c) of the CRC requires that "[e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age." International standards also require that juvenile justice systems emphasize the well being of the juvenile and that the treatment of the

[1] Inter-American Court Of Human Rights, Advisory Opinion Oc-17/2002 [hereinafter Oc-17/2002], Of August 28, 2002, Requested By The Inter-American Commission On Human Rights.*Juridical Condition and Human Rights of the Child*, para. 60, *available at* http://www.corteidh.or.cr/serica_ing/index.html.

juvenile should balance the circumstances of the offender and the offense.[2] Regard for the special needs of the child is also reflected in numerous provisions requiring separate facilities and different procedures for children.[3] Two of the most fundamental rights inherent in the right of children to special protection are the right to be incarcerated for the shortest possible duration and to reintegration and rehabilitation. Both are violated by the current state and federal laws which try and convict youth, as if they were adults, and sentence them to spend the rest of their lives in prisons for acts they committed as a child.

The imposition of life sentences without the possibility of parole is also contrary to any concept of rehabilitation. A concept that is embedded in all correctional departments by virtue of their name and espoused goals. Further, the very point of a juvenile justice system is premised on the understanding that juveniles respond to and are entitled to a chance at rehabilitation in their youth to allow them to participate as full citizens upon adulthood. This concept is also embeded in laws and documents signed and ratified by

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[2] Beijing Rules, *supra* note 54, 5.1 concerning the "Aims of Juvenile Justice" provides "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence." Rule 14.2 requires that court and other proceedings concerning a juvenile offender "be conducive to the best interests of the juvenile," and Rule 17 provides that any disposition by a competent authority shall be guided by the principle of proportion – consideration of "the needs of the juvenile as well as [] the needs of society" (Rule 17.1(a)) and that "the well-being of the juvenile shall be the guiding factor in the consideration of her or his case" (Rule 17.1(d). *See also* Oc-17/2002, *supra* note 62, para. 61 ("it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.")

[3] ICCPR, Art. 10(2)(b)("[a]ccused juvenile persons shall be separated from adults"), Art. 10(3)("Juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status."); Art. 14(4)(juvenile criminal procedure shall "take account of their age"); CRC, Art. 37(c)("e)very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age."), Art. 40(3)(requiring States Parties to establish "laws, procedures, authorities and institutions specifically applicable to children" accused or recognized as violating the penal law); American Convention, Art. 5(5)(requiring that minors be separated from adults and "brought before specialized tribunals . . . so that they may be treated in accordance with their status as minors.")

nearly all national states.

Article 10 of the ICCPR establishes that incarcerated juveniles must receive special treatment aimed at their reintegration in society.[4] Article 14(4) of the ICCPR requires that procedures "take account of [juveniles'] age and the desirability of promoting their rehabilitation."[5] In the United States context, the U.S. Supreme Court has also noted the potential to rehabilitate children stating, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[6] The Inter-American Court has held that, "When the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to "allow them to play a constructive and productive role in society."[7]

The sentence of life without parole for children contradicts the right to rehabilitation and

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[4] Article 10, ICCPR: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [2](b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." General Comment No. 21 on article 10 echoes the rehabilitative goal stating that juveniles should be separated and treated differently from adults "with the aim of furthering their reformation and rehabilitation."

[5] Although the U.S. issued a reservation to Article 10 and 14(4), the reservation is limited, stating that the U.S. only "reserves the right *in exceptional circumstances* to treat juveniles as adults." *See* discussion on the reservation *infra* note 85 and accompanying text.

[6] United States Supreme Court, Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 1195 (2005).

[7] *Street Children Case*, *supra* note 59, para. 197. Article 5 of the American Convention holds that, "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." The Beijing Rules state that the objectives of institutional treatment must be to "provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society." Rule 26.1, Beijing Rules *supra* note 54.

the often stated assertion that imprisonment should promote rehabilitation.[8] It reflects a determination that there is nothing that can be done to render the child a fit member of society. It is an unforgiving sentence of permanent banishment – which rejects any concept of redemption or faith that time, treatment or hard work can promote positive change. The sentence denies youth any hope that they may atone for their crimes and improve their lives.

Recently, the United States Supreme Court in the case of *Roper v. Simmons*, 125 S.Ct. 1183 (2005) struck down the death penalty for juveniles as violation of our constitution's prohibition on cruel and unusual punishment, holding:

> First, as any parent knows, and as the scientific and sociological studies...confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.
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> * * *
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> Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This is explained in part by the prevailing circumstances that juveniles have less control, or less experience with control over their own environment.

These words apply with equal force to juveniles who commit crimes that carry mandatory life without any possibility of parole sentences for adults.

Scientific research in the last five years has confirmed the areas of the brain that control impulses, anticipation and understanding of consequences, logical judgment,

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[8] The Michigan Supreme Court has stated that "[t]he rehabilitative function of sentences, with an eye towards returning the offender to society at a future time, is not present in nonparolable life sentences." *People v. Fernandez*, 427 Mich. 321, 339 (1986).

ability to foresee and appreciate consequences is simply not developed in adolescents.

This punishment of juveniles also incorporates two of the more disturbing elements that course through our criminal justice system, race and class. The life without parole sentences are imposed on African-Americans and children of color in a disproportionate manner. In Michigan, 72% of the juveniles who were tried as adults and sentenced to life without parole, are children of color. An overwhelming number of the children who receive life without parole did not have the resources to hire independent counsel.

Each year in the United States, children as young as 14 are sentenced to die in prison without a date of execution. Thousands of children have been arrested and sentenced to life without possibility of parole for crimes committed at an age in which we as a society of adults are required to take of them. Boys and girls across the country are being tried in adult courts without any consideration of their age or mitigating factors. The cost of warehousing our children for life is staggering to our communities and to our own humanity. Children are entitled basic rights that derive directly from their status as human beings and children in our society.

This bill eliminates life without parole sentences, and offers the opportunity for a second chance, by requiring only that we look at these children and make an assessment of whether they pose any danger to society or whether they have in fact grown up into an adult who can participate as a citizen, starts us on the right path toward reclaiming this humanity.

No one can say with any assurance what a child will be when they grow into adulthood. And, the U.S. stands virtually alone in rejecting youth's unique potential to grow, to change, to learn and contribute, it stands without support in asserting that a girl or a boy is so unredeemable that you need never look to see the woman or man they become.

All that this legislation requires is that we look at these individuals again and that we acknowledge that children can, and do, change. This legislation will make our criminal laws consistent with our civil laws which are based on the understanding that a child is not as responsible as an adult. This legislation acknowledges that putting a child away for life – without consideration of what role the youth's immaturity, lack of judgment and undue influence by peers played in their crime, constitutes disproportionate punishment.

Indeed a recent decision of The U.S. Supreme Court recognized that children are less culpable than adults in striking down the death penalty for all youth who committed their crime under the age of 18, holding that:

> Juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows, and as the scientific and sociological studies (...) tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. (...) The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (...) The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an

adult.[9]

The Supreme Court fully acknowledged the persuasiveness of recent adolescent brain research that scientifically affirms that children's brains are physiologically different from adult brains, with children reacting more in their impulse area to stress, and adults reacting more in their cognitive area.[10]

Given the greater vulnerability, lesser maturity and consequent lesser moral and legal culpability of persons under 18 years of age, the imposition of life sentence without the possibility of parole constitutes cruel, infamous and unusual punishment and also violates their right to be free from inhumane treatment.. International instruments also confirm an international consensus on the right to humane treatment. Article 5 of the American Convention[11] states that, "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Article 7 of the ICCPR establishes that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The ICCPR also recognizes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of

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[9] *Roper v. Simmons, supra* note 75, *at* 1195.

[10] *See e.g.* Jay N. Giedd, et al., "Brain Development During Childhod and Adolescence: A Longitudinal MRI Study," Nature Neuroscience, vol. 2 (1999), *at* 861, *cited in The Rest of their Lives, supra* note 2, *at* 47.

[11] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), *available at* http://www.cidh.org/Basicos/basic3.htm

the human person.[12] Article 16 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment requires that States Parties undertake to prevent "acts of cruel, inhuman or degrading treatment or punishment." Similarly, Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") prohibits inhuman or degrading treatment or punishment.

Because a child's moral and mental maturity is different from an adult, severe forms of punishment such as LWOP are not appropriate. Indeed, in many states, life without possibility of parole is the severest sentence that can be meted out for any crime. The result is a vastly disproportionate inequitable punishment – where an adult with full facilities who commits the most heinous crime – perhaps after eschewing many opportunities, receives a life without possibility of parole sentence. If that person is 45 years old, it will likely be 30 years – the rest of their adult life in prison.

Yet, a child, whether it be for a first offense, perhaps even for a felony murder conviction, when the youth did not commit a homicide, will also receive the mandatory adult sentence of life without possibility of parole. Only for the child it will be even harsher, likely 60 years in a cell until death. Not only is there no consideration for their child status, but they are punished harsher.

International standards also require that a child's status be taken into account when determining whether punishment is inhumane. For example, the CRC treats JLWOP as a form of

[12] ICCPR, *at* art. 10(1).

cruel, inhuman and degrading treatment. The CRC's prohibition on life without parole appears in Art. 37(a) and generally prohibits torture and other cruel, inhuman or degrading treatment. Art. 37 reads:

> States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

In Jailton Neri Da Fonseca,[13] the Commission found a violation of Art. 5 of the American Convention, reasoning,

> ... although this article leaves some room for interpretation in defining whether a specific act constitutes torture, in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity, for instance. [14] (emphasis added)

While an LWOP sentence would be difficult for any person, juveniles in particular have heightened vulnerability. Applying the highest standard to determine the degree of suffering of children,[15] sentences of life without the possibility of parole constitute such cruel, infamous and unusual punishment and also violates their right to humane treatment. Punishments "prescribed by law and applied in fact should be humane and proportionate to the gravity of the offense."[16] Life without parole sentences for child offenders are per se disproportionate. Indeed, giving an adult sentence of natural life to a

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[13] *See Jailton, supra* note 58.

[14] *Id.*, at para. 64.

[15] Id., at para. 63.

[16] "Report on the 1960 Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purpose and Legitimate Limits of Penal Sanctions," organized by the United Nations in Tokyo, Japan, 1960.

minor is disproportionate even compared to the same sentence given to a forty-five year old adult. The years juveniles miss are the most formative, during which they would otherwise finish their education, form relationships, start families, gain employment, and through those experiences learn to become adults.

Moreover, adult prisons are especially harsh for juveniles. Juveniles held in adult prisons and jails are at a much greater risk of harm than their peers in juvenile facilities. Sexual assault of juveniles is five times more likely in adult facilities and beatings by staff are almost twice as likely. Because of their young age and smaller size, juveniles are often the prey for sexual predators and are over-represented as victims of custodial sexual misconduct. [17]

The mental anguish faced by juveniles who receive LWOP is reflected in the fact that the suicide rate for juveniles in adult prisons is eight times that of juveniles in detention facilities.[18] One juvenile in Michigan, Kevin Boyd, stated "the best part of your day is when you are sleeping; [] your life is nothing more than a daily routine that turns to a monthly or even yearly routine; [] you prayed for death to find you so you didn't have to look into your own face watch it age with nothing to be proud of or show for those frown lines; [] you know that society looks at you as a piece of garbage and you start to believe it . . . ."

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[17] *Second Chances*, *supra* note 5, at 18, citing Forst, Fagan, and Vivona, "Youth in Prisons and State Training Schools," 39 Juvenile and Family Court Journal 1-14 (1989); Forst, Fagan, and Vivona, "Youth in Prisons and State Training Schools," 39 Juvenile and Family Court Journal 1-14 (1989). "No Escape: Male Rape in US Prisons." Human Rights Watch. April 2001, *available at*: http://www.org.reports/2001/prison/report4.html_1_24

[18] *See id, citing* James Austin, Kelly Johnson, & Maria Gregoriou, "Juveniles in adult prisons and jails: A National Assessment." U.S. Department of Justice, Bureau of Justice Assistance. October 2000., citing Community Research Center, "Juvenile Suicides in Adult Jails. Juvenile Transfer Series. Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention." (1980).

As a JLWOP prisoner who has been incarcerated since the age of sixteen put it, "When I went to prison, I was around … all the violence. I was like, 'man I gotta get out of this—how am I gonna get out of this prison?' I can't do no life sentence here at that age. And so I thought of that [killing himself]. Gotta end it, gotta end it. . . . .I've got so many cuts on me ."[19] Psychological experiments have found that the negative mental effects of imprisonment increase the longer one is imprisoned, but decrease as time of release nears.[20] JLWOP prisoners know they will never be released, thus providing no brake for a downward spiraling emotional state. A treatment director at Mitchellville prison in Iowa says JLWOP prisoners "tend to go through the grief cycle twice. The first time it has to do with the simple fact of entering adult prison, so they pass through shock, anger, depression, and then acceptance. But for the lifers, they go through all four stages again—often several years later or whenever the reality of their sentence finally sinks in."[21]

Beyond the normally harsh conditions of prison life, JLWOPs are often sent to the harshest of environments: supermaximum security confinement (supermax). In Colorado, over fifty percent of JLWOPs had spent time in supermax. Supermaxes themselves may

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[19] Human Rights Watch interview with Richard I., East Arkansas Regional Unit, Brickeys, Arkansas, June 21, 2004 (pseudonym), in *The Rest of their Lives, supra* note 2, *at* 64.

[20] For documentation of increased effects, *see, e.g.*, Stanton Wheeler, "Socialization in Correctional Communities," *American Sociological Review*, vol. 26 (1961), p. 697; Peter Garabedian, "Social Role and Processes of Socialization in the Prison Community," *Social Problems*, vol. 11 (1963), p. 140. For documentation of decreased effects, *see, e.g.*, Robert Johnson and Hans Toch, "The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting," *The Pains of Imprisonment* (Thousand Oaks: SAGE Publications, 1982); "Psychology and the Limits to Prison Pain," p. 499, in *The Rest of their Lives, supra* note 2, *at* 53.

[21] Human Rights Watch interview with Treatment Director at Iowa Correctional Institute for Women, Mitchellville, Iowa, April 5, 2004, in *The Rest of their Lives, supra* note *2, at* 58.

constitute CIUP, with total isolation over 23 hours per day leading to devastating psychological effects including depression and difficulty relating to others once released from solitary. While most of the individual petitioners are not at the maximum-security levels, they have all been subject to isolation either as a mechanism for protecting themselves from harm or as a punitive detention. The Human Rights Committee in General Comment 20 notes that ""prolonged solitary confinement of the detained or imprisoned person may amount to" torture or CIDT.[22]

Although juveniles sentenced to a lifetime in prison do not face death or corporal punishment on a certain date, they are faced with a prison term that will end only with their death. Psychological studies of long-term prisoners show "protracted depression, apathy, and the development of a profound state of hopelessness."[23] Children, naturally more dependent on their family relationships for support, are especially vulnerable to depression when they are cut off from family contact in prison. Here the anguish is caused not by the imminence of death, but with the fear and dread of physical harm and the prospect of continued incarceration until the end of their days.

The juvenile's age and status as a child makes JLWOP particularly cruel, inhumane, infamous and unusual. Jailton Neri Da Fonseca's holding that the mental trauma of a fourteen year-old child abducted by the Brazilian military police was CIUP

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[22] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 6

[23] "Psychology and the Limits to Prison Pain," p. 499 (citing Judith Herman, "Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma," *Journal of Traumatic Stress*, vol. 5 (1992), p. 377), in *The Rest of their Lives, supra* note 2, *at* 61.

emphasized "the highest standard must be applied in determining the degree of suffering" in children. Just as Jailton feared his abduction by the military police would mean torture and possible death for him, children sentenced to JLWOP face physical abuse, sexual predation, and the suicidal depression that accompanies lifetime in prison. The individual petitioners faced, and continue to face, adult prison life, with all the attendant traumas to which children are especially vulnerable, without the hope of ever being released. One juvenile in Michigan, Barbara Hernandez, wrote: "[d]eath sentence is what the judge gave me. A long slow death. I would have rather been taken out and shot."

A fair trial in the context of juvenile criminal justice must include safeguards to protect the special needs and interests of those persons under 18 years old that are accused of having commited a crime. At a minimum level, these safeguards must include different courts and justice systems to judge persons under 18 years old and adults, independently of the crime commited and an opportunity for judges to make meaningful individualized determinations prior to imposing life without parole sentences. Michigan's criminal system and laws do not provide adequate safeguards for these rights. Juvenile courts do not have jurisdiction over 17 year olds, and they are automatically tried as adults. Children 16 and under, accused of certain crimes, can be directly prosecuted as adults, without any individual judicial determination of the propriety of treating them as adults.[24] Once it has been determined that children will be tried and sentenced as adults, life without parole sentences are mandatory for certain crimes, and judges

[24] These cases are called "direct files" or "automatic waiver" cases since the juvenile status of the accused is never raised nor considered by the Court. The decision is taken by the prosecutor.

have no discretion to determine whether they are appropriate for the child being sentenced.

The United States indicated general support for special criminal procedures for children when it ratified the ICCPR. ICCPR Article 14 requires, "in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of their rehabilitation."[25] When the United States ratified the ICCPR, it attached a limiting reservation that stipulates:

> That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.[26]

The circumstances surrounding this reservation indicates that it was intended to permit – on an exceptional basis – the trial of children as adults and the incarceration of children and adults in the same prison facilities. As discussed below, instead of being limited to exceptional circumstances, in Michigan adult criminal procedures and sentences are being applied in a routine and automatic fashion. Further, while the reservation discusses criminal procedures, there is nothing in the reservation to suggest that the United States reserved the right to sentence children as harshly or harsher than adults who commit similar crimes. On the contrary, the reservation's plain language and drafting history show that the United States sought to reserve the ability in "exceptional

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[25] ICCPR, *at* art. 14(4).

[26] Untied Nations Treaty Collections, International Covenant on Civil and Political Rights. U.S. Reservations, Declarations and Understandings: Reservations, para. 5 (emphasis added); 138 Cong. Rec. 54781-01 (Daily Ed. April 2, 1992).

circumstance" to try children in adult courts and to require some of them to serve their sentences in adult prison. According to the United States Senate Committee on Foreign Relations, the reservation was included because, at times, juveniles were not separated from adults in prison due to their criminal backgrounds or the nature of their offenses.[27] The reservation is not about the length or severity of sentences for juveniles and it cannot be read to condone the automatic sentencing of juveniles involved in serious crimes as adults.

Art. XXVI of the American Declaration states, "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws."[28] In order to comply with due process guarantees, at a minimum, Michigan courts should consider children's juvenile status and potential for rehabilitation and special needs in some meaningful way. Indeed, the American Convention not only requires consideration of juvenile status but also mandates special tribunals for juveniles subject to criminal proceedings. For example, Art. 5 of the American Convention states that "[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that

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[27] United States, *Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 651 (1992) ("Although current domestic practice is generally in compliance with these provisions, there are instances in which juveniles are not separated from adults, for example because of the juvenile's criminal history or the nature of the offense. In addition, the military justice system in the United States does not guarantee special treatment for those under 18.").

[28] Art. XVIII provides the right to "resort to the courts to ensure and respect [] legal rights" and requires a procedure for court protection "from acts of authority that || violated any fundamental constitutional right." Art. XXIV provides "the right to submit respectful petitions to any competent authority . . . and the right to obtain a prompt decision thereon." Art. XXV provides "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by preexisting law" and [e]very person [deprived of liberty] has the right to have the legality of the detention ascertained without delay . . . the right to be to be tried without undue delay , , , [and] the right to humane treatment during his time in custody."

they may be treated in accordance with their status as minors."

According to the Inter-American Court, the special protection that must be afforded to children should be reflected in the creation of special courts and the "characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt."[29] Adults and persons under 18 years of age must be treated differently in order to maintain substantive equality given that they are different and have different needs. The Inter-American Court held, "[t]here are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness in which they find themselves."[30]

The Beijing Rules specifically address the need for special procedures for juvenile justice systems in its Rule 6 on scope of discretion:

> 6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions. 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion. 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

According to the commentary to Rule 6,

> Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the

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[29] Oc-17/2002, *supra* note 62, para. 137(10).

[30] *Id., at* para. 46.

> actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion.

Once it is determined that the children would be tried and sentenced as adults, they are subject to a mandatory adult sentence of life without parole in many states. Imposing such a severe mandatory sentence on children violates due process because the individual petitioners were not given an opportunity to make submissions or present evidence that the sentence was inappropriate given the particular circumstances of their cases. They were also denied the opportunity for effective review or appeal of the life without parole sentence.

These "cradle to the grave" sentences are thus imposed without anyone -- neither judge nor jury -- having the opportunity to consider how the youth of the person, their child status should impact on the punishment. Nor, under the current laws, iwthout this bill will any other person be able to consider this matter.

The Convention on the Rights of the Child explicitly addresses th contradiction between the particular rights and needs of children and life without parole sentences.[31] Underpinning several of the treaty's provisions is the fundamental recognition of the child's potential for rehabilitation. Recognizing the unacceptability of sentences that negate the potential for children to make changes for the better over time, the CRC flatly prohibits sentencing children to life sentences without parole or to the death penalty.[32] Article 37(a) states:

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[31] CRC, art. 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. no. 49, at 167, U.N. Doc. A/44/736 (1989) (entered into force Sept. 2, 1980), reprinted in 28 I.L.M. 1448, 1470 (emphasis added).

[32] The juvenile death penalty is now prohibited in the United States. *Roper, supra* note 75, *at* 1199 (finding the juvenile death penalty unconstitutional and citing to international standards).

> Neither capital punishment *nor life imprisonment without possibility of release* shall be imposed for offenses committed by persons below eighteen years of age.[33]

The CRC also requires that a state's decision to incarcerate a child "shall be used only as a measure of last resort and for the shortest appropriate period of time."[34] A child who has committed a crime is to be treated in a manner that takes into account "the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[35] States are to use a variety of measures to address the situation of children in conflict with the law, including "care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care."[36] The treaty also anticipates the need for regular and accessible procedures in which a child can "challenge the legality of the deprivation of his or her liberty."[37] Punishing a youth offender with the longest prison sentence possible, offering no hope of rejoining society, little motivation of rehabilitation, and scant opportunities for learning, violates each of these provisions.

The CRC has been accepted nearly universally, with 192 out of a total of 194 countries joining as parties. None of the state parties to the treaty has registered a reservation to the CRC's prohibition on life imprisonment without release for children.[38] The United States and Somalia[39]

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[33] CRC, *at* art. 37(a) (emphasis added).

[34] CRC, *at* art. 37(b).

[35] CRC, *at* art.40.1.

[36] CRC, *at* art. 40.4.

[37] CRC, *at* art. 37(d).

[38] United Nations Treaty Collection Database, available online at http://untreaty.un.org/, accessed on July 16, 2004. Malaysia registered a reservation to art. 37(a) as follows: "The Government of Malaysia. . . declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia." Ibid. The government of Myanmar made a broad objection to Article 37,

are the only two countries in the world that have not ratified the CRC, although both have signed it.[40] As a signatory to the CRC, the United States may not take actions that would defeat the convention's object and purpose.[41]

The U.S. government has proclaimed commitment to the CRC's principles. When Ambassador Madeline Albright, as the U.S. Permanent Representative to the U.N., signed the CRC on behalf of the United States in 1995, she declared:

> The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world. . .

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which it later withdrew after other states protected. Ibid. The government of Singapore has maintained a declaration regarding Article 37. However, the declaration does not address the prohibition on life imprisonment without parole. Singapore's declaration reads: "The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit – (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore; (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedom of others; or (c) the judicious application of corporal punishment in the best interest of the child." A number of states have interpreted the declaration as a reservation and objected to it as contrary to the object and purpose of the Convention. See UN Treaty Collection Database (Germany: Sept. 4, 1996; Belgium: Sept. 26, 1996; Italy: Oct. 4, 1996; The Netherlands: Nov. 6, 1996; Norway: Nov. 29, 1996; Finland: Nov. 25, 1996; Portugal: Dec. 3, 1996; Sweden: Aug. 1997). In the *Roper* decision, the United States Supreme Court took special note of the fact that no state party to the CRC made a reservation to the prohibition against the juvenile death penalty contained in Article 37. *Roper, supra* note 75, *at* 1199.

[39] According to the Untied Nations' agency for children, UNICEF, Somalia is currently unable to ratify the CRC because it lacks a recognized government. See UNICEF, "Frequently Asked Questions," available online at: http://www.unicef.org/crc/faq.htm#009, accessed on July 19, 2004.

[40] The United States signed the CRC on February 16, 1995, and the Somalia signed on May 2, 2002.

[41] See Vienna Convention on the Law of Treaties, art. 18, concluded May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980). Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess. (1971), p. 1; Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *American Journal of International Law*, vol. 79 (1985), p. 283. The U.S. government has also accepted that it is bound by customary international law not to defeat a treaty's object and purpose. See e.g., "Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote," *Washington Times*, (November 2, 1999), p. A1 (describing the Clinton administration's acceptance of obligations under the Comprehensive Test Ban Treaty despite the Senate's failure to ratify).

> United States' participation in the Convention reflects the deep and long-standing commitment of the American people.[42]

The United States has reaffirmed this commitment on subsequent occasions. For example, in 1999 Ambassador Betty King, U.S. Representative on the U.N. Economic and Social Council stated:

> Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be.[43]

The widespread ratification of the CRC demonstrates the almost absolute consensus in the international community against JLWOP. Only three countries appear to have prisoners serving LWOP sentences for crimes committed as children, and those states have about a dozen prisoners *combined*.[44] Further, the practice is inconsistent with international juvenile justice norms emphasizing the importance of taking into account the status and special of the child and a goal of rehabilitation.

In *Domingues*, the IACHR found that the prohibition against the juvenile death penalty to be a *jus cogens* norm. The Commission looked at the near-universal ratification of the CRC without reservation to article 37(a) and found that "the extent of ratification of this instrument

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[42] "Remarks by Ambassador Madeline K. Albright, United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child," U.S. Press Release, (February 16, 1995).

[43] "Statement by Ambassador Betty King, United States Representative on the Economic and Social Council, to the Plenary of the 54th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child," November 11, 1999, available online at: http://www.un.int/usa/99_1i2.htm, accessed on July 22, 2005.

[44] *The Rest of their Lives*, *supra* note 2, *at* 105-7. The CRC Committee recently urged Liberia, the Netherlands and Aruba to amend legislation to prohibit JLWOP. CRC/C/15/Add/236, para. 68; CRC/C/15/Add.227, para. 59.

alone constitutes compelling evidence of a broad consensus on the part of the international community" against the juvenile death penalty.[45] The IACHR examined a widespread trend against the death penalty generally, and the juvenile death penalty in particular. With the juvenile death penalty, the Commission found that eight states still allowed the practice, and five were currently using it; with JLWOP fourteen states (at most) allow the practice, and only three are currently using it. The prohibition against JLWOP is part of the same sentence in the CRC that prohibits the juvenile death penalty, and state practice is almost equivalent to that against the juvenile death penalty, thus the Commission's reasoning in *Domingues* strongly supports a finding that the prohibition on JLWOP constitutes customary international law.

/s/
Deborah LaBelle, Esq.

[45] *Domingues, supra* note 59, at para. 57.

Mr. SCOTT. Thank you.
Professor Turley?

TESTIMONY OF JONATHAN TURLEY, THE J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Mr. TURLEY. Good afternoon. Chairman Scott, Ranking Member Forbes, Chairman Conyers, it is a great honor to appear before you today to talk about an important issue, which is in H.R. 261. I come to this question as someone who teaches in the field and also practices in the criminal law field and also as the founder and the executive director of the Project for Older Prisoners, or POPS, although listening now, I think I also can claim to be the father of four children under 9. So I have seen the ravages of recidivism and overcrowding in my own house as well as juvenile recidivism. But I am going to focus instead on older prisoners.

The fact is—and it is a fact that we cannot avoid—our prisons are graying. They are graying with our society. Our prisons are a microcosm of our society, and our society is getting older, our prisons are getting older, and that is presenting serious problems across the board in all 50 States and the Federal system.

As prisoners grow older, they become more expensive. They are on average two to three times the expense of a younger prisoner. They are in a system that has a very difficult time in handling them. We are in a serious overcrowding situation in this country. We have had a massive growth within our prison system. If you look simply at the Federal prison system, we have gone from in 1986 33,000 inmates. We are now at 193,000. Within that system, we have seen the fastest-growing segment as older and geriatric inmates.

Now many of our prisons are under overcrowded conditions, that is past their design capacity for those facilities, and it is getting worse. It is getting worse because we have ballooning hidden costs associated with the fact that these prisoners are becoming more expensive. They are becoming more expensive partially because of health problems.

As you get older, you become more expensive, and if you are in the prison system, you get older faster. In fact, when we talk about a chronological age in terms of prisoners, that can be misleading. The number of physiologically older and geriatric prisoners is much, much higher. All the studies show that prisoners age about seven to 10 years beyond their chronological age, so the number of physiologically older prisoners is much, much higher, which is why we have these hidden ballooning costs.

This is due often to masking. It is a medical term of when you get older, some conditions are masked by confusion with the normal appearance of aging, and so those conditions are often missed and they go into acute or chronic states.

So we have a system that is not working. It is not working because we are ignoring the fact that we have a much more different prison population today than we have had before, and the population of the 21st century demands that we adjust with it.

That does not mean releasing people because they are older. In fact, the Project for Older Prisoners has received, I am happy to

say, as much conservative as liberal support. We have had some of the most conservative Members of Congress, some prior Administrations that have supported us, because we are extremely conservative in who we recommend for release. That decision is based upon recidivism.

Now recidivism involves a lot of different factors, but the most reliable factor remains age. Everyone agrees on that. What we do not agree on is why. Some of us believe that it is the natural evolution of the body and its system. Some believe it is cultural. But we all agree that after age 30 certainly—and that is a conservative figure—recidivism drops dramatically. At POPS, we focus on prisoners who are 55 years or older, but that drop most certainly occurs after 40, as I mentioned in my testimony, where you see after 40, someone is a third of the likelihood of recidivism than someone who is younger than that.

H.R. 261 is a very important step, and it offers a framework for us to try to deal with this problem. As I mention in my testimony, I think that it should be tweaked, that it should be amended. We need to make sure that people simply do not get out because they reach a certain age. My understanding from its sponsor, Congresswoman Jackson Lee, is that she welcomes those changes and we have, in fact, talked about them.

Some of the changes may include tweaking the age to increase it slightly. More importantly, I think we need to deal with habitual offenders that involve nonviolent offenses. Occasionally, you will find people who are avertable or habitual offenders that graduate up, and we can recognize those patterns. We can also exclude certain crimes. As Congressman Forbes has pointed out—and I think he is absolutely correct—there are some crimes that are nonviolent that we simply would not want to be subject to this release program. But I also agree with Congresswoman Jackson Lee that we do not want to cut this too closely to the bone.

But we can rely on recidivism studies. There are recidivism categories that indicate that certain crimes are hard to predict. Child molesters, child pornographers tend to have a higher recidivism rate, and we can exclude those based on science, not emotion.

I will end my comments today by simply saying that I think we can work together. POPS has worked with both parties across the country, and I think if you look at our record, you will find that we have been able to reach consensus, and I do believe that this is about victims, but I think that we need, if we really care about victims, to make fewer of them, and the way we do that is to make mature decisions about who we need to incarcerate and how, and I look forward to working with this Committee to achieve that goal.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY

STATEMENT OF
PROFESSOR JONATHAN TURLEY

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"Promoting Inmate Rehabilitation and Successful Release Planning"

Before the House
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary

December 6, 2007

I.
INTRODUCTION

Chairman Scott, Ranking Member Forbes, I wish to thank you and the other members of the Subcommittee for the privilege of appearing before you today to discuss the rising population of older and geriatric prisoners. I come to this issue with two related interests. First, at the George Washington University Law School, I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law where I teach in constitutional and criminal subjects. I am also the founder and Executive Director of the Project for Older Prisoners (POPS), the oldest legal organization dedicated to the issue of older and geriatric prisoners.

I am delighted that the Committee is considering changes to the federal law to allow for the early release of low-risk older prisoners. The new direction set out in H.R. 261, "*The Federal Bureau Prison Non-Violent Offender Relief Act of 2007*," is long over-due and vitally needed in the federal prison system.

For a prison system, there are generally four horsemen of the apocalypse that can (like their biblical counterparts) combine to produce a catastrophic crisis: recidivism, overcrowding, budget shortfalls, and acute demographic shifts in population. Many states and the federal government are experiencing the ravages of all these dangers. These problems grew considerably worse after the United States moved to an indeterminate sentencing model to a determinate sentencing model. After Maine became the first state to abolish parole, the federal system followed suit and prompted a national movement. The Federal Sentencing Guidelines resulted in longer sentences and a greater proportion of defendants sent to prison. The result was a rapid expansion of both the prison population and the percentage of long-term incarcerated inmates. Prisons were forced to terminate many rehabilitation programs and special programs in favor a of warehousing approach for the influx of prisoners.

While there are various areas of the prison system that could be reformed to address one or more of these "horsemen," all four of these problems can be significantly

reduced with reforms in the area of older and geriatric prisoners. Older prisoners represent a low-risk, high-cost population that can serve as a vital release valve for a system on overload. Of course, this reform depends on the willingness of Congress to take the initiative to avoid a crisis before it becomes acute.

The Bureau of Prisons (BOP) should be leading the nation in forward-looking reforms and cost-containment measures. After all, the BOP revolutionized our prison system by implementing a uniform and scientific approach to correctional institutions. Time, however, is of the essence. The fact is that our prisons are graying and the system is not prepared to handle the monumental burden of the new prison population of the twenty-first century. For that reason, before addressing the specific language of H.R. 261, I would like to put the problem that it addresses into a national context.

II.
THE GRAYING OF AMERICA'S PRISON SYSTEM

In many respects, prisons are a microcosm of society. As the general population ages, the prison population ages. However, in the last two decades, the aging of many prison systems appears to be accelerating. This trend is due to the reduction of parole opportunities and the lengthening of sentences. As a result, there is a large stagnant population of middle age prisoners who are approaching old age. For example, in the federal system, a remarkable 43.7% of the prison population is now 41 or older.[1] The older prisoner population is the fastest growing segment of the prison systems of many states.[2] As discussed below, this demographic shift comes with attendant problems of increased medical costs and overcrowding.

A. Increasing Prison Populations in the Federal and State Systems

The increasing size and cost of the general prison population puts most states in a poor position to deal with an increase in a special needs sub-population. The rate of increase in the federal and state systems is quite daunting. Consider the growth in the federal system. In 1986, the federal system housed 33,132 prisoners. By 1990, the number of inmates had risen to 59,123. In 2002, the United States Bureau of Prisons for the first time surpassed California and Texas as the nation's largest prison system with 164,043. In 2006, the federal system stood at 193,046 inmates. In comparison, California's prison system increased to 161,412 inmates and Texas increased to 146,476 during the same period.[3]

The national prison system, therefore, is both growing and graying. This has

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[1] United States Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2000, Table 6.47.

[2] For example, Colorado's inmate population grew 57% from 1995 to 2000. Yet, its population of prisoners over the age of 50 grew by 110%. *See* Robert Sanchez, *Colorado's Graying Inmates*, Rocky Mountain News, April 22, 2002.

[3] It is important to note that the prison population in California in 1977 was only 19,600 prisoners. Eric Schlosser, *The Prison Industrial Complex*, Atlantic Monthly, Dec. 1998, at 74.

produced a continually overcrowded system where facilities are forced to hold populations beyond their rated or design capacities. According to the BJS report, state prisons were operating between 98 percent and 114 percent of capacity.[4] While prison construction is necessary, neither states nor the federal system can build out of this crisis.[5]

Each year, the expansion of the federal system has out paced the states. For example, in 1989, the federal system expanded at an astonishing 12%, twice the average of the state systems. Even with intensive construction programs, of the six main federal penitentiaries, five prisons remained over their rated capacity by 40 to 100 percent. While the federal government has spent an enormous amount on building new prisons, prison construction has failed to keep pace with population growth. At an average cost of $100,000 per cell, unlimited prison construction is simply unrealistic in today's economic environment. In the federal system alone, officials have estimated that they must add the equivalent of a new 1,000-bed facility every week to simply keep pace with the growth of their population.[6] In 2006, 7.2 percent (113,791) of state and federal inmates were held in private prison facilities, according to the Justice Department. Notably, one-quarter of all privately held inmates were federal prisoners. In fact, states like California have reduced their reliance on such private enterprises.[7]

The prison systems in the United States (when one considers incarceration, parole, and probation) now amount to an astonishing 7.2 million men and women, or about one in every 31 adults. The Justice Department's Bureau of Justice Statistics (BJS) announced this week that there has been an increase of 159,500 during prior year. The federal prisoner population increased by 2.9 percent.

B. The Increasing Older Prisoner Populations in the Federal and State Systems

With the increase in the prisoner population, there has been a corresponding increase in the population of older prisoners. In the last 20 years, the population of older prisoners has grown by 750%.[8] Some states are reporting that their older prisoner population is now growing three times faster than any other segment of the population – as have other countries.[9] Since 1980, the nation's population of older prisoners has tripled

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[4] This report is available on-line at WWW.OJP.USDOJ.GOV/BJS.

[5] Indeed, many sheriffs have found state overcrowding to be an environment rich with opportunities to make a profit in renting out jail cells. *See generally* Jonathan Turley, *Our Prison Profiteers*, N.Y. Times, Aug. 3, 1990, at A20.

[6] Timothy Egan, *Hard Time, Less Crime, More Criminals*, N.Y. Times, Mar. 7, 1999, at 1.

[7] *See* Peter Slevin, *Prison Firms Seek Inmates and Profits; Management Woes, Loss of Business Noted*, Wash. Post, Feb. 18, 2001, at A3 (discussing lower expectations from private correctional enterprises); Dan Morain, *Governor Now Backs Private Female Prison*, L.A. Times, Jun. 12, 2002, at 7 (noting that, while one private prison would remain open, four would be closed by order of the governor).

[8] Joanne O'Bryant, *Prisons: Policy Options for Congress*, Cong. Res. Service, Aug. 1999, at 7.

[9] Clarke, *supra*, at 1 (noting that Pennsylvania's older prisoner population is the fastest growing segment of its population). Other countries are experiencing the same increase. For example, in the last decade the number of older inmates has tripled, but facilities to deal with them have not been put in place. In 1993 there were 450 sentenced prisoners over the age of 60, but by 2003 the number had increased to

and, by 2000, passed 100,000 in number.[10] Put another way, in 1986, prisoners over 50 represented 11.3% of the federal prison population. That number reached 26% in 1989 and it is expected to reach 33% by 2010.[11] In 1997, the federal system reported that 23.9% of its prison population was 45 or older.[12] In the state systems, on average 12.7% fall within this category.[13]

State studies show an exponential increase in the population of older prisoners that is being seen nationwide. For example, recently Oklahoma completed its budget and population projections. It found that 16 percent of new offenders were over 45 years old – more than double the rate in 1990. The state is now projecting that its population of prisoners older than 45 will increase 48 percent by 2018.[14]

It is important to keep in mind that these figures only represent chronological measurements of age. In reality, the number of physiologically older prisoners will be greater. Federal studies have shown that the average prisoner is seven years older physiologically than he or she is chronologically.[15] Thus, a 45-year old prisoner will often show the physical deterioration and require the level of care of a person in his early to mid-fifties. This is due to histories of poor diet, drug and alcohol abuse, stressful prison life, and often poor medical care.[16] Thus, a prison system must be concerned not just with chronologically older but also with the physiologically older prisoners in the system. It is the latter population that will allow the state to better track ballooning hidden costs in prison budget projections.

The problems associated with the older and geriatric prison population can be expected to increase significantly as this population of middle-aged prisoners swells the ranks of the older prisoners.

1,441, many of whom are first-time non-violent offenders. Male prisoners over the age of 60 constitute the fastest growing sector of the prison population in England. *See* 'No Problems-Old and Quiet': Older Prisoners in England and Wales, available at www.homeoffice.gov.uk/justice/prisons/inspprisons/thematic.html, accessed 23 March 2005). Likewise, Japan has reported sharp increases in its population of older prisoners. From 2000 to 2006, the number of older inmates in Japan rose by 160 percent -- 46,637 from 17,942 inmates. *See* Norimitsu Onishi, *As Japan Ages, Prisons Adapt To Going Gray*, N.Y. Times, Nov. 3, 2007, at 1.

[10] *Aging, Infirm Inmates Quietly Stacking Up,* Associated Press, Oct. 3, 2001.

[11] Connie L. Neeley, et al., *Addressing the Needs of Elderly Offenders,* Corrections Today, August 1997, at 120.

[12] *Id.* at Table 6.38. In year 2000, the number of federal prisoners above the age of 51 was reported as 10.9%. *Id.* at Table 6.47.

[13] *Id.* California is illustrative of this sharply rising growth curve. Although the population of prisoners over 55 years old is only about 6,000, or about 4% of the prison population, the California Legislative Analyst's Office ("LAO") projects that the over-55 population will approach 50,000 in less than twenty years, growing at a rate faster than the prison population as a whole. *See* LAO, *Analysis of the 1996-97 Budget Bill, available at* http://www.lao.ca.gov/a96d1.html#A1 (Feb. 21, 1996).

[14] Angel Riggs, *People Entering Prison Reaches Record Level*, Tulsa World, Oct. 26, 2007, at 1.

[15] This is a more conservative figure than the estimate of some states. For example, Florida recently estimated that an inmate's physiological age was 11 1/2 years greater than their chronological age. Clarke, *supra*, at 1.

[16] While some states offer adequate medical care, the prison system continues as a whole to give substandard care that causes further injuries and even death. *See generally* Jonathan Turley, *Why Prison Health Care is a Crime*, The Chicago Tribune, March 19, 1991, at A19.

C. The Asymmetrical Costs of Maintaining an Older Prisoner Population

Both the federal and state systems are reeling under the increasing costs of their prison systems. Nationally, the states are spending between $30 - $50 billion dollars a year to maintain the current prison population of almost 3 million prisoners,[17] a rate that has doubled in the last 10 years and will likely double by 2010 to $60 billion. The per capita cost of prisoners is increasing.[18] Many states have experienced costs rising faster than their populations. This trend is largely due to two factors. First, correctional wages and benefits have increased and roughly 50% of the operating budget of a facility goes to correctional employment costs. Second, medical costs have risen dramatically, particularly with the imposition of court orders forcing improvements in correctional medical care.

The increase in medical outlays is due to often hidden ballooning costs associated with special needs populations ranging from HIV-positive prisoners to geriatric prisoners. Older and geriatric prisoners are the largest and fastest growing segment of special needs prisoners. As noted earlier, on average cost of an older prisoner is two to three times that of a younger prisoner.[19] The average cost of imprisoning an older prisoner today is roughly $70,000.[20] The costs associated with older prisoners vary, but the highest costs are borne in medical care and maintenance. These costs tend to be much higher in systems that spread their older prisoners throughout their facilities under a classic "mainstreaming approach" as opposed to the establishment of geriatric units or facilities. As noted below, medical costs often rise unnecessarily due to the failure to diagnose preventable or treatable illnesses until they reach a chronic stage.

The increase in the older prisoner population is expressed in three types of social costs. First, older prisoners occupy cells that are in short supply and extremely expensive to construct. Thus, maintaining an older prisoner population has a displacement cost for the system, increasing the pressures of overcrowding and forcing greater construction of new cells. Second, because older prisoners are often serving long-term sentences, over-crowding can lead to court-ordered early releases. In a perverse twist, the prisoners who are most likely to be released are younger, statistically more dangerous prisoners serving shorter sentences. These younger prisoners are still in the age group with the highest recidivism rate and are graduating to more serious offenses. As a result, we have a system that works to the inverse of logic: we struggle to continue to incarcerate the lowest risk prisoners while releasing those with the highest risk. The social cost is then incurred through higher crime rates and victimization. Finally, there is the direct cost of maintaining an older prisoner population.

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[17] Egan, *supra*, at 1; *see also* Alexandra Marks, *Strapped for Cash, States Set Some Felons Free,* Christian Science Monitor, Jan. 21, 2002, at 1.

[18] In the federal system, projections forecast that treatment of older prisoners for common ailments like hypertension and cardiac conditions will increase over 14 times by 2005 from the rates in 1988. American Bar Association, Report on Elder Resolution 2 (2000).

[19] For example, in Pennsylvania, the average cost of a younger inmate is $78 per day while an older prisoner will cost $203 per day. Clarke, *supra*, at 1.

[20] *See* Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol'y 687, 688 (2001); Barry Holman, *Old Men Behind Bars*, Wash. Post, July 25, 1999, at B8.

Older prisoners represent an important opportunity for reform because their proper management can dramatically slash costs and reduce overcrowding.[21] Because the average cost of older prisoners is two to three times that of younger prisoners, the release of 500 older or geriatric prisoners is the equivalent to a reduction of 1000 to 1500 prisoners – roughly the total number of prisoners housed in two mid-sized prisons. This cost ratio was confirmed in California in a 1996 report revealing that the cost of an older prisoners was more than double the cost per inmate under the age of 55.[22] To put this into concrete terms, the average cost of a prisoner remains generally between $20,000 and $30,000 per year in various systems.[23] Again, consider California, which is facing a truly dangerous crisis of overcrowding and recidivism in its system. In that state, the annual cost of a prisoner is over $26,000.[24] The cost of an older or geriatric inmate is likely between $40,000 to $70,000 per year. Obviously, due to serious illness and disability, it is not uncommon to find geriatric inmates who cost the system in excess of $100,000 per year. The costs associated with geriatric illness tend to be higher in the correctional setting, which lacks the "efficiency of numbers" associated with large-scale civilian health care systems. Moreover, every medical treatment like dialysis that occurs outside of the prison facility generates collateral costs in correctional staff time and travel.[25]

On an individual institutional level, the increasing size of the older prisoner population can present an array of non-fiscal problems for both maintenance and security. Since roughly 50% of a prison's operating costs are dedicated to officer salaries and benefits, efforts to extend prison resources and control costs have centered on the officer to inmate ratio. Older prisoners often frustrate such efforts by requiring special care and attention within the system. In addition to difficulties in mobility and interaction, older prisoners can be targets of abuse by younger prisoners. Older prisoners make ideal targets for theft, extortion, and even sexual assault as part of the so-called "wolf-prey' syndrome.[26]

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[21] *See generally* Jonathan Turley, *An 'Old' Prison Solution*, The Los Angeles Times, October 7, 2006; Jonathan Turley, *A Solution to Prison Overcrowding*, USA Today Magazine, November 1992, at 80-81; Jonathan Turley, *Our Prison Profiteers*, New York Times, August 3, 1990, at A20; Jonathan Turley, *Solving Prison Overcrowding*, New York Times, October 9, 1989.

[22] *See* LAO, *supra* note 6.

[23] It should be noted that, depending on the state calculation, this figure should already include the high costs of older prisoners, which serve to drive up the average per capita costs. Thus, if one removes the older prisoners from the calculation as a separate group for analysis, presumably the average cost per prisoner would fall. However, currently the average system has between four and seven percent of its population in the older or geriatric category. Thus, the upward pressure is not nearly as great as the expected higher percentages facing states with the emergence of the expanded population in the next ten years.

[24] Gloria Romero, *Correctional System Needs Correcting; Cut State Costs by Reforming Parole and Releasing Elderly Inmates*, L.A. Times, Jan. 26, 2003, at 5.

[25] *See* Jason S. Orndurff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 Elder L.J. 173, 186 (1996). Such trips often cost hundreds of dollars for just guards and gasoline. Jennifer Warren, *The Graying of Prisons*, L.A. Times, June 9, 2002, at 1. In facilities like the women's prison in Corona, there are hundreds of such trips each month to outside hospitals. *Id.*

[26] O.W. Kelsey, *Elderly inmates Providing Safe and Humane Care*, Corrections Today, May 1986, at 56; Curran, *supra*, at 245, 250; *see also* Sol Chaneles, *Growing Old Behind Bars*, Psychol. Today, Oct. 1987, at 51.

The costs associated with a graying prison population can represent a serious threat to the correctional system as a whole if they expand exponentially and rapidly. Most correctional budgets are based on common projections of population growth, operational costs, and inflation. However, due to the demographic shift described above, the federal and state systems will face a different population in a decade. While many of the inmates will be the same, their costs and needs will be materially different. Without careful planning, this extreme shift can leave a state struggling to maintain minimal correctional services and public safety. The greatest danger is that such a budgetary crisis will lead to diminished capacity and ultimately court-ordered releases on a large scale. Many states have faced such court orders and they are the most dangerous form of reform. There is little attention to individual risk in such releases and society pays the price ultimately in increased crime.

D. Recidivism Rates for Younger and Older Prisoners

Any review of reforms related to older prisoners must ultimately focus on the most important question related to public safety: the likelihood of a given individual to commit another offense. This "recidivism rate" is at the heart of the POPS evaluation. Recidivism is measured by the commission of a crime that results in the "rearrest, reconviction, or return to prison with or without a new sentence during a three-year period following a prisoner's release."[27] The rate of recidivism is calculated by the number of individuals who recidivate divided by the number at risk of recidivating during a certain period.[28]

States are experiencing exceptionally high levels of recidivism. The average rearrest rate for prisoners within the first three years after release is 67.5% according to the Bureau of Justice Statistics. This has increased since the 1980s. Notably, property and drug offenses have seen increases to 74% and 67% nationally. Individual states obviously can exceed this national average. The rate of recidivism in a state like California is staggering.[29] Studies show a recidivism rate almost twice the rate of other states in the country.[30] There has been an estimated 30-fold increase in the number of parole violators since 1980.[31] Of the 70% who return to prison, roughly two-thirds are a result of a parole violation and 14% commit a new crime.[32] Notably, in 1978, parole

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[27] Bureau of Justice, Reentry Trends in the United States, Definitions, *available at http://www.ojp.usdoj.gov/bjs/reentry/definition.htm*. The

[28] California Department of Corrections, Definitions and Formulas, at *http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/RECID1/RECID1d1999.pdf.*

[29] Petersilia, Joan, *Challenges of Prisoner Reentry and Parole in California*, *available at, http://www.ucop.edu/cpre/parole.html.*

[30] *Id.*, Some studies indicate as many as 70% of California's paroled felons end up back in prison within 18 months of parole. Jim Herron Zamora, *Parolees in Revolving Door; California Has Highest Rate of Recidivism*, San Francisco Chronicle, Dec. 23, 2002, at A1. While other studies place the rate closer to 60%, even the lower figure would be alarmingly low.

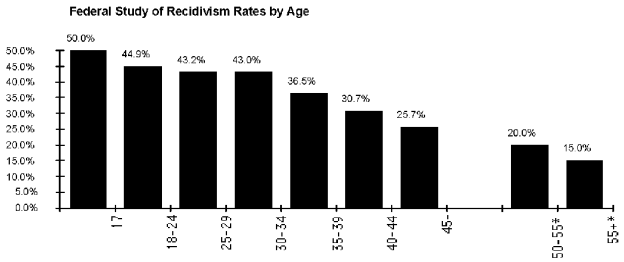
[31] Gloria Romero, *Correctional System Needs Correcting: Cut State Costs by Reforming Parole and Releasing Elderly Inmates*, L.A. Times, Jan. 26, 2003, at 5 (citing a report of the Urban Institute).

[32] Byrd, Gynnae, *The Future of the Prison State*, at *http://www.worldfreeinternet.net/news/nws149.htm.*

violators represented approximately 8% of the total felons admitted to prison in that state. By 1988, this number had increased to 47%, and by 1998 parole violators constituted nearly three-fourths (71%) of all admissions to state prisons.[33]

By any objective measure, older prisoners are generally not the prisoners who need to be incarcerated in conventional prisons. Numerous studies show that age is one of the most reliable predictors of recidivism. Many older prisoners are statistically low-risk in comparison to younger prisoners and their conventional incarceration offers little for public safety. While academics often disagree on the specific cause, there is widespread agreement that the recidivism rate for adult male inmates tends to fall dramatically around the age of 30. This is most likely due to a mix of physiological and cultural influences. Whatever the cause, the reduction of recidivism with age is well-documented in figures from state and federal systems. As inmates age and their institutional cost skyrockets, the risk of releasing them decreases. This does not mean, of course, that every older prisoner is low-risk. To the contrary, this population will contain the same variation of individuals from first offenders to habitual offenders to avertable recidivists.[34] Obviously, a prisoner who committed murder at 60 years old is hardly a candidate for POPS or any rational system for release based on age and risk. Likewise, a habitual offender is unlikely to drop in risk of recidivism at the same rate as a non-habitual offender. However, what is clear is that the "yield" of low-risk, high-cost prisoners is greatest in the population of older prisoners. It is within this segment of the population that a state can get its highest return on savings and lowest risk of recidivism.

Federal statistics reflect the difference of age in recidivism that POPS has found on the state level. Older federal prisoners are half as likely to commit new offenses as younger prisoners and the difference is even greater with younger prisoners in their late teens and early twenties.



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[33] *Id.* The most current data offered by the CDC is from 1999, which lists the recidivism rate within a one and two-year follow-up period for felons paroled to California supervision. This data is limited to felons paroled for the first time in 1999 on a new admission to prison and those returning to prison with a new court commitment. California Department of Corrections, Office of Correctional Planning, Recidivism Rates, *available at* *http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/RECID1/RECID1d1999.pdf.*

[34] An avertable recidivist is someone who commits a new crime after an early release and within the period of his or her original sentence.

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Past statistical reports of the federal system show a recidivism rate of prisoners above the age of 40 as roughly a third of the rate for prisoners under 40. Specifically, prisoners above the age of 40 showed a recidivism rate of 11% where prisoners under the age of 40 showed a recidivism rate of 31.6%.[35] These statistics are interesting in two respects. First, the federal prison system is more likely to have a higher recidivism rate for older prisoners because of the lower percentage of violent crime sentences in comparison to the states, which continue to prosecute and sentence the vast majority of violent criminals annually. Over 60% of federal prisoners are serving for drug offenses, including possession.[36] Thus, the recidivism rate for states should be lower given the higher percentage of offenses that are most sensitive to the effect of aging.[37] Second, the majority of prisoners reported in this 40-plus category are ineligible for POPS, which uses 55 years as the threshold qualification. The rate of recidivism for those prisoners 55 years or older is likely even lower.

In its evaluation of the New York and Illinois systems, POPS found higher costs and lower recidivism rates among the older prisoner populations. In Illinois, older prisoners were over twice as likely to succeed on parole than younger prisoners. Likewise, the POPS study of the New York system found a similar age-recidivism correlation. This is demonstrated in New York's 48% recidivism rate for all inmates in comparison to its 22.1% recidivism rate for inmates over age 50 and under age 65. The rate for inmates over age 65 is only 7.4%. New York, therefore, has found almost identical recidivism rates for older offenders as in national studies. Both New York and the federal studies show a gradual and predictable fall in recidivism with age. While the most recent federal study consolidates all offenders over age 45, a projection of the existing federal figures shows a close correlation to the New York data. The figures show a clear and steady drop in recidivism with age, falling to approximately 25% for inmates over age 45 in comparison to 50% for the youngest prisoners. Our study of the California system showed the same marked differences in recidivism in a state in the grips of a recidivism crisis.[38]

Of particular relevance to this legislation is the apparent connection between warehousing policies and recidivism. Recidivism has gone up since the eradication of parole boards. Moreover, one of the few states to experience a drop in both prison population and recidivism is Missouri. This has been attributed to a revision of their parole and probation laws to allow move more non-violent offenders into alternative

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[35] United States Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2000, Table 6.67.

[36] In the federal system, 97% of older prisoners are serving for non-violent crimes. Barry Holman, *Old Men Behind Bars*, Wash. Post, July 25, 1999, at B8.

[37] The number of older prisoners serving for violent offenses is quite low, even in the state systems. *See generally* Craig J. Forsyth & Robert Gramling, *Elderly Crime; Fact and Artifact*, in Older Offenders: Perspectives in Criminology and Criminal Justice 9. However, since a greater number are serving for violent offenses, this will have an impact in the different recidivism rate. An older prisoner serving as a first-offender for a violent crimes is probably less likely to commit a new crime with the advancement of age.

[38] POPS California Report (available upon request from the George Washington POPS office).

programs such as in-prison "shock" and treatment programs.[39] Likewise, prisoners who are released into parole systems early (rather than "maxed out" on their sentences) are 30% less likely to recidivate, according to a recent New York study.[40] Seventy-three percent of prisoners released after serving their full sentence were rearrested as opposed to 51 percent of those given parole.[41] The point is not that recidivism is due entirely to determinate sentencing and loss of parole systems. Rather, these studies show that our current system may be contributing to the recidivism crisis and that a more tailored approach to different categories of offenders would yield better results.

III.
THE PROJECT FOR OLDER PRISONERS

In 1989, I established POPS to work on the problems associated with the growing population of older offenders. POPS began with a single prisoner, Quenton Brown, who wa incarcerated at the Angola Prison in Louisiana. On June 7, 1973, then 50 years old and homeless, Brown walked into a bread store in Louisiana and, at gunpoint, stole $100 and a 15-cent pie. He then crawled under a nearby house where he remained until the police arrived. After his arrest, Louisiana determined that Mr. Brown had an I.Q. of 51—the intelligence of a three-year-old child. After a one-day trial, Mr. Brown was given a 30-year sentence without chance of parole. He had served 16 years when I first met him.

In a matter of weeks, I was deluged by letters from close to one hundred older and geriatric prisoners, who heard I was representing an older prisoner for free. This number wa striking in a state with such extreme overcrowding that it had to rent out cells in local jails f a significant percentage of its population.[42] With the help of my students, POPS was born. We set out to develop new approaches to this population, including evaluative measures to isolate low-risk prisoners and policies to reduce the costs of this population while improvin care for individual prisoners.

POPS works on both national and local aspects of this problem, and POPS continue to gather data on the special costs and necessities of this population. Hundreds of law students have been trained in POPS and are now practicing attorneys. All that is required is for a state to request such a program, give POPS researchers access to the prison population and enlist the participation of one or more law schools. POPS/DC will help any law school establish an academic program and regional office for work in a given state. POPS largely performs three functions in this area: individual case evaluations, state reports and recommendations for reform, and legislative drafting.

POPS students work without compensation and the project does not charge for its services. When assigned a case, POPS students first interview prisoners over the age of 55. Each prisoner is then evaluated according to a long, comprehensive questionnaire that explores the prisoner's criminal history, chemical dependence history, health,

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[39] *See Report Shows Missouri's Use of Recommended Sentences Reduces Recidivism Rates, Prison Population*, Oct. 15, 2007, U.S. States News, at 1

[40] *See* Rick Hepp, *Study Cites Benefits of Supervision for Ex-Convicts*, Star Ledger, January 11, 2007, at 41.

[41] *Id.*

[42] *See generally* Jonathan Turley, *Our Prison Profiteers*, N.Y. Times, Aug. 3, 1990, at A20.

employment background, and family background. This information is generally taken from interviews with the inmate, review of the prison files, interviews with the correctional staff, and a search of all courts and news files available on LEXIS/NEXIS and Westlaw. POPS generally uses two different recidivism tests to gauge the risk of an individual inmate. If the inmate appears low risk on both tests, the student presents the case to the other POPS students.

If the students vote to go forward, the student then attempts to contact any victims or surviving family members as part of our victim consultation stage. POPS was one of the first organizations to make such interviews mandatory. Victim interviews can reveal inconsistencies in an inmate's account or simply show a level of violence or aggression that does not appear in a written record. In states allowing conditional paroles, victims are asked what conditions would make them feel more comfortable with a release.

Assuming the inmate's case is still viable, the case worker then proceeds to determine how a prisoner will live upon release. Specifically, the student confirms any benefits, such as veteran's benefits or social security payments, which the inmate may be entitled to receive. If the prisoner has a supportive family offering long-term housing, the student confirms who owns the house, who lives in the house, and the space available for the prisoner.[43] The student further confirms whether anyone in the house has a criminal record. Finally, if the prisoner is able to work, the student works with any family or friends to confirm employment upon release.

Once all of these facts have been ascertained, the case is presented a final time to the POPS members. If approved, the student then submits the comprehensive findings and recommendations to the appropriate parole or pardon board. The POPS model has been endorsed by leaders from both parties and state commissions in states like California.

IV.
H.R. 261 AND OLDER PRISONERS

Former Attorney General Janet Reno once remarked: "You don't want to be running a geriatric ward . . . for people who are no longer dangerous."[44] General Reno correctly understood that our prisons cannot serve as nursing homes and that it is possible to isolate low-risk, high-cost prisoners for release within the system. Good correctional policy requires that choices be made on the basis of societal risk and limited resources. Older prisoners present an opportunity to make efficient and humane decisions in using our limited resources. Obviously, a sizable population of still dangerous older and geriatric prisoners will remain after any process of winnowing out low-risk prisoners. Thus, any approach to aging prisoner reform should be comprehensive enough to address the three basic categories used by POPS in classifying prisoners: low-risk, mid-risk, and high-risk prisoners. H.R. 261 is a first step in dealing with the low-risk population of prisoners.

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[43] Students are encouraged to actually include photographs of the dwelling for review by POPS and ultimately the parole or pardon board. Older prisoners require living quarters that are accessible and stable.

[44] Federal News Service, Weekly News Conference with Attorney General Janet Reno, Feb. 10, 1994.

Unfortunately, the federal guidelines and policies have in the past allowed little flexibility in managing the older prisoner population in either sentencing or release determinations. The sentencing guidelines addressed this issue in Section 5H1.1:

> Age (including youth) is not ordinarily important in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient and less costly than incarceration. Physical condition, which may be related to age, is addressed at 5H1.4.

Yet, courts have tried to incorporate considerations of age and infirmity.[45] Thus, despite references to age in a presentence report (PSR), courts found it difficult to tailor a sentence to such an element in the form of a downward departure.[46]

After sentencing, the prospect for early release due to age is equally poor. Congress has repeatedly indicated that it views age to be a valid criteria for release. In 18 U.S.C. § 3582 (c)(1)(A), Congress authorized sentencing reductions for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the BOP Director has determined that the prisoner is no longer a danger to society or individuals. Likewise, Congress allowed for early release under 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons." Such releases in practice meant that an older prisoner was expected to die within six months – a limitation that did not comport with past congressional support for age-based releases.

It was not until 1994 and after considerable pressure that the BOP loosened the six-month rule. The period was extended to twelve months and estimated life expectancy was formally treated as "a general guideline, not a requirement." Despite such changes, the release of geriatric prisoners remains quite low.

Part of the problem is the reliance on the BOP as the critical gatekeeper. The BOP has a very distinguished history and has many very talented professionals who care deeply about correctional policy. However, the agency has always been viewed as somewhat resistant to reforms addressing special needs groups like older prisoners. The BOP was founded on a principle of uniformity and humane treatment in the incarceration of prisoners. This was a great advance at the time. However, this cultural touchstone has produced internal resistance to proposals for special units and programs to address a prison population that is far more heterogeneous than it was when the BOP was formed in 1930. Yet, when Congress abolished parole, it did away

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[45] Some relied on Section 5H1.4, which states:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

[46] *See generally* John D. Burrow & Barbara A. Koons-Witt, 11 Elder Law J. 273 (2003)

with the Parole Commission which was the best body to handle such case-by-case decisions. This left either the BOP making discretionary decisions or a statutory remedy for automatic release. Like their state counterparts, BOP officials are leery of exercising this authority out of fear of a political backlash if a released individual were to commit a high-profile crime. This "Willie Horton" fear is well-based, as shown by the recent attacks on Gov. Mike Huckabee's release of Wayne Dumond.[47]

The current system, therefore, has the classic reluctant turnkey problem. By relying on the BOP, these releases have occurred at a slow trickle without a meaningful impact on the federal population. The ideal system would entail a commission to review individual cases and make case-by-case decisions to release based on recidivism elements. A long history of habitual non-violent offenses can indicate a likelihood of recidivism and a pattern leading to a violent crime. Some offenders "graduate up" in the criminal code. Ideally, habitual offenders should be excluded from release on the basis of age absent incapacity or terminal illness. Indeed, the language of the current bill could be tweaked to exclude such offenders.

Despite this reservation, H.R. 261 offers a compelling alternative to a case-by-case review by setting high standards for release that track current recidivism research.

The proposed change in the criminal code would add language to 18 U.S.C. 3624(a) to add a subsection (g) reading:

> g) Early Release for Certain Nonviolent Offenders- Notwithstanding any other provision of law, the Bureau of Prisons, pursuant to a good time policy, shall release from confinement a prisoner who has served one half or more of his term of imprisonment (including any consecutive term or terms of imprisonment) if that prisoner—
>
> (1) has attained the age of 45 years;
> (2) has never been convicted of a crime of violence; and
> (3) has not engaged in any violation, involving violent conduct, of institutional disciplinary regulations.

This language mirrors some of the most important recidivism criteria used by POPS in assessing prisoners. While POPS uses the age of 55 years as our threshold requirement, recidivism studies show a decline in the likelihood of recidivism occurs well before 45 years of age. Likewise, the law directly prohibits those who are serving sentences for violent crimes, which tend to be some of the highest risk prisoners. Though POPS is a bit more conservative on the age criteria, subsection (2) is more conservative on the crime category. POPS does not exclude violent offenders. Rather, we consider a violent offense as weighing heavily against a low-risk determination. It is not an outcome-determinative criteria in our system. Notably, under this language, Quenton Brown would have been barred from participation.

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[47] *See* Susan Milligan, *Huckabee Could Face Hurdles From the Past; Parole of Rapist haunts Campaign*, Boston Globe, Oct. 14, 2007, at 1.

The law also looks at the prisoner's history of incarceration in terms of disciplinary violations. POPS also considers any such violations but does not confine them to violent occurrences. Once again, the difference is probably small. Disciplinary write-ups occur for often trivial violations like failing to button a uniform (a problem for older prisoners) or having unapproved snacks in a cell. The predictive value of write-ups are largely confined to violent offenses, absent a pattern of disruptive behavior.

Finally, the law applies a similar standard on time served that is used in our own analysis. POPS will generally only consider a case for a recommendation of release if the person has served beyond the average for his offense. In this bill, the criterion is expressed in terms of having served "one-half or more of his term or imprisonment (including any consecutive term or terms of imprisonment)." This criterion is important for three reasons. First, age should not be an excuse for criminal conduct. An older prisoner needs to be punished for his crimes regardless of his age. Second, it prevents "late bloomers" (or prisoners who are first incarcerated in their later years) from immediately claiming age as a way to circumvent a sentence. Third, and finally, it helps preserve some uniformity of sentencing and punishment within the system.

As noted earlier, my preference would be for a more case-by-case determination, but that system was abolished with the U.S. Parole Commission. In the absence of such a system, the only practical alternative to the current system is a mandatory release program. This bill is sufficiently conservative in its threshold requirement to minimize the likelihood of recidivism. Obviously, recidivism will occur under any system. However, I would expect this system to experience a fraction of the recidivism rate currently seen across the country which stands at roughly two-thirds of released prisoners. I would recommend, however, the use of an organization like POPS to help identify such prisoners and bring their cases to the BOP for possible release. The various requirements in this law will inevitably raise case-by-case questions of prior records or the determination of time served. An outside group can help guarantee that such cases will move through the system, particularly given the difficulty of some older prisoners in completing necessary paperwork for such programs.

One of my greatest concerns is the necessity of a post-release program to guarantee a "soft landing" releasees. The success of POPS is largely due to the confirmation of jobs and living arrangements. This is particularly a concern with regard to drug offenders. Absent a job and structured environment, such an offense can easily recur. Drug dealing is motivated by economics and a return to the identical circumstances and neighborhood can easily produce the same conduct.

The most important contribution of this legislation, however, would be its impact on the states. Many states followed the lead of the federal government in abolishing parole and lengthening sentences. They are now in the grips of a massive over-crowding and recidivism crisis. The federal government could offer this reasonable reform as a model for duplication around the country. I expect that many states would be very interested in such a reform as they try to deal with the graying of their prison populations. Obviously, POPS has many other suggested reforms in

dealing with mid-risk and high-risk inmates that can lower the costs to the system while improving care for the inmates. However, for low-risk prisoners, this bill would represent a great advance in reforming our policies to reflect current knowledge of recidivism and correctional management.

V.
CONCLUSION

I am eager to work with Congress in perfecting such legislation. The federal government is fortunate to have a great resource in the BOP and the Justice Department to assist on these reforms. I honestly believe that a responsible program for release can be drafted with consensus in the legal and correctional communities. What we cannot do is continue to ignore this problem.

The aging of the federal and state system represents a serious threat to not just our legal system, but to society as a whole. We cannot continue to live in denial of the realities before us. Rising recidivism rates and severe overcrowding are not just some abstract discussion among academics. Under our current system, the most dangerous prisoners are released to commit new crimes. The victims of those crimes are needlessly harmed. If we are truly going to serve victims, we should work to make fewer of them. One way to do that is to make mature decisions about who should be incarcerated and who can be released in a system struggling to hold the largest prison population in the world.

After years of passivity and stagnation across the country on this problem, H.R. 261 is an opportunity for Congress to play a true leadership role in a growing crisis around the country. For that reason, it is a great credit to this Subcommittee and its members that H.R. 261 has been offered as the first meaningful step toward reform in this area.

I want to thank you again for the honor of addressing you on this important issue. I would be happy to answer any questions that the members may have on my testimony.

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Mr. SCOTT. Thank you.
Mr. Mosely?

TESTIMONY OF FRED MOSELY, JUSTICE AFFILIATES, CLEVELAND, OH

Mr. MOSELY. Mr. Chairman, Ranking Member Forbes, Members of this Subcommittee, I consider it an honor to be able to appear before this Subcommittee in support of H.R. 4752.

I bring what I consider to be a unique experience to the work that I do in prison advocacy, having served as a trial attorney for the United States Justice Department, as an assistant Cuyahoga County prosecutor, as a defense attorney and as a municipal court judge. During my years in the legal profession, I did not realize the fine line that there is between the prosecutor's side of the trial table and the defendant's chair, nor did I realize that there is not much distance between the defense attorney's chair and the defendant's chair. And likewise I certainly was unaware of the fact that the judge, who may be presiding over the proceedings, is not immune from perhaps one day being seated on the defendant's chair.

I have come to realize that you can be on the top one day and on the bottom on another day. One can be in a position of authority at one time and at a later time at the lowest level of society. I have also learned that it is wise to show compassion because we find in the Word "blessed are the merciful, for they shall obtain mercy."

My unique experience also includes the fact that I was indicted by a Federal grand jury and a grand jury seated in the State of Ohio for receiving kickbacks from contractors. I had a potential incarceration period of 132 years. I was convicted in 1985, sentenced to 10 years in Federal prison and 12 years concurrent in the State of Ohio. Also, I have the unique experience of not only having been a Federal inmate, a State inmate, but also a Federal and a State parolee.

As a result of what I came to learn concerning the advantage of good time credit, I was able to return to my family much sooner than I would have been, and I had some very pressing issues at home. My youngest daughter who had been attacked by sudden infant death syndrome was operating at a much lower mental level than she should have been, my middle daughter who was a teenager was running away form home constantly because her dad was not home, and my oldest daughter was dealing with the stigma and embarrassment of a father being incarcerated.

So, as a result of good time credit, I was able to return home and address some of those pressing issues.

I met men at Big Spring from all walks of life. Some were judges, lawyers, medical doctors. You name a profession, it was represented in the prison camp at Big Spring, Texas. And many of these men were well educated and had various skills. But then again, there were many men from the urban areas of Dallas and Houston, Oklahoma City, and the District of Columbia, who did not have skills and who did not have an educational background.

So these men also took advantage of good time credit, and many of them as a result of that were able to return home sooner. Some were able to get their GEDs. Some took college courses. Others

were accomplished on their jobs. Men who had never had any meaningful employment previously had regular jobs that they were able to go to and develop a sense of pride while away.

I can recall various instances, one in particular. A pharmacist, who came from Shelbyville, Tennessee, had two young boys. He was a divorcee, and he worked hard in a cable factory, and as a result of that, he was able to get home much sooner to address the concerns and the issues of those young sons that he had at home.

Also, there was a young drug dealer from Lubbock, Texas, who did not have a high school diploma. He was able to get his GED, returned to Lubbock, Texas, and now he is a respected pastor at a church there in Lubbock. There was a farmer there who likewise took advantage of good time credit. He was in his 60's when he arrived, returned to his farming career and home to his family.

So I strongly support good time credit for the inmate community. I am invited to speak at various institutions, State and Federal, around the country. I encourage the men and women to whom I speak to take full advantage of any and all good time credit opportunities that are there, reminding them that preparation for release begins the day that you enter the institution as opposed to the day that you are released.

So, in closing, again, I strongly support H.R. 4752, and I add to that that it should be extended to all Federal inmates, including those from Washington, DC.

Thank you.

[The prepared statement of Mr. Mosely follows:]

PREPARED STATEMENT OF FRED M. MOSELY

Mr. Chairman and Members, I am grateful for this opportunity to appear in support of HR-4752 (Literary, Education, and Rehabilitation Act). My name is Fred M Mosely and I am Founder and President of Justice Affiliates. Through our Justice Project, we provide assistance to men and women recently released from incarceration and we also provide counseling to their family members. Another component of Justice Affiliates is Justice Ministries, wherein as an ordained minister, I share a series entitled "The Laws of Life", with the inmate community.

I bring a unique experience to the work that I do, having served as a trial attorney for the United States Justice Department, as a Special Ohio Assistant Attorney General, Assistant Cuyahoga County Prosecutor, defense attorney in private practice, and as a municipal court judge.

I did not realize the fine line between various positions in the courtroom. I have however, learned that there is a very fine line between the prosecutor's side of the trial table and the defense side. The distance between the defense attorney's chair and the chair of the defendant is nearer than one would imagine. Surprisingly, the presiding judge is not immune from finding him or her seated on the defendant's chair.

Early in my career, I was not cognizant of the fact that an individual can be on top one day and on the bottom on another. Further, I did not realize that one can be in a position of authority in the legal community for a season and at the lowest level at a later time. Therefore, I have learned that it is wise to have compassion for the least of them because "Blessed are the merciful, for they shall obtain mercy".

My unique experience includes the fact that in 1984 I was indicted for the same offence by a Federal and State of Ohio Grand Jury for receiving kickbacks from contractors. I had a potential incarceration period of one hundred and thirty-two (132) years. I was convicted in 1985 and sentenced to ten (10) years in the federal system, and twelve years (12) concurrent in the State of Ohio.

In addition to the fact that I have sat on almost every strategic seat in the courtroom, I also have had the experience of being a federal and state inmate, and parolee. As a result of these experiences, I truly appreciate the benefit of good time credit, and as a result of which I was able to return to my home in seven and one half (7½) years. To have been released earlier than I would have been, enabled me to address several pressing issues concerning my children: one (1), my youngest

daughter who was in her teens was functioning on a much lower mental level because of SIDS, two (2), my middle daughter, because of the hurt and disappointment of my incarceration, was frequently running away form home, and three (3), my oldest daughter who was having to deal with the embarrassment of negative pretrial and post trial press concerning her father.

I am familiar with the re-entry process, having been away for a significant number of years: forty months (40), in the federal system and four (4) years in three (3) different Ohio institutions. I also understand the process of re-entering society after a long prison term. Similarly, I am mindful of dealing with scornful looks from former colleagues and I know what it is like to seek employment having the barriers of being a middle aged minority with a criminal record.

My understanding of HR-4752 introduced by Representative Bobby Scott (D-Virginia 3rd) is that this bill would amend Title 18, United States Code , to award credit toward the service of a sentence to prisoners who participate in designated educational, vocational, treatment, assigned work, or other developmental programs. I support such efforts because of my personal experience and because of certain facts in numerated in the document of support of HR-4752 summarized below:

- Increased recidivism results in profound collateral consequences, including public health risk, homelessness, unemployment and disenfranchisement.
- Impact on children, the weakened ties among family members, and destabilized communities.
- That more than fifty percent (50%) of former inmates are unemployed.
- A large percentage of inmates function at the two (2) lowest literacy levels.
- A substantial number of local jail inmates have never completed high school or its equivalent.
- That participation in correctional educational programs lowers the likelihood of re-incarceration.
- Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community, and to those who commit the most serous offences.
- That the elimination of incentives such as parole, good time credit and funding for college courses means that fewer inmates participate in and excel in literacy, education, treatment, and other development programs.

I met men from all walks of life at FPC Big Spring, Texas. Some of these men were well educated and trained (i.e. judges, lawyers, federal and state legislators, medical doctors, educators, businessmen, pilots, ministers, etc.). Most of the inmates, however, at FPC Big Spring, Texas were men from urban areas such as Dallas, Houston, Oklahoma City, and from the District of Columbia who had no marketable skills and limited education. Many of these men took advantage of educational, vocational, treatment, assigned work and other developmental programs, and were able to earn additional good time credit.

My memories of FBP Big Spring include seeing the pride on the faces of men pursuing their GED's or college courses as they walked to class with school books in hand. I recall the look of accomplishment on some who had never had a meaningful job or a regular place of work to go to on a daily basis. These men were able to earn good time credit. I also reflect on the interest displayed by some of the men enrolled in various programs and the successful completion of same which also provided good time credit.

I vividly recall a pharmacist, from Shelbyville, TN who was serving a six and one half (6½) year sentence. He was a divorced father with two (2) young boys and was driven to do all in his power to return home as soon as possible to be a responsible parent and a guiding force in the lives of his two sons. Being aware of the good time credit he could earn based on work assignment, the pharmacist applied for work in the cable factory. He worked extremely hard and was able to send money home to help support his children. Also, because of his painstaking work ethic he earned sufficient good time credit to effectuate his release months sooner than scheduled. He has been restored to his career in pharmacy, and is remarried and active in ministry.

Another individual at FPC Big Spring who availed himself to the benefits of good time credit was a young drug dealer from Lubbock, TX. This diligent individual worked long hours on his prison job, earned his GED and accumulated sufficient good time credit to allow him to return home sooner than his scheduled release date. He is now a well know and respected pastor in Lubbock, TX.

There was a farmer from Guyman, Okalahoma who offered his skills as a heavy equipment operator. He was involved in most of the construction work on the com-

pound. This individual was in his sixties (60's) upon his arrival of FPC Big Spring and longed to return to his wife of many years and his family in Oklahoma. The good time credit earned by him allowed him to do just that, and he returned to a successful farming career.

Since my release I have been invited to speak to the inmate community in various institutions (state and federal) I have endeavored to give a message of hope and restoration. I encourage those to whom I speak to take advantage of every conceivable opportunity to better themselves, spiritually, mentally, and physically. They are also strongly encouraged to take advantage of every opportunity to earn additional good time credit. They are reminded of the fact that their preparation for return to society began the day they entered the institution, and not on the day of release. I encourage them not only to endeavor to better themselves, but also to be an integral part of the lives of their family members.

On many occasions, as I walk through downtown Cleveland, I see men with whom I was incarcerated, in desperation of meaningful employment. The combination of race, age, criminal record, limited education and skills, all but preclude them from significant employment. I receive letters from around the country from men and women in need of re-entry assistance.

I strongly support HR-4752. It is my opinion that good time credit should be based upon term of imprisonment imposed as apposed to time served. Further, good time credit should be extended to all federal inmates including those from the District of Columbia. I applaud Congressman Scott and the Members of this Sub Committee.

Mr. SCOTT. Thank you.

Mr. Krone?

TESTIMONY OF RAY KRONE, EXONERATED FROM DEATH ROW IN ARIZONA AFTER HIS INNOCENCE WAS CONCLUSIVELY ESTABLISHED, YORK, PA

Mr. KRONE. Thank you.

I consider it a great honor, too, to be here to address this meeting and also a great privilege.

I do not hold any degrees, I do not hold any political offices, but I do think I represent a lot of people in this country. I was born in the 1950's, I am a baby-boomer from a small town in Pennsylvania, high school graduate, Vietnam-era vet, 6 years in the U.S. Air Force, ex-U.S. Postal employee, 7 years for the Post Office, and also a convicted murderer, thankfully, an exoneree, too, and that is what I am here to address. And I am going to address the issue on bill H.R. 4063, restitution for the wrongfully convicted.

It is hard for me to believe this could happen, would happen to me. I have never been in trouble in my life, graduated in the top 15 percent of my class. I did not even have detention in high school. I served my country for 6 years, got out, worked for the Post Office.

One day, I was questioned about a murder. Two days later, I was arrested based on the assumption that marks on the body matched my teeth. I went to trial in just 7 months, had a court-appointed attorney who was given $5,000 to defend me. At the time when I checked in, to get representation, it was over $100,000. My little pragmatic country mind thought about it, said, "Well, now I am making $30,000 a year at the Post Office. I bought a house 7 years ago that cost me $50,000. I am supposed to come up with over $100,000 to defend myself for something I did not do, and I am not going to get that money back?"

And so I trusted the system with that court-appointed attorney. The trial lasted 3½ days, found guilty of murder, found guilty of kidnapping, based on the bite mark testimony by an expert. I was

sent to death row because I did not show remorse, I did not show regret, I did not plead for my life for something I did not do. My family stood by me all those years, friends and people that knew me at the age of 35 when I was arrested. I knew a lot of people, and a lot of people knew and believed in me.

And I fought that system for 10 years, having a new trial at one point because the prosecution withheld evidence, again getting convicted, and this time the judge saying that there was lingering residual doubt. So he only sends me to 25 to life this time.

After 10 years in prison, DNA finally was recovered from the victim's clothing. That DNA was put in a nationwide DNA databank that came back and identified a known sexual predator who had a history of assaulting women and children. His DNA matched the DNA found at the crime scene, and I was finally released after 10 years, 3 months, and 8 days. The judge told me good luck. The prosecutor would not even admit that he made a mistake.

I got out, come home to my family in Pennsylvania, start my life over again at the age of 45, having lost my retirement at the Post Office, my career in the Post Office, having lost my home, all my personal property, just thankful—thankful—that somebody believed in me, and that I was finally able to walk free and hold my head up because they got the guy that did it.

I am here to represent a lot of people that are also still in prison fighting for their day of freedom, their chance to prove their innocence. There was 123 other death row exonerees in our country that walked out of prison a free man, being exonerated, wishing they had some help. My family stood by me. My friends supported me. My small town, my community, supported me. I am so thankful for that. I am lucky. I am one of the few fortunate. A lot of people do not get out with being able to stand on their feet, and society turned their backs on them just like the justice system they trusted turned their backs on them.

I am thankful and honored to be able to talk and address you today about this bill. It is important knowing that the interest of justice—I heard the word "fairness" mentioned. I heard "truth" mentioned. Those two go hand in hand. In order to have justice, you have to have the truth, and you have to have fairness.

I know as a kid taking the Pledge of Allegiance before the class each day started school, with liberty and justice for all, and I believed in that and I stood for that. I found the day that it did not seem that it does come for all.

But bad things do happen to good people. It is the luck of the draw when you get involved in the justice system, and that scares me because what happened to me could happen to any of your sons, your daughters, your brothers, your fathers, your uncles, your friends.

As I said, I do not have a degree, I do not hold any offices. I am just an American that believes in my country, believes in justice, and wants to be able to believe in my government to recognize, respect, and protect that life and liberty, that pursuit of liberty and justice for all.

Thank you.

[The prepared statement of Mr. Krone follows:]

PREPARED STATEMENT OF RAY KRONE

A wrongful conviction is a nightmare for the innocent person, the crime's victim, and for our society. I should know. I spent 10 years in an Arizona prison for a crime someone else committed. My incarceration included nearly three years on Arizona's death row.

When Kim Ancona was killed in 1991, a friend of hers mentioned someone named Ray to investigators, and the police focused on me as their only suspect. In fact, investigators were so focused on me that they ignored evidence that exonerated me, including a bloody footprint from the scene that did not match my size. In addition, I owned no shoes that matched the tread.

Because I trusted the justice system, I did not bother to hire a private attorney and accepted court-appointed counsel. My attorney's resources were woefully inadequate. The courts granted him a mere $5,000 to represent me. A bitemark was the one piece of evidence that led to my conviction, but my lawyer could not afford to hire a bitemark expert. He relied on a family dentist as our expert.

At trial, my roommate testified on my behalf, stating that I was at home sleeping when Kim was killed, but the prosecuting attorney attacked his credibility. The prosecutor claimed that my roommate would lie on my behalf because I had taken him in during a rough period in his life.

I was luckier than most, though. My family and friends came to my aid. My mother took out a second mortgage on her house and spent her retirement savings to help. High school friends held fundraisers for my legal defense. My cousin, Jim Rix, whom I had never met before I went to jail, heard my story and also offered his help. In total, my family and friends spent hundreds of thousands of dollars to help free me.

A wrongful conviction is not just about the unlucky person who goes to jail. It's also about the victims and the safety of society. We must not forget the simple and obvious truth that when we get it wrong, a guilty person goes free. 20 days after Kim was killed, Kenneth Phillips, the man whose DNA matched the evidence from the crime scene, assaulted a young girl, a crime for which he was incarcerated at the time of the DNA test that freed me.

In fact, had investigators broadened their list of suspects, they may have found Phillips soon after the death of Kim Ancona. He lived just a few hundred yards from the bar where the crime occurred and was on probation at the time for assaulting a neighbor.

I lost ten years of my life in jail, but I choose not to be bitter. Rather than focus on the ten years I lost, I've made a conscious decision to focus on the next ten years. By talking about my experience, I hope to impact significant change toward making our criminal justice system truly just.

In that respect, to have justice, it must be about seeking truth and fairness for all. Just as we seek suitable and just punishment for a crime committed, so should we seek suitable and just restitution for those wrongly convicted. Our pledge of allegiance declares "with liberty and justice for all". The loss of liberty, liberty that our forefathers fought so hard to secure for all Americans, should never be taken lightly. It dishonors their efforts and diminishes us all as Americans. When our justice system, a system that we should all hold in high esteem, fails to protect our liberties, and in fact revokes our liberty, our freedom, in error, then fairness, neigh justice requires that this esteemed system of justice recompense those who the system failed. I ask that you carefully consider this bill and support it in the continued pursuit of fairness and thus justice for all.

Ray Krone of York County was the 100th person since 1976 to be exonerated after spending time on death row. He is the director of communications and training for Witness to Innocence (www.witnesstoinnocence.org).

Mr. SCOTT. Thank you.

Those bells indicate we have a vote coming up. I think we can probably get in the testimony of the next two witnesses.

Mr. Wrigley?

Mr. WRIGLEY. I am happy to wait if that is required as well.

Mr. SCOTT. All right. Proceed.

TESTIMONY OF DREW WRIGLEY, U.S. ATTORNEY, DISTRICT OF NORTH DAKOTA

Mr. WRIGLEY. Good morning, Chairman Scott and Ranking Member Forbes and all of the Members of the Committee—I am indeed honored to be here with all of you as well as with this esteemed panel.

And let me just start by saying that, Mr. Krone, I am particularly moved to be here with you this morning. I think anybody who respects and loves justice, although your story will wrench anybody, has to love about the system that it will also look to and provide ways for there to be exoneration, I am looking forward to talking to you after the hearing today because, as I say, anyone who loves justice would be wrenched by your story this morning.

I want to point out that I am prepared to comment, Mr. Scott, on a couple of the bills that are before the Committee today, H.R. 261, the "Federal Prison Bureau Nonviolent Offender Relief Act of 2007," as well as H.R. 4063, the "Restitution for the Exonerated Act of 2007."

I understand that some additional bills were introduced yesterday or today, and while I was not able to prepare comment on those proposals on behalf of the Justice Department, I can assure you and all the Members of the Committee that I will be happy to relay any concerns or questions that are raised here today, and if at all possible, I would be glad to answer questions as well.

It has been an honor on my part to represent in my service as a prosecutor the interest of victims, crime victims and their aggrieved communities dating back to 1993. In that year, I began my career as a prosecutor by moving to Philadelphia. I took my oath of office as an assistant district attorney. Six years ago, on November 15, 2001, I had the privilege of again taking a similar oath, this time as the United States attorney for my home state of North Dakota.

I am the 17th United States attorney in my State's history. I look at the wall of my predecessors when I walk into the office each morning and realize that 100 years from now, there are going to be 17 more probably who have come and gone. Some will do a better job than me, some maybe worse, but I can assure this Committee that none will be more honored than I am and have been by the service with the Justice Department, with my colleagues in North Dakota and around the country.

It is an honor to be here today.

I am going to first discuss, if I may, H.R. 4063 and just jump right into it, I guess. While the Department of Justice opposes the enactment of H.R. 4063, I want to stress—I want to stress—that we support the purpose of that legislation, and then, again, the successful transition of wrongfully convicted persons back into their communities is not really a controversial concept. Toward that end, the Department of Justice supports Federal, State, and local programs that work to assist in such transitions.

The Administration's proposal in this regard would consolidate the Justice Department's more than 70 existing grant programs into four flexible and competitive grant programs that would direct taxpayers' dollars to the places and to the people where they are most needed.

It sounds like the Committee is most needed someplace else, but I will proceed until instructed otherwise.

The President's fiscal year 2008 budget proposes $65 million for a single reintegration and ex-offenders program, including exonerees, and the Department of Housing and Urban Development and the Department of Labor that would enlist faith-based and community organizations in assisting those people return to their communities.

If I might, I will turn now to H.R. 261, the so-called "Federal Prison Bureau Nonviolent Offender Public Relief Act of 2007."

I will be clear from the beginning the department strongly opposes the enactment of H.R. 261. The legislation is completely contrary to the longstanding truth in sentencing policy of the United States government. That policy has been promoted consistently by both Democratic and Republican administrations, by Democratic and Republican Congresses over the least 20 years. H.R. 261 and its arbitrary release-triggering mechanism would undermine the purposes of the sentencing reform that has been in place since 1984, and, consequently, the thoughtful consideration of appropriate sentencing guidelines by the sentencing commission, which, of course, is not just a commission office without name. It is a commission comprised of a wide array of criminal justice experts.

H.R. 261's release mandate ignores the specifics of a particular defendant. It ignores the specifics of his or her crime. It ignores the specifics of his or her criminal history. In that way, H.R. 261 runs entirely counter to the factors the sentencing court is required to consider in imposing a sentence under United States law.

Federal district court judges are required by law to take what we call the 3553 factors into account in the determination of an appropriate sentence in every single case. Nonetheless, H.R. 261 would turn its back on the judge's determination, would arbitrarily release all qualifying 45 year olds who have served just 50 percent of what the public was led to believe that they would serve.

That is an important concept. Across my more than a decade of prosecuting crimes, I can tell you it is incredibly important to victims of crime, to their families, and to the communities most affected. It is incredibly important to them to know that there is integrity in the sentence that has just been passed. After all, criminal sentences are not simply a matter of when will the person recidivate, will the person recidivate. They are also a matter of punishment, appropriate punishment handed out at the time as the sentence is passed.

This legislation would inequitably and unjustly benefit an entire class of offenders whose release would present a clear and present danger to the public. It is unclear why these 45-year-olds would get the benefit of this much more lenient treatment simply because they have attained the age of 45, or if it was tweaked, if it was tweaked to 46 or 48 or 52, arbitrary nonetheless.

And keep in mind the types of criminals over the age of 45 or 55, whatever it would be, for whom the release would be required—drug dealers, spies, others convicted of violating the Nation's espionage laws, lifelong fraudsters, money launderers, members of terrorist organizations, gangsters, possessors of child pornography.

Possessors of child pornography—I prosecute these cases personally. In a district my size, I try these cases. I can tell you that the people that are involved in that industry, people who are on the bad end of that industry, the victim, would be loath to stand before you and say these are not violent crimes, and they would like the people who are sentenced under these provisions to be released indiscriminately simply because they got to 45.

The fact is all of these offenses constitute real threats to the security of the United States, whether or not the person committed what we will call a violent act of some kind. Lengthy sentences in such cases are appropriate and they are a true deterrent.

I see that my time is going by here, and I do not wish to cut into the Committee's time because I know the questions are more important than what perhaps I have to say this morning.

I am just going to end, Mr. Chairman, by pointing out again that this sentencing regimen that we are called upon as Federal prosecutors so often to defend has been a sentencing regimen that has been passed on by the Congress and has been in the policy of the United States for 20 years.

Now I can say from my perspective and in my district—I know people might snicker and say, "Well, is there crime in North Dakota?" I can assure you that there is. In my years as U.S. attorney, we have had a 300 percent increase in a number of Federal criminal violations that we are prosecuting, and that includes a 500 percent increase in the drug-trafficking cases that we are prosecuting, and these are drug-trafficking cases that reach all across the United States into many of your districts. I have cases reaching all across the United States into Canada and into Mexico.

And so we are impacted by those problems, and we are trying to deal with it the best we can, and I think one of the most important tools is certainty in length of sentences. I think it has a dramatic impact on our communities, it keeps them safer, and it helps us live in a time when violent crime is a very, very serious problem that we all recognize. I think if we look at it statistically, we are in a position that we can feel that we are making real progress because the violent crime rates are in a position that were probably enviable in the 1960's and 1970.

Thank you.

[The prepared statement of Mr. Wrigley follows:]

PREPARED STATEMENT OF THE HONORABLE DREW WRIGLEY

Statement of

Drew Wrigley

United States Attorney
District of North Dakota
United States Department of Justice

Before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives

December 6, 2007

Good morning. Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee – It is a pleasure to be here with you today to discuss legislation pending before the Subcommittee: H.R. 261, the "Federal Prison Bureau Nonviolent Offender Relief Act of 2007" and H.R. 4063, the "Restitution for the Exonerated Act of 2007."

H.R. 261 would amend 18 U.S.C. § 3624 ("release of a prisoner") by adding a new subsection (g) to require that, "[n]ot withstanding any other provision of law," the Bureau of Prisons (BOP) release from custody any prisoner who is at least 45 years of age, who has served at least one-half of his or her sentence, and who has neither been convicted of a "crime of violence" nor "engaged in any violation, involving violent conduct" of BOP's "disciplinary regulations."

H.R. 4063 would establish a new grant program and would authorize the Attorney General to award grants to eligible organizations that "provide support services for exonerees."

Such grants would be available to provide, for example, "employment services, vocational training, education, and health care services." To carry out the provisions of the bill, the legislation would authorize appropriations of $1.25 million for each of fiscal years 2008 through 2012.

H.R. 4063 – Restitution for the Exonerated Act 2007

Turning first to H.R. 4063, the Department of Justice opposes its enactment. We do, however, support the purposes of the legislation: to promote the successful transition of persons who have wrongfully been convicted of criminal offenses back into their communities and to support federal, state, and local programs that work to assist in such transitions. The way in which the legislation seeks to achieve these goals is, unfortunately, inconsistent with the Administration's proposals to address, in a comprehensive manner, offenders' reentry into the community.

The Administration's proposals would consolidate the Justice Department's more than seventy existing grant programs into four flexible and competitive grant programs that would enable taxpayers' dollars to be directed to the places and the people where they are most needed.

The President's fiscal year 2008 budget proposes $65 million for a single reintegration and ex-offenders program (including exonerees) in the Department of Labor that would enlist faith-based and community organizations in assisting such persons. The Department recognizes the unique strengths of faith-based and community organizations as primary partners for the delivery of social services and strongly supports the authorization of the Department of Labor's

reintegration program. This will help to ensure that the significant efforts made to date through job training programs that are conducted by community and faith-based groups across the country are allowed to continue and to flourish.

Aside from the Department's opposition to H.R. 4063, for the reasons described above, we have two additional comments about the bill, as currently drafted, should the Subcommittee elect to proceed with it.

First, in section 6(1) (definition of "eligible organization"), it should be made clear, in the bill text or the legislative history, that an "eligible organization" includes a faith-based organization.

Second, in section 6(3) (definition of "factually innocent"), it does not appear that the requirement in paragraphs (A) or (B) – that there be a finding of innocence – is connected in any way to the requirement in paragraph (C) that "[t]he conviction has been vacated or reversed by a court." As currently drafted, if a defendant's case is vacated for <u>any reason whatsoever</u>, the defendant would be considered "factually innocent" (*e.g.*, even in cases involving incorrect jury instructions or incorrect evidentiary rulings by a district court). This would, in our view, be highly inappropriate. At a minimum, paragraph (3) should be amended to read, as follows: "All

counts of conviction [have] been vacated or reversed by a court of competent jurisdiction and no new trial on such counts is ordered or otherwise permitted."

H.R. 261 – Federal Prison Bureau Nonviolent Offender Relief Act of 2007

The Department strongly opposes enactment of H.R. 261.[1]

The legislation would be completely contrary to the longstanding policy of the United States Government, promoted consistently by both Democratic and Republican Administrations and Democratic and Republican Congresses over at least the past twenty years, to achieve "truth in sentencing" in the federal criminal justice system. It wound undermine the purposes of the Sentencing Reform Act of 1984 and, consequently, the thoughtful consideration of appropriate Sentencing Guidelines by the Sentencing Commission.

The bill runs entirely counter to the factors a sentencing court is required to consider in imposing a sentence under 18 U.S.C. § 3553 ("imposition of a sentence"), which include the protection of the public, the need for a sentence to reflect the seriousness of the offense, and the need to provide adequate deterrence against the commission of other offenses. Federal district court judges are required to take these factors into account in the determination of an appropriate sentence; the bill fails to take into account these critical factors. Moreover, certainty of punishment, especially in the imposition of "mandatory minimum" sentences, is a particular

advantage that the federal criminal justice system has over many state sentencing systems and would be completely undermined by this legislation.

[1]We note that there is no "Federal Prison Bureau, as the title of the bill suggests. The correct reference is 'Bureau of Prisons.'"

Consider, for example, a federal judge who is imposing a sentence on a defendant who is 35 years old and, who should, under the Sentencing Guidelines, receive a sentence of 20 years' imprisonment. If H.R. 261 were enacted, the judge could reasonably anticipate that, if he or she imposed a 20-year sentence, it would, in effect, automatically be cut in half. What might a judge do in such a situation? Some judges would no doubt impose the 20-year term called for by the Sentencing Guidelines, knowing that the defendant would only serve ten years. Others might double the sentence to forty years, in order to achieve the 20-year term envisioned by the Guidelines. Still other judges might do something in between. What is clear, though, is that any of these outcomes would result in inconsistent sentencing in similar criminal cases and would thus severely and inappropriately subvert the longstanding and sound principle incorporated in the federal government's criminal justice system of "truth in sentencing," as called for by the Sentencing Reform Act of 1984.

In addition, the Department notes that there are already several early release or furlough programs in place in the federal correctional system that are more consistent with truth-in-sentencing principles. *See, e.g.,* the 15 percent "good time" credit available under 18 U.S.C. § 3624(b) ("credit toward service of sentence for satisfactory behavior"); the ten percent early release program under 18 U.S.C. § 3624(c) ("pre-release custody"), and the furlough program set forth at 18 U.S.C. § 3622 ("temporary release of a prisoner"). This latter program already allows for the pursuit of educational and outside employment opportunities by trustworthy offenders – both of which appear to be goals of H.R. 261.

Perhaps most importantly, this legislation would inequitably and unjustly benefit an entire class of offenders, whose release would present a serious danger to communities and the Nation as a whole. It is altogether unclear why the particular class of offenders identified by the bill (*i.e.*, those over 45 years of age) should be singled out for special and much more lenient treatment. It is neither sound nor fair to provide for the early release of certain offenders – when such release is not available to other offenders – merely because they committed their offenses at points the bill's drafters apparently consider "late" in the offenders' lives or because the crimes committed by such offenders were of such seriousness that they received sentences extending into their "old age." As noted below, the age 45 "cut off" contained in the bill appears to be quite arbitrary and is unsupported by any facts or studies.

Of even greater concern, under section 2(a) of the bill (adding new subsection (g) to 18 U.S.C. § 3624), included among other offenders over the age of 45 for whom release would be required, could be: drug traffickers, spies and others convicted of violating the Nation's espionage laws, life-long fraudsters and other con artists who exploit senior citizens, money launderers, members of terrorist organizations, cyber criminals, gangsters and other organized crime figures, possessors of child pornography, and others convicted of very serious offenses involving public corruption and abuse of the public's trust. All of these offenses constitute real threats to the security of the United States. Lengthy sentences in such cases are entirely appropriate and act as true deterrents to their commission.

To cite but three examples of the kinds of sentences that would be inappropriately shortened if H.R. 261 were enacted, I invite the Subcommittee to consider the following

"spying" cases:

- Ana Montes, a former analyst with the Defense Intelligence Agency, who is now over the age of 45, was convicted in 2002 and received a 25-year sentence, would be eligible for release in 2014.
- David Boone, a former analyst with the National Security Agency, who is now over the age of 45, received a sentence of 24 years in 1999 and would be eligible for release in 2011.
- Harold Nicholson, a former officer with the Central Intelligence Agency, who is over the age of 45, received a sentence of 23 years in 1997 and would be eligible for release in 2009.

The bill presents other serious concerns, as well. It does not define "crime of violence." The bill's failure to define this term could result in the early release of what most would consider violent offenders, including, for example, those who were convicted only of unlawfully possessing firearms. The U.S. Sentencing Guidelines exclude from its definition of "crime of violence" a conviction for an offense involving the possession of a firearm by a previously-convicted felon under the Gun Control Act. *See,* U.S.S.G.§4B1.2, Commentary, Application Note 1. United States Attorneys routinely prosecute offenders for violations of the Gun Control Act whose offenses include the commission of a violent state crime, such as murder or sexual assault, for which there may be an impediment to state prosecution (*e.g.,* an inability to prove an element of the offense). If the Sentencing Commission's definition of "crime of violence" were adopted, federal firearms offenders would be considered "non-violent" and would reap the very

significant benefit of the legislation: mandatory early release – notwithstanding the risk to the public, including victims of the offenses and the witnesses to them.

The bill is completely arbitrary in selecting the age of 45 as the apparent "marker" of reduced crime recidivism. It does not contain any legislative "findings" or any other indication why age 45 was selected as a "cut off." To the best of the Department's knowledge, there are no studies or other facts that support such an altogether capricious determination. In that connection, the legislation – remarkably – fails to take into account an offender's prior criminal history aside from crimes of violence. According to a May 2004 study of recidivism prepared on behalf of the U.S. Sentencing Commission, offenders between the ages of 41 and 50 frequently commit new crimes when they are released. There is no evidence or legitimate argument whatsoever to be made to support the notion that an offender can be expected to abide by the norms of society simply because he or she has obtained the relatively youthful age of 45. It is difficult to imagine, to cite but one example, what a senior citizen who has lost his or her life savings to a fraudster would think about an offender who has had his or her sentence cut in half simply by virtue of turning 45 years of age. The Department also observes with concern that the bill in no way attempts to tie efforts to provide restitution to victims in connection with the proposed mandatory early release plan.

We understand that one of the unstated goals underlying the introduction of H.R. 261 may have been to relieve pressure on the facilities and personnel of the Bureau of Prisons. While such a goal may be laudable, it would be more appropriately and satisfactorily addressed by fully funding the President's budget request for the Federal Prison System for fiscal year

2008. The enactment of legislation such as H.R. 261 should not be accepted as a solution to concerns that would be better addressed by other means.

* * * * *

Mr. Chairman, when Congress abolished parole in the federal criminal justice system in the Sentencing Reform Act of 1984, it did so, in part, to do away with the gross discrepancies in sentencing that resulted from federal judges' certain knowledge that only a fraction of any sentence they imposed would likely be served. If enacted, H.R 261 would constitute a very highly undesirable step toward a return to the pre-1984 parole regime. Indeed, it would in some respects be worse than the pre-1984 system (*e.g.*, in its mandatory nature, its indiscriminate reliance on an illogical factor (*viz.*, the age of the offender), and its establishment of an altogether arbitrary requirement of a flat prison term reduction, regardless of circumstances). This would be an unfortunate – indeed an unacceptable – result. We strongly urge this Subcommittee not to take that step and to reject H.R. 261.

Mr. Chairman and Members of the Subcommittee, that concludes my prepared statement. I thank you for the opportunity to appear before you today. I would be pleased at this time to respond to any questions that you or other Members of the Subcommittee may have.

Mr. SCOTT. Thank you.

And we just have a few minutes to get to the floor, so we will recess. I understand we have three votes. So it will be about 20 minutes before we get back.

The Committee is now in recess.

[Recess.]

Mr. SCOTT. The Committee will come to order.

Reconvening the hearing, we will now hear from Mr. Ogiste.

TESTIMONY OF LANCE P. OGISTE, COUNSEL, BROOKLYN DISTRICT ATTORNEY, MEMBER, NATIONAL DISTRICT ATTORNEY'S ASSOCIATION

Mr. OGISTE. Good afternoon, Chairman Scott and Ranking Member Forbes and the rest of the Members of the Subcommittee. Thank you very much for having me here today. It is quite an honor.

My name is Lance Ogiste, and I am counsel to the district attorney of Kings County, Brooklyn, New York, Charles J. Hynes. I have been a prosecutor for 20 years, and among my current responsibilities is I am in charge of the district attorney's prisoner reentry program, ComALERT, which stands for Community and Law Enforcement Resources Together. I am also a member of the National District Attorneys Association.

The successful rehabilitation and re-entry of ex-offenders into the community demands the attention of prosecutors throughout the country because, quite simply, the welfare and safety of the public are at stake.

Recidivism by formerly incarcerated individuals takes a tremendous toll in terms of both the immediate harm caused by the criminal conduct and the direct and indirect costs of recidivism, such as the criminal justice system costs of investigation and prosecution, the incarceration costs, and the myriad social costs, such as medical care, foster care, and welfare system costs, resulting from the impact of the crime on the victim and the victim's family and friends, and even on the offender's family and friends and, of course, on the larger community.

The NDAA recognizes the importance of reducing recidivism rates of ex-offenders and supports the development and implementation of innovative programs to assist with prisoner reentry issues. Because successful re-entry can have such a positive impact on an individual and, by extension, a community's well-being, DA Hynes in 1999 created ComALERT in close collaboration with Counseling Service of EDNY, an out-patient drug treatment provider; the Doe Fund, a not-for-profit organization providing transitional employment and housing; the New York State Division of Parole; and numerous community-based social services providers. ComALERT is not a re-entry court. It is a re-entry partnership for Brooklyn residents who are on parole and who have been mandated to engage in substance abuse treatment.

The program assumed its present structure in October 2004. There are currently approximately 150 active participants in ComALERT. For most clients, the program lasts 3 to 6 months. Between October 1, 2004, and October 1, 2007, 446 clients graduated

from the program. The program graduation rate is approximately 53 percent.

Most ComALERT clients are recently released from prison and are referred to the program by parole. ComALERT representatives also regularly perform informational sessions via video hookup at various prisons throughout New York State explaining the program and the services offered. As a result, some clients, even if not referred to ComALERT by their parole officers, nevertheless choose to enroll in the program once they are released.

At ComALERT's downtown Brooklyn location, clients receive outpatient substance abuse treatment from state-licensed drug treatment counselors. Each week, clients attend one individual counseling session and one or two group sessions. They are also regularly tested for drug use. Once drug testing results verify that a ComALERT participant has been drug-and alcohol-free for at least 30 days, he or she can begin engaging in other services and, per the referral of the primary counselor, will meet with ComALERT's community resource coordinator, who is an employee of the district attorney's office.

Approximately one-third of ComALERT clients receive a referral to and preferential placement in the Doe Fund's Ready Willing & Able program, which provides transitional employment, transitional housing, job skills training, 12-step programs, and courses on financial management and other life skills.

RWA participants work full time in manual labor jobs, primarily street cleaning, and are paid $7.50 per hour. A portion of the salary is deposited directly into a savings account for the client. They receive meals and other services in a Doe Fund facility. After 9 months of transitional employment, participants begin the search for a permanent job. During this process, they continue to receive a stipend.

Once RWA participants secure permanent employment and housing, they graduate from the program, and the Doe Fund continues to provide them with $200 per month for up to 5 months. ComALERT's weekly individual and group counseling sessions and periodic drug testing help clients maintain sobriety and their enrollment in RWA, which enforces a zero-tolerance policy for drugs and alcohol use.

In addition to providing referrals for RWA and other transitional employment, ComALERT's community resources coordinator also links participants to a wide range of other social services offered by community-based providers, such as transitional housing, vocational training, GED test preparation, family counseling, and job readiness programs. Service referrals are specifically tailored to meet the needs of the individual clients.

Professor Bruce Western, formerly of Princeton University and now at Harvard, recently completed research evaluating ComALERT. Professor Western has analyzed the recidivism rates of ComALERT graduates from July 2004 to December 2006 and found that ComALERT attendees have done much better than those who did not receive ComALERT.

I see already that my time is running very low. I will go right to our results.

By contrast, 48 percent of matched parolees were re-arrested, 35 percent were reconvicted, 7 percent were re-incarcerated on a new crime. That is in comparison to ComALERT graduates who had a 29 percent re-arrest record or a 19 percent reconviction percentage or a 3 percent re-incarceration for a new crime. So, therefore, you can see that ComALERT has been much better than those individuals who have not been able to access these kind of services.

I understand that the Subcommittee is now also looking at legislation that would provide Federal funding to agencies delivering coordinated social services to individuals who have been released from prison after being found factually innocent of the crimes for which they were incarcerated.

Certainly, those who end up behind bars for crimes that they did not commit may well have social service needs, such as for drug treatment and employment assistance, that are no less acute as those of ex-offenders leaving prison. A coordinated effort to meet those needs would assist wrongly convicted individuals to successfully re-integrate into society after the disruptive and traumatic impact of imprisonment and would help them become healthy, productive citizens.

Because we rely on a criminal justice system that can never be free of human error, we have a concurrent responsibility to assist in the re-integration of those who were unjustly removed from society as a result of that system. Moreover, prosecutors have an additional public safety interest in seeing that any person who is having difficulty re-integrating into the community following release from prison receive the support services that they need. A sober and employed former inmate who has strong connections to family and community is less likely to commit a crime than an unemployed drug addict who is alienated from society.

I would caution, however, that the fact that a conviction has been vacated or reversed by a court is not tantamount to a finding of innocence, and the reversal or vacatur of a conviction should not make an individual immediately eligible for services. In fact, most of the time that there is a vacatur or reversal of a conviction, the prosecuting agency, be it the State or the Federal Government, will have the opportunity to retry the defendant.

A defendant who has charges pending against him or her obviously stands on very different footing than an individual against whom all charges have been dismissed because, for example, DNA testing indicates that another person committed the crime.

Finally, I would note that the NDAA supports increases in Federal funding to help correctional facilities not only develop and implement appropriate individualized re-entry plans for prison inmates, but also provide necessary medical and mental health care, including substance abuse treatment, vocational training, educational programs, and life-skills training, as a means of smoothing the transition back to productive community living. Such programs will benefit all incarcerated individuals.

[The prepared statement of Mr. Ogiste follows:]

PREPARED STATEMENT OF LANCE P. OGISTE

Good morning. My name is Lance Ogiste and I am counsel to the District Attorney of Kings County (Brooklyn), New York, Charles J. Hynes. I have been a prosecutor for twenty years and among my current responsibilities, is being the execu-

tive in charge of the District Attorney's prisoner re-entry program, ComALERT—which stands for Community and Law Enforcement Resources Together. I am also a member of the National District Attorneys Association (NDAA).

The successful rehabilitation and re-entry of ex-offenders into the community demands the attention of prosecutors throughout the country, because, quite simply, the welfare and safety of the public are at stake. Recidivism by formerly incarcerated individuals takes a tremendous toll—in terms of both the immediate harm caused by the criminal conduct, and the direct and indirect costs of recidivism, such as the criminal justice system costs of investigation and prosecution, the incarceration costs, and the myriad social costs (medical care, foster-care, and welfare system costs) resulting from the impact of the crime on the victim and victim's family and friends, and even on the offender's family and friends. Communities, often already economically fragile, are threatened with further destabilization. The NDAA recognizes the importance of reducing recidivism rates of ex-offenders and supports the development and implementation of innovative programs to assist with prisoner reentry issues.

Because successful re-entry can have such a positive impact on an individual's and, by extension a community's, well-being, Kings County District Attorney Charles J. Hynes, in 1999, created in ComALERT (Community and Law Enforcement Resources Together)—in close collaboration with Counseling Service of EDNY (an out-patient drug treatment provider), the Doe Fund (a not-for-profit organization providing transitional employment and housing), the New York State Division of Parole, and numerous community-based social services providers. ComALERT is *not* a re-entry court. It is a re-entry partnership for Brooklyn residents who are on parole and who have been mandated to engage in substance abuse treatment.

The program assumed its present structure in October 2004. There are currently approximately 150 active participants in ComALERT. For most clients, the program lasts three to six months. Between October 1, 2004, and October 1, 2007, 446 clients graduated from the program. The program graduation rate is approximately 53%.

Most ComALERT clients are recently released from prison and are referred to the program by Parole. ComALERT representatives also regularly perform informational sessions, via video hookup, at various prisons throughout New York State, explaining the program and the services offered. As a result, some clients, even if not referred to ComALERT by their parole officer, nevertheless choose to enroll in the program once they are released.

At ComALERT's downtown Brooklyn location in the Municipal Building, ComALERT clients receive outpatient substance abuse treatment from state-licensed drug treatment counselors. Each week, clients attend one individual counseling session and one or two group sessions. They are also regularly tested for drug use. Once drug testing results verify that a ComALERT participant has been drug- and alcohol-free for at least 30 days, he or she can begin engaging in other services, and, per the referral of the primary counselor, will meet with ComALERT's Community Resources Coordinator, an employee of the District Attorney's Office.

Approximately one-third of ComALERT clients receive a referral to, and preferential placement in, the Doe Fund's Ready Willing & Able (RWA) program, which provides transitional employment, transitional housing (if needed), job skills training, 12-step programs, and courses on financial management and other life skills. RWA participants work full time in manual labor jobs, primarily street cleaning, and are paid $7.50 per hour. A portion of the salary is deposited directly into a savings account for the client. They receive meals and other services in a Doe Fund facility. After nine months of transitional employment, participants begin the search for a permanent job. During this process, they continue to receive a stipend. Once RWA participants secure permanent employment and housing, they graduate from the program, and the Doe Fund continues to provide them with $200 per month for five months. ComALERT's weekly individual and group counseling sessions and periodic drug testing help clients maintain sobriety and their enrollment in RWA, which enforces a zero-tolerance policy for drug and alcohol use.

In addition to providing referrals for RWA and other transitional employment, ComALERT's Community Resources Coordinator also links participants to a wide range of other social services offered by community-based providers, such as transitional housing, vocational training, GED test preparation, family counseling, and job readiness programs. Service referrals are specifically tailored to meet the needs of the individual clients.

On site, at the ComALERT Re-Entry Center, participants may attend HIV/STD/hepatitis workshops, and be seen by an on-site doctor who conducts physical health assessments and provides referrals as necessary. ComALERT participants who need mental health treatment, but only at a moderate level, may receive such treatment from their ComALERT primary counselor. If the client has a serious and persistent

mental illness and needs treatment involving medication, the primary counselor or the on-site doctor will refer the client to an outside mental health treatment provider. ComALERT plans to augment, in the near future, the range of wraparound services offered on site.

Professor Bruce Western, formerly of Princeton University and now at Harvard, recently completed research evaluating ComALERT. Professor Western has analyzed the recidivism rates of ComALERT graduates from July 2004 to December 2006, and compared those rates to all ComALERT attendees for that period (*i.e.,* for all participants regardless of whether they graduated or were discharged) and to those of a matched control group of Brooklyn parolees who did not participate in ComALERT.[1] Outcome percentages for ComALERT graduates were *substantially* better in all categories when compared to those of a matched control group. One year after release from prison, parolees in the matched control group (who did not have the benefit of ComALERT) were over twice as likely to have been re-arrested, re-convicted, or re-incarcerated as ComALERT graduates. Even two years out of prison, ComALERT graduates showed far less recidivism than the parolees of the matched control group. Twenty-nine percent of ComALERT graduates were re-arrested, 19% re-convicted, and only 3% re-incarcerated for a new crime.[2] By contrast, 48% of the matched parolees were re-arrested, 35% re-convicted, and 7% re-incarcerated on a new crime. Even re-incarceration based on parole violations occurred much less frequently for ComALERT graduates (16%) than for parolees in the matched control group (24%).

As to employment, ComALERT graduates were nearly four times as likely to be employed as the parolees in the matched control group, and they also had much higher earnings than parolees in the control group.

These results validate ComALERT as an effective collaborative model for ensuring that ex-offenders make a successful transition from prison to the community.

Certain aspects of ComALERT appear to be very important to its success. For example, the program's emphasis on substance abuse treatment and employment assistance addresses two major stumbling blocks to successful re-entry and re-integration-drug use and unemployment.

In addition, the speed with which those leaving prisons are linked, through a referral from Parole, to the ComALERT program is important to ensure that former inmates begin receiving treatment and supportive services at a time when they might be most vulnerable to start slipping back into their old lifestyle of drug use and crime-namely, the first few months after release from prison. Moreover, ComALERT's substance abuse treatment provider partner, Counseling Service of EDNY, has secured state funding so that even if a ComALERT client does not have a Medicaid card, the client can begin engaging in substance abuse treatment immediately. So that clients become Medicaid eligible as soon as possible, ComALERT also has staff on site to assist with obtaining needed documentation (such as birth certificates, etc.) for rapid benefits enrollment.

Finally, the fact that both the client's linkage to social services and the delivery of those services are coordinated and tracked by a single program, ComALERT, which itself maintains constant contact with the Division of Parole, means that parolees receive the services that they really need without an inefficient waste of resources.

In considering legislation that is aimed at promoting inmate rehabilitation and successful re-integration into society, I would urge this Subcommittee to consider the importance of an ex-offender's speedy and coordinated linkage to social services, especially substance abuse treatment and employment assistance.

I understand that the Subcommittee is also now looking at legislation that would provide federal funding to agencies delivering coordinated social services to individuals who have been released from prison after being found factually innocent of the crimes for which they were incarcerated.

Certainly, those who end up behind bars for crimes that they did not commit may well have social service needs, such as for drug treatment and employment assistance, that are no less acute as those of ex-offenders leaving prison. A coordinated effort to meet those needs would assist wrongly convicted individuals successfully

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[1] Erin Jacobs, ComALERT's Research Director, collaborated with Professor Western on this research.

[2] Although the comparison is imperfect, the recidivism rates of ComALERT graduates were dramatically lower than for prisoners released from state prisons in general. A study conducted in 2002 of inmates released from state prisons in 1994, concluded that, two years after release, approximately 59% had been re-arrested, 36% re-convicted, and 19% re-incarcerated for a new crime. P. Langan & D. Levin, RECIDIVISM OF PRISONERS RELEASED IN 1994 at 3, table 2 (U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 193427, June 2002).

re-integrate into society after the disruptive and potentially traumatic impact of imprisonment, and would help them become healthy, productive citizens. Because we rely on a criminal justice system that can never be free of human error, we have a concurrent responsibility to assist in the re-integration of those who were unjustly removed from society as a result of that system. Moreover, prosecutors have an additional public safety interest in seeing that any person who is having difficulty re-integrating into the community following release from prison receive the support services that they need. A sober and employed former inmate who has strong connections to family and community is less likely to commit a crime than an unemployed drug addict who is alienated from any social network.

I would caution, however, that the fact that a conviction has been vacated or reversed by a court is not tantamount to a finding of innocence, and the reversal or vacatur of a conviction should not make an individual immediately eligible for services. In fact, most of the time that there is a vacatur or reversal of a conviction, the prosecuting agency, be it the state or the federal government, will have the opportunity to retry the defendant. A defendant who has charges pending against him or her obviously stands on very different footing than an individual against whom all charges have been dismissed because, for example, DNA testing indicates that another person committed the crime.

Finally, I would note that the NDAA supports increases in federal funding to help correctional facilities not only develop and implement appropriate individualized re-entry plans for prison inmates, but also provide necessary medical and mental health care (including substance abuse treatment), vocational training, educational programs, and life-skills training, as a means of smoothing the transition back to productive community living. Such programs will benefit all incarcerated individuals

Mr. SCOTT. Thank you. Thank you very much.

I thank all the witnesses for your testimony.

We will now have our panel pose questions, and I will recognize myself to begin for 5 minutes.

Ms. Woolard, is there any research to say whether primary prevention and-or early intervention actually reduces recidivism with juveniles or reduces crime with juveniles?

Ms. WOOLARD. There certainly have been evaluations of particular programs that indicate that early intervention can be successful. The Office of Juvenile Justice and Delinquency Prevention, for example, has their Blueprints programs out of the Web site on the University of Colorado that has documented scientifically through experimental evaluation the success of some programs in reducing recidivism among juveniles.

Mr. SCOTT. What evidence is there about locking up more juveniles as adults increasing the number, that is to say those who are not now locked up prosecuted as adults, but increasing the number? Would that be helpful or counterproductive?

Ms. WOOLARD. Well, the research that we have coming out of Florida where I used to be and New York-New Jersey comparisons indicates that for the majority of crimes they study, where they compare kids that have been prosecuted as adults or not, that those who were prosecuted as adults recidivated more often and faster, I think, for almost all the crimes they studied. There was either no effect or it actually exacerbated recidivism for the studies we have so far.

Mr. SCOTT. Were the crimes more or less likely to be violent?

Ms. WOOLARD. That I actually do not recall, the type of crime that was different.

Mr. SCOTT. Ms. LaBelle, on eliminating life without parole, you indicated that the bill would eliminate life without parole. Would it be more accurate to say that it may not eliminate life without

parole, but it would make the person eligible for parole. Some may not ever make parole. Is that right?

Ms. LABELLE. That is correct, that the child would just be reviewed for parole. There may be a decision that that person would have to continue to stay in, but at least it would provide for individualized review, an opportunity.

Mr. SCOTT. Thank you.

Professor Turley, if our goal is to reduce crime in a cost-effective manner, how useful is it to deny the possibility of any consideration for parole for those over 45 or certainly over 55 years of age?

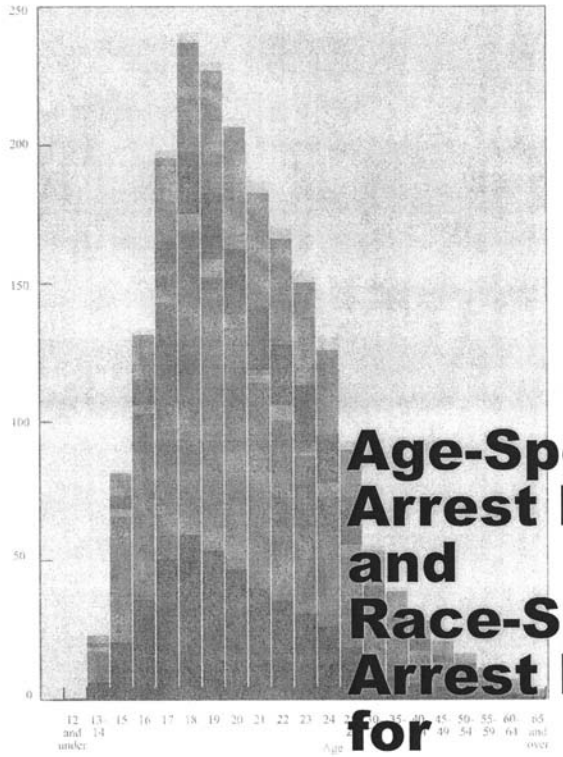
Mr. TURLEY. Well, we have already seen what happens. That is when we talk about the reforms in 1983, as Mr. Krone did, since 1983 and since many of the changes in the States, we have seen an increase in recidivism that most States are experiencing, recidivism rates. The average in the Federal system and the State systems is 67 percent. Most parole boards did a lot better than that, and some did exceptionally well before they were eliminated.

And the reason is it is based on a lot of data that shows that as you get older, you become statistically less likely to commit a new offense. It does not mean that it applies to everybody. There are late bloomers. There are habitual offenders, avertable recidivists.

But if you take a look at the Department of Justice's own studies, for example, if you look at the uniform crime reports from November 2003, the age-specific arrest rates, you will see on this chart that when you are above age 50, the rate of recidivism is the same as people who are 14 and younger.

[The information referred to follows:]

U.S. Department of Justice
Federal Bureau of Investigation



Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001

Uniform Crime Reports
November 2003

Mr. TURLEY. So you see what happens to recidivism is it peaks and then it continues to fall. We need to rely on science and to have some logical connection between our policies of incarceration and what we know of our recidivism. We know a lot more about recidivism now than when I went to law school.

In the age of computers, we have been able to identify and predict with a very high likelihood of success. We should use that not to give people a free ride, but to make mature decisions that can reduce recidivism because right now the wrong people are getting out. The younger prisoners that are being released are much higher in likelihood of committing a crime. But we hold on to people who may become statistically a low risk.

Some of the prisoners I interview in prison are statistically lower risk than the students I drive to prison with.

Mr. SCOTT. Is the age of release as important to consider as the length of the sentence?

Mr. TURLEY. Well, there are a number of factors. What age does is it identifies a population where the yield of low-risk, high-cost prisoners is the greatest. It is not a magical number, but what it does is it gives you a body of people where the yield is the greatest, and then you, with these other elements, sort out people who are higher risk, mid risk, low risk.

The crime that they are in for is very, very relevant. If someone is in there for a violent crime, you measure that harshly. Also, if someone has not served beyond the average of their offense, we generally do not consider them at POPS. We also look at the pattern of criminality. If it is a first offender, it is very different from somebody who has been a habitual offender, and you can also track people that seem to be graduating up.

So there are lots of ways to do it. This is not some smoke and mirrors thing where we all sit there and just guess at things. You know, this is a science, and it has become very, very accurate. It does not mean it is 100 percent, but I can promise you this. I do not know any recidivism test that would come anywhere near the failure rate of the current system.

Mr. SCOTT. Thank you very much.

My time has expired.

Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

Once again, I want to thank all of you for being here, but also your patience with us going back and forth to votes. It is very difficult for us because we have seven of you here. We would love to ask you a lot of questions. I have 42 seconds for each person, so I cannot do that. So I want to just address a few things and feel free to put anything in the record that you might want to supplement or add to because I have to be kind of brief in the 5 minutes that I have.

You know, the gentlelady from Texas concluded her remarks earlier by saying we just have philosophical differences.

But, you know, Professor Woolard, you went to one of the greatest universities in the world. You could not have done better.

And, Professor Turley, you know, you all get to sit in class and think lofty thoughts and ideas.

You know, here, this is not about philosophy. This is about a piece of legislation that is ultimately going to put a key in the door and let somebody out or it is going to put somebody in jail, and so we have to look at the wording. We have to look at the legislation. That is what we do here. We pass legislation, not ideas.

On this particular piece of legislation, I just want to make everybody sure of one thing. I agree that we need prison reform. I mean, we have had testimony about people who are raped in prison. We know the situation. We need to change that.

Mr. Krone, your testimony, nobody questions that for somebody who is proven factually innocent we need to do something to compensate that. You went through hell, and, you know, I am just amazed that you could withstand that and you could come out and do the stuff that you do. And I read some of your stuff of your faith and all that got you through that, and I admire you for that. So we do not disagree with that.

But there is a difference in your situation and someone that a governor sits back somewhere and just says, be it for political reasons or whatever, "I am just going to pardon that person," and the legislation before us does not differentiate that.

The second thing that we look at is we cannot have our cake and eat it, too. We are overcriminalizing stuff every single day. In this Committee alone, we are passing legislation on what people say and sometimes what they think because we do not like that and that is politically correct. We have to stop doing that because a lot of people that commit criminal acts today, have no idea that they did something that was criminally wrong.

Ms. LaBelle, you have talked about children and the child, and, you know, when you have this connotation of—I have four children—you know, somebody in there with a little Teddy bear that I am putting my arm around. Most of the people we are talking about who get life without parole are not little people holding Teddy bears.

I mean, you know, the case that you mentioned, the Simmons case, this guy plotted a murder where he looked at his co-defendants and he said, "We are not going to get punished because we are minors," you know, and "We are going to go in there and kill this woman." They went in there. He intentionally did it. He took her out, put tape around her, wrapped her feet up with wire, threw her over a bridge to drown, and I am going to tell you I do not have any problem at all looking to somebody like that who is 17 years old—he could have been a month before he is 18—and looking at them and saying, "Buddy, you are gone for life without parole."

Lee Malvo killed 10 people, many of them from my State, you know. I cannot look at their children that will never see their parents again or the brothers and sisters. I cannot say to them, "Okay, now we are going to have a relook at this where you all get to go back to the husband or wife that you lost."

We do not get that shot again, and so I do not have a problem looking to Lee Malvo and saying—you know, at 17 years old, I have to balance this some way. I have to look at what the States do, the courts do, and the juries do, and they say, "He needs to go away. You know, he needs to go away for life without parole." And he is not a little speeder. He is somebody that killed 10 people.

We have had testimony in here of ladies whose husbands were killed by a gang member, 17, put a gun to their husbands' heads and killed them for one reason—to be initiated into a gang. You know, I do not have as much sympathy in those situations.

And, Mr. Turley and Ms. Woolard, you know, you all have competing claims here. I mean, Ms. Woolard is saying we ought to be easier on younger people because they cannot formulate their decisions as well, Mr. Turley is saying we ought to let older people out because they are not going to commit the crimes as much. And the reality is, if any of you have been in sentencing hearings and proceed rings—Ms. Woolard is shaking her head. I am sure Mr. Turley has—that judge has to take into account a lot of things. He gets a lot of testimony—the previous record that they have, the gravity of the crime, the effects on the victim, the likelihood to commit another crime—and that judge and jury makes a sentence at that particular point in time.

To have a piece of legislation like we have before us today—Mr. Turley, I do not even think you would agree with—that says at 45, if you have committed half of your sentence, we are going to automatically mandate that we open that jail cell and you walk out. You would not even agree with that, would you?

Mr. TURLEY. I think that the language should be changed and——

Mr. FORBES. Well, that is the language we have, you know, that is here.

And the final thing I just want to tell you, when we do that, it is an absolute affront to every judge, every jury, every prosecutor that has worked hard in getting that sentence right at the beginning and then to say, "We do not care what you did, we are going to over rule it, and we are going to let these people out."

And the last thing I just want to tell you is this. Ms. Woolard, I think you mentioned this. You said those prosecuted as adults are more likely to have recidivism. Is that a fair statement?

Sure! I mean, part of the reason is because if they are prosecuted as adults, most of the time, it is because they have done something that is, you know, a lot worse, you know, I think in a lot of situations. So I think that makes good sense.

But, once again, thank you all for being here. Please feel free to submit anything to the record.

The red light is on, and I yield back.

Mr. SCOTT. Thank you.

Mr. Conyers?

Mr. CONYERS. Randy Forbes, our Ranking Member, has underscored my idea for a discussion amongst us that is provoked by the subject matter and presence here. And everybody has agreed to it—the Chairman of the Committee, the Ranking Member—and I have not talked to Judge Gohmert about it yet, nor Howard Coble, but I think we need these kind of enlightened public discussions where we talk among ourselves. We might even invite you to sit in as invitees, so I am going to be pushing that forward, and you will be hearing more about it.

Professor Turley, I have gotten over your unconstitutional view of voting rights for the District of Columbia and—— [Laughter.]

Mr. CONYERS. —I am feeling very good about you as I always had before I heard your explanation of that, and so I am glad that you are here.

And I am always happy to see a Wayne State University Law School graduate there for very obvious reasons, and I welcome Attorney LaBelle. And I wanted to ask you and Ms. Woolard this question. With two guys, 17 and 12—and I try to let them in on everything we are doing—what would be the benefit or harm of talking with my boys about what you two have talked about today?

I mean, is it good for them to hear about the fact that they may be going through a little bit of a period of beast ability and maybe emotional turmoil just to let them know that I know how they are feeling, and I have science to back me up, or what? I mean, how do we approach this on a very personal level now that I have both of you in the room, and we are just talking among ourselves? What do you think?

Ms. LABELLE. Well, speaking of someone who has a new 13-year-old, I think that we all as parents do recognize that there are some significant differences between children. To be very non-scientific, they can be just incredibly goofy and immature at times and make ill-considered decisions.

While Mr. Forbes spoke of 17-year-olds, there are also 13-, 12-, 14- and 15-year-olds that are caught up in this mandatory life without parole in many States where the judge has no discretion. And no one can individualize, and one of the important things that we have learned in talking, in polling and focus groups, is that what citizens of the United States greatly need in their criminal justice system is individualized consideration and some sense of equity.

What happens now is no individual consideration of a 14-year-old who just goes along with an adult and is convicted of a felony murder and a 17-year-old that was described that does a homicide or a multiple homicide. And what this bill would do would put back in individual consideration as to the crime and as to the child and allow an opportunity for them to maybe go home.

Mr. CONYERS. I have been thinking about all of the cases. I mean, we passed one of our bills out on the floor yesterday. There were lynchings in America up until 1968. You say, "Well, wait a minute. Did you transpose a figure there by accident?"

I am thinking about what if we started a bank of all the cases, all the criminal justice cases, State and Federal, that there have been obvious or grave miscarriages, not just the ones that were corrected, but the ones that are happening. Maybe a bank like that exists somewhere, but I think that we ought to start one until somebody calls up and says that we are doing the same thing. So I want to leave that for my Chairman of Crime Committee to help us think about.

Do you have any thoughts on that, Professor Turley?

Mr. TURLEY. Well, in response to your first question, I am the father of four habitual offenders, so I have talked to them about it. In fact, the testimony today I have talked to them about, what this hearing is about, and I think that it does raise a very important issue, which is how do we explain the current system to our

children? I mean, what is the point of it, that we have a system that is cranking out high recidivism?

I just did a study of California which took my breath away. I thought the statistics were wrong. I called up their correctional department to say, "There must be something wrong here. You are showing recidivism rates in some categories of 90 percent. You are showing an average of 70." Now that is basically having a system that is no better if you take it off line. I mean, it is doing nothing.

And I think that the important thing about your question is I cannot explain to them what we are trying to achieve because we are not achieving much. I believe in punishment, and I believe in old people being punished because they have a right to be punished if they have done the crime, but I also believe in a system that has a purpose, that makes mature decisions, and we do not have that.

So whatever disagreement we have on this bill and how it might be changed, the one thing I do not think we can argue much about is we do not have a system now that is achieving anything but generating high recidivists in crime.

Mr. CONYERS. Well, I am taking this all back. We may need another hearing to check out our results in our individual families.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you, Mr. Conyers.

The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Thank you. Thank you, Mr. Chairman.

Good to have you all with us.

Professor Turley, I do not mean to be speaking for the entire Judiciary Committee, but I think they would all agree with me in expressing appreciation to you for the very fine article you wrote in memory of the late Henry Hyde. I think that appeared in The Chicago Tribune?

Mr. TURLEY. Yes, sir.

Mr. COBLE. It is an excellent article, and we thank you for that.

Mr. Krone, thank you for your testimony. There is no way I can say to you I know how you feel, did not go through it, but thank you for being here with us.

Now, Mr. Chairman, the distinguished Ranking Member from your state of Virginia, has raised some good points, I think, that indicate that some fine-tuning may be necessary. I do not think we need to major overhaul the bill. And, Mr. Chairman, as you remember, I supported the Second Chance Act, sort of a companion bill with this one.

Let me ask the U.S. attorney a question, if I may. Mr. Wrigley, describe for us, if you will, the situations where a person may be retried after their conviction is vacated or reversed.

Mr. WRIGLEY. I apologize. I could not hear the end of your question. I am sorry.

Mr. COBLE. I say describe for us the circumstances, the situation in which a person may be retried after his or her conviction is vacated or reversed.

Mr. WRIGLEY. Okay. Well, let me give you an example from my State. Shortly after I became U.S. attorney, there was a rather notorious—it happened to be a murder case, but it could be any kind of a case—criminal case. A notorious murder case was tried in State court across the river in Minnesota. The judge there made a

ruling that was not on the firmest ground, you know, made a discretionary call on an evidentiary matter and allowed the person's wife to testify against him because he ruled that their marriage was a sham, and he should not be afforded protection under the marital privilege, and so she was allowed to testify in Minnesota state court, he was convicted, and the matter went up to——

Mr. COBLE. Make it quick because I only have 5 minutes.

Mr. WRIGLEY. Oh, yes, sir. It went up to the State supreme court, and the State supreme court reversed it in Minnesota. It came back, and that county court over across the river would have been allowed to try that case again just not using that evidence. Basically, the court sent it back, said, "Try it again, but now do it within the confines of our ruling and our evidentiary ruling."

So that is fairly common, frankly. It gets sent back, and it is just determined that an improper ruling was made by the trial court on an evidentiary matter, and I think that would probably be your most common retrial purpose.

Mr. COBLE. All right. I thank you, sir.

Professor Turley, is it your opinion that a lower likelihood of recidivism should be grounds for early release?

Mr. TURLEY. Yes, sir.

I mean, first of all, let me thank you for your comment, and it is a privilege to be here. I know Henry Hyde is being buried tomorrow, I believe, and it is a great privilege to be in this room with his portrait and to think about his wonderful service to this Committee which he loved a great deal.

Yes, I do believe that the touchtone of whatever we do has to be recidivism, and we have a wealth of studies to make decisions based on recidivism, and we have had a revolution in science in the last 20 years. In 1983, the science was not nearly as evolved as it is today. So we can make decisions, and the rate of recidivism, if we make the decisions correct—we have not had, as far as I know, any POPS prisoner that has recidivated, but we are very, very careful, and we are very conservative in how we select.

It is not that you are going to have a perfect system, but if the measure is the current system, I can promise you that I can do a lot better in the Federal system than, you know, a 67 percent failure rate. I mean, we are talking about less than a 10 percent failure rate. If I am over 10 percent, I would be appalled. I would consider that a terrible system.

Mr. COBLE. Let me try one more question before the red light illuminates and the Chairman comes after me.

We all know, I think—I will put this to anybody on the panel—sex offenders have one of the highest, if not the highest, rates of recidivism of any class of offenders. Do you all have any objection to the early release of those convicted of possession of child pornography or sexual solicitation of a minor, neither of which would be classified as a crime of violence? What do you all say to that?

Professor Woolard?

Ms. WOOLARD. Well, certainly, the recidivism rates that you talk about we do see higher among certain classes of sex offenders than we do for other categories of crime. So that, I think, is pretty well established.

In terms of your specific question about what the bill should include or not include, you know, I can provide you information about recidivism, and then I think it is your decision, you know, as the policymakers, in terms of what crimes are included or not included. They do have a higher rate of recidivism, certain groups of them do.

Mr. COBLE. Thank you all for being with us.

Mr. Chairman, I see my time has expired.

Mr. SCOTT. Thank you.

The gentlelady from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And I want to again associate myself with the Chairman of the full Committee by applauding him for giving us another one or two or three bites at this apple which is enormous, and it is an important discussion where we can grapple with what I, frankly, believe is a broken system.

My good friend from Virginia has indicated a philosophical difference, and what I was suggesting to him is the philosophy in discussion results in policy, and that is what we are to do, policy and law, and so there is a difference in the philosophy of what results in progress or success and what we all want.

Really, I think, the best of all worlds is a crime-free world and a world that we can account for those who have perpetrated crimes and we can say truly rehabilitated and present and ready to contribute back to society. So that is the framework of the Federal Bureau of Prisons Nonviolent Offender Act.

And, Mr. Mosely, I agree that there is a partnership to good time, though it is different, and what I would like to do is just delay the framework and ask that this be submitted into the record. But if you look at our own state of Texas, now we are at 147,993. That is in 2003. So our numbers are not complete. But we are spending $2 billion in the incarceration of persons, and I would say to you that there are probably a good number of bad actors that are incarcerated there, but there are probably a good number of elderly persons there or people that are aging in the prison system, and, of course, we know that Texas does have an early release program.

If we look at the cost of Federal and State corrections, we are seeing that in 1980 we spent $9 million, and now we are spending $60 billion, and to incarcerate a person, it costs about $24,000. To have a person in community corrections, it costs $20,000, but to have someone on a Federal offender supervised program, it costs about $3,000. And, of course, you can finish your term in the Federal system and be on probation. You have sort of a probation period, and I think that is important to note.

So, Professor Turley, let me also suggest to you, as I ask you some pointed questions, that we want to find solutions, and I have already indicated—we used the words "tweak," "amended"—I think we have a good framework to amend.

I want to ask, Mr. Chairman, that those poster boards—at least the text of those poster boards—be submitted into the record.

Mr. SCOTT. The information from the poster boards will be——

Ms. JACKSON LEE. Thank you. The text I said of the poster boards.

And I do want to thank your staff and Bobby Vassar and all of your staff, and I want to offer into the record a document that says Uniform Crime Reports, November 2003, which shows a graph that says that an elderly person has as much propensity to perpetrate a crime—this is science, as we have said—as about a 12-year-old. We do know that people getting younger who are committing crimes, but statistically it says that these ages are at the lowest level of committing a crime.

I would like to submit that into the record as well, and that is only one sheet, Mr. Chairman. I ask unanimous consent to submit this into the record.

[See U.S. Department of Justice information on page 82 of this publication.]

Ms. JACKSON LEE. Thank you.

So I want to pose these questions with that framework, Professor Turley, and that is, one, let me just say that I accept the fact that we want to frame the legislation through an amending process, and I am delighted to note that with that tweaking my Chairman of the full Committee is to be and very interested in joining us, as I expect a number of others in co-sponsoring the legislation. I appreciate it.

One, the legislation on its face does not define the question of violence, and that, obviously, is something that we would look at, but neither have we found that in the Federal Bureau of Prisons. So we want to work on accepting the fact that there are certain actions or certain crimes that we would be willing to eliminate.

But going to the point of recidivism, how reliable is age in predicting recidivism, coming from you and your research that you have done?

And then you referred to making mature decisions about our prison system and preventing new victims that are due to overcrowding. How does overcrowding produce victims, which is what we are facing in our prison system today?

You also mentioned that you have reservations. What I would like you to do is to give us sort of a road map of what might help strengthen the legislation for its very premise, which is documented science that recidivism is very low in older populations, and my component is that not only is it low, but they could be contributing, 45, 48, 50—the age may vary—can still be contributing even to the extent of restitution and, of course, helping their families become independent of public assistance.

I gave you three questions, and I appreciate your response.

Mr. TURLEY. Thank you very much. I do not remember the order, so I will just take them as best I can.

Ms. JACKSON LEE. That is okay.

Mr. TURLEY. First, I think the legislation is a wonderful framework for us to work in, and like many pieces of legislation, it can be tailored. I think some of the objections raised so far—not really objections, but observations—I think it was foreseen that those would have to be incorporated.

You can exclude certain categories of crime. I think we can all agree that terrorists should not be on this list and spies cannot be on this list. I have represented both, but I would be the first to say that they should not be on the list.

I also want to note you are talking about a handful of people with those exclusions.

Ms. JACKSON LEE. Absolutely.

Mr. TURLEY. So that is not——

Ms. JACKSON LEE. And right now, they are probably not in our system.

Mr. TURLEY. Right. I mean, that would——

Ms. JACKSON LEE. In our population.

Mr. TURLEY. Yes, a few dozen people very likely that could ever be under this law. And we also will probably want to exclude areas that science shows are simply a poor yield in terms of recidivism, things like molestation, child pornography. Those are the types of crimes that recidivist studies have shown do not diminish with age.

So, if we agree on using the scientific foundation that we have, I think we can come to a very easy accommodation as to framing this question.

In terms, however, of age, as you have raised, I do not know of anybody in this bill that does not agree that age is the most reliable predictor of recidivism, and when you graft on to that process other elements—age, criminal pattern, and other elements—it becomes very, very accurate. When I say very accurate, I am saying it is much, much more accurate than our current system. I do not know of any legitimate system of recidivism that would produce the types of results that we have under the current system.

Now it gets to the last question. When we talk about protecting victims, I think the greatest victim protection law is a law that produces fewer victims, and we only talk about this in a post hoc way of, you know, what are we going to do with these victims. Let us have fewer victims.

The problem with just saying, "Well, you know, let us just lock them up," is I do not want to make this decision, no one wants to make this decision, and so we let the system go into chronic overcrowding. We let the system release the people of highest risk, and those people go out and commit new crimes, and nobody is answering for it because nobody wants to sign a piece of paper, nobody wants to come here and say, "We have to make choices." And we need to fix that system because there are people being victimized today who would not be victimized if we had a prison system that worked.

Ms. JACKSON LEE. I think what is also important to put on the record is that we are facing this problem in the Federal system because we have mandatory sentencing without parole, any kind of release whatsoever.

And, Mr. Chairman, could he just finish this question. The point has been raised that the victim——

Mr. SCOTT. Very briefly because your time——

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. SCOTT [continuing]. Expired some time ago.

Ms. JACKSON LEE. If you could reiterate again that the argument that is made is that you are hurting the victims again. You know, the article suggested you do not want these outrageous persons to be out, like a Jack Abramoff or others, because there are victims. How do you respond to that?

Mr. TURLEY. Well, first of all, Abramoff would not be subject to this law because he has to serve at least 50 percent of his sentence, and after we——

Ms. JACKSON LEE. I am glad you put that on the record, but——

Mr. TURLEY. And furthermore, you know, if you make further tweaks, you can deal with people that have certain types of crimes, but I have to say even if Abramoff did finish half his sentence, you know, I do think that if you have a long sentence and someone has served half of it, then we can consider whether that person, as a first offender, should be released.

My preference would be having what we had before. You know, Mr. Krone talks in glowing terms of what happened in 1983. What happened in 1983 is we eliminated the United States Parole Commission that made case-by-case decisions. The reason we are talking about a trigger law like we have here is because we have no body that can make case-by-case decisions, which is what I would prefer.

Mr. SCOTT. The gentlelady's time has expired.

Ms. JACKSON LEE. Thank you.

Mr. SCOTT. The gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman. And I do appreciate the witnesses being here today. I do have a number of comments.

Having been a prosecutor, a judge, a chief justice and also having been ordered to handle some criminal cases—in one case, a death penalty appeal—I think all of which I did a pretty amazing job on, including having the death penalty reversed, I understand about both sides of the docket, and I think there is no question we have an obligation as a society and responsibility to attempt to rehabilitate prison inmates. But we also have to be very careful not to create incentives to do the very things that people are being punished for, and that is a concern I have had.

We saw the pendulum in the 1970's, and I think in the early 1980's, in Texas was more to release people early. People through the 1980's in Texas were getting cut loose with just a tiny fraction of their time, sometimes doing 1/12th or less of a sentence, and so there was a push for truth in sentencing. When the Republicans had the majority in Congress and the Republicans took the majority in Texas, there was this huge push toward truth in sentencing. So judges and juries knew exactly what the consequences of the sentences would be.

What we have seen in the recent few years is a retreat from that position, and, you know, if you are a historian like I am, you see these pendulums going back and forth. And I get the impression the pendulum for a couple of years now has been swinging back the other way toward cutting slack. We saw crime rates dropping as we got tougher in Texas and dropping and dropping and dropping, and now they are a little bit more on the upswing.

So, Mr. Turley, I have tremendous respect for your legal intellect. Sometimes we have agreed, and sometimes we have not, and I appreciate you whether we agree or not. But when you say this is a science, if that is true, it is one of the most inexact sciences there is.

And also the point needs to be made this is not simply about science. This is also about justice. Now we can bring in here case after case——

And, Mr. Krone, I have nothing but sympathy for you, and there are so many others where there has been injustice, but there are also as many victims who have never to this day seen justice. And so when we have a bill that is being proposed as one of these is today, that we are going to start paying people who have been pardoned, which means they were not exonerated, they were just pardoned, but we are going to create a definition that says, "We are going to consider you exonerated just because you have been pardoned" or your conviction has been vacated or reversed, and people like me know that you have cases which have been reversed because some judge did a problem. I have seen a couple of them in other courts in our country, reversed because of some technical problem.

And so they are retried and, in some cases, three times get convictions, and by the time it ultimately gets sent back for trial again, witnesses have died and the courts have ruled you cannot use those people's prior testimony because they are not allowed to confront the witnesses with new issues that have arisen. Therefore, guilty people have walked free. And that happens.

And under this bill, we are saying we are still going to pay you. The victims in those cases never got justice, and yet we are going to say we are going to aggravate that circumstance by paying defendants simply because they hit the jackpot and got released because of some problem in the trial court, I think that would be a problem.

There has been a big push in recent years to have life without parole instead of the death penalty. What we are saying with some of this legislation is: Keep in mind if we convince you to get rid of the death penalty and go with life without parole, we are going to come in, pull the rug out from under you, and cut your guys loose in 15 years. That is not exactly right either.

There is another message from some of this legislation we are considering today, and that is if you want to commit crimes, do what this couple that was caught yesterday did, get involved in stealing identities, wrecking lives, destroying lives where people cannot buy homes, cannot get credit, cannot get jobs, do that kind of crime because that would be a nonviolent crime, and we are already showing that we want to cut you all kinds of slack. White collar crime, Enron felons, we want to cut you slack. That is the pace to go if you are going to be an organized criminal. Make sure you get involved.

I have had testimony from gang members and we have seen testimony from organized crime members who say, "Look, we are businesspeople. We go where the percentages are best, and the punishment is least." We also see—and I have had testimony in my court—these folks are juveniles that actually pulled the trigger because they were encouraged. "You are a juvenile. You are going to get cut slack that the rest of us cannot." They are businesspeople. They know how to play the odds.

And I think that those things have to be considered. You cannot just consider recidivism. You have to consider deterrents, public safety, and, yes, punishment for punishment's sake.

My time is up. Thank you very much.

Mr. SCOTT. Thank you very much.

I had just a couple other questions.

Mr. Turley, we have heard about the idea of a governor's pardon might pardon a person who is factually guilty or factually innocent. Isn't it true that if the governor's exercises his discretion that it could be for absolute innocence?

Mr. TURLEY. Oh, absolutely. Yes.

Mr. SCOTT. And that as a matter, a lot of people who are absolutely exonerated are not exonerated in a court of law, they are exonerated because a governor issues a pardon and that a lot of the 100 who have been exonerated by DNA evidence, for many reasons, could not even get into court?

Mr. TURLEY. Oh, indeed. In fact, one of the problems that we have, one of the frustrating problems, is the view of courts that exclude exculpatory evidence because of various reasons. The evidence may be excluded because of error of counsel. It may be excluded because it was raised too late under laws passed by Congress. There are limits on your ability to raise new issues on appeal. So all of those reasons can lead to the failure to consider evidence in a court of law that, in fact, could be considered by a governor.

Mr. SCOTT. Now we have heard a lot about when you have so-called truth in sentencing that they keep talking about the sentence as if the sentence is the same in all proposals. I, frankly, have never seen a proposal to abolish parole that did not concurrently reduce the sentence at least 50 percent—if you are being honest, three-fourths—because that is what a good comparison would be. If you double the average time served, in the situation of Virginia, you have 1½ to 10 years, average 2½. You double the average time served. Everybody got out in 5 years. Those that could not make parole are getting out in half the time.

Have you seen any proposal to abolish parole that kept the sentence exactly the same in the new system as the old?

Mr. TURLEY. Well, I have not. As a criminal defense attorney, I can tell you that one of the big jokes among criminal defense attorneys is that the tough-on-crime legislation tends to favor the really hardened criminal because that guy would never have gotten through a U.S. Parole Commission, would never have gotten through a State commission. These are people that on parole boards would sit there and just take one look at your guy and say, "There is no way I am going to release you early. I take one look at you, and I see an avertable or habitual offender." Under these laws, that guy benefits because he gets out automatically.

The other thing I want to note is, in my testimony, I mentioned that some of the recent studies on the State level have actually presented some interesting results. One of them is that people who are in a parole system have a lower recidivism rate than people who max out in a non-parole system so that it is actually a significant difference, that if you are in the old parole system, you have a lower likelihood of recidivism.

And if you look at some of the States, there are a handful of States that have actually lowered their recidivism and lowered their prison population. That State, which I talk about in my testimony, is actually a State that went back to indeterminate sentencing and put people into alternatives for incarceration. So the studies are actually going against our current system in terms of its effectiveness.

Mr. SCOTT. Well, in going back to what Virginia did 1½ to 10 years, you call it a 10-year sentence, average 2½, we doubled the average time served, spending billions of dollars. If you look at what you did, following up on what you just said, for the lowest risk prisoner, you triple the time. For the average prisoner, you double the time. And for the worst prisoner that could never make parole, they are getting out in half the time.

And for a proposal that lets the worst criminals out in half the time, you are going to spend $2 billion construction and $1 billion a year, $200 million per congressional district construction and $100 million operating every year, to start a proposal that lets the worst criminals out in half the time.

Ms. Woolard, you indicated that on sex offenders, some sex offenders recidivate more than others. Could you provide us with the research that shows which of the crimes have higher recidivism rates and which do not, because I think most of our legislation kind of puts them all in the same basket.

Ms. WOOLARD. Sure. I would be happy to bring that to you all and have you——

Mr. SCOTT. Thank you.

The gentleman from Texas, any questions?

Mr. GOHMERT. Yes. Thank you, Mr. Chairman. A little follow up. And some of your comments brought to mind—and Professor Turley's—we have one of those cases that is going on right now where there was a great injustice, I believe, a tremendous injustice at the trial, and that was two Border Patrol agents, Ramos and Compean, where the U.S. attorney's office apparently was not honest with the court and with the jury, and an injustice occurred, and I am certainly feeling that we owe those two Border Patrol agents some monetary help when they get out.

So I realize that there are some good intentions and some good ideas here, but just like in the Second Chance Act, there is a right idea. We have to do a better job of rehabilitation, retraining, or educating in some cases for the first time, but, you know, my concern, as I said, through that bill was we are going about some wrong ways to try to get to the right result.

You know, what we have seen in some of the recidivism numbers, and I agree whether it is parole or probation, it helps if you have a stick and carrot both out there for people when they are released. Whether it is an alcoholic or a drug addict, they need that supervision, they need the monitoring, they need some accountability, and that those can be very helpful in cutting recidivism from the numbers I have seen, and I would sure agree with that, and I am hopeful that that is more the direction we would go.

But I also have to note that some of the things that I have heard today—and for part of this, I was sitting in the back room watching on television and taking notes—I have heard from a dear judge

friend of mine. I think the world of her, she is one of the finest people you could ever meet, but she took some of these similar positions and that is what caused her in one particular case to keep giving a young juvenile a chance when he should have been locked up and should not have been let out.

And because he was let out under that same type thinking—we need to help, we need to encourage, we need to train, we need to educate, we need to do these things instead of just punishing somebody when they have done something very wrong—he got a couple other guys, they went out, they found an elderly fruit stand vendor, they kidnapped this poor gentleman, they terrorized this poor gentleman, and then they shot him in the back of the head and left him dead, and then ended up abandoning the idea of the bank that they were going to rob because they could not drive the stick shift truck of the gentleman.

So, you know, some experiences like that cause me to go, yes, we do need to cut recidivism. There is no question. We need to do a better job of rehabilitation, no question. But sometimes when somebody is dangerous, they need to be locked up so that we do not create more victims, and that is also why the statistic about juveniles that commit terribly violent acts are more inclined to have recidivism. Sometimes they are just what under the old DSM used to be sociopath, but now I think would be antisocial personality.

So there is work to be done. I think the intention is right, but, my goodness, we have to be more careful with the messages we send with the legislation that we take up.

And thank you, Mr. Chairman. I yield back.

Mr. SCOTT. Thank you.

Further comments? The gentlelady from Texas?

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I wanted to pose a question to Mr. Mosely. You had a very moving story, and I did not get a chance to speak to Mr. Krone, but I think the legislation that comments on compensation late but squarely responds to you as a victim. When we use the term "victim," there are victims, and we do not want to be insensitive to the crime victim.

In your instance, Mr. Krone, you did not commit that crime, so the victim was not your victim or the victim that you victimized. You on the other hand had become a victim.

And Mr. Moseley's point is those who have been sentenced—I was listening to you say 100 years, 125 years. Mr. Mosely, just on your particular offense, was that extraordinary? How did you wind up with—did you kill someone?

Mr. MOSELY. No.

Ms. JACKSON LEE. You need to get the mike, sir.

Mr. MOSELY. Is it on?

Ms. JACKSON LEE. Yes, sir.

Mr. MOSELY. I was indicted by a Federal grand jury on six counts.

Ms. JACKSON LEE. So some of yours was mandatory sentencing, I take it.

Mr. MOSELY. Well, I was facing 132 years, 120 in the Federal system, and I was also indicted for the same offense by the State of Ohio carrying another 12 years.

Ms. JACKSON LEE. And you served how many?

Mr. MOSELY. Well, I was sentenced to 10 years in the Federal system and 12 years concurrent in the State of Ohio, and I served a total of 7½ years.

Ms. JACKSON LEE. All right. And did you receive a good time response? Is that what you are saying?

Mr. MOSELY. Yes.

Ms. JACKSON LEE. All right. And so there allegedly were victims in your crime. How do you answer the question that there are victims? How do you answer the question of how you have been able to turn your life around and how you have been able to help your family by having a reasonable response to your incarceration, which is good time, utilization of good time?

Mr. MOSELY. Well, in several respects. Firstly, my crime was a money crime, kickbacks from contractors that were working for the city wherein I sat on the bench—I have been making restitution in that regard—together with the fact that I have had an opportunity to go to various institutions around the country, speak to men and women who are incarcerated, and encourage them with respect to paying back in any way that they possibly can. But also I am invited from time to time to speak to high school students and college students, and I make them aware in a talk that I give that "it could happen to you." And I try to instill in them that the shortcuts of life can cause one to forfeit many opportunities that might come their way.

Ms. JACKSON LEE. So you have turned around to be of assistance by having an early release through good time?

Mr. MOSELY. Yes.

Ms. JACKSON LEE. And turned you around?

Mr. MOSELY. Yes.

Ms. JACKSON LEE. Professor Turley, again, if I could just point out, I think I just want to leave on the table the fact that we are not ignoring victims, the original victims of the incarcerated person who now may have the opportunity to come out because they are older, because they are 45 or 50. Can you just pointedly answer the question how do you resolve that conflict? There is a victim left, whether or not it was fraud or some other offense, again, and now someone is getting out short of the—I am going to go on the Federal system—the mandatory 35 years. They have served 17½, and they are coming out. How do you reconcile those two distinct aspects?

Mr. TURLEY. I would be happy to answer that.

First of all, I wanted to apologize to Mr. Krone. I meant to refer to Mr. Wrigley in his testimony in terms of the elimination of parole. I am sure Mr. Krone was wondering why he was being associated with the elimination of parole.

But the answer, I believe, is, first of all, the standard of the 50 percent of the sentencing is not out of line with what you see in the State system in terms of time that is actually served before people become eligible for release, either under parole or with discounted time, under one rule or the other, and so it is not a great departure in that sense. At POPS, we use the average served for a crime, but that is a bit too fluid for a provision of this type. You are trying to create an automatic trigger because we no longer have

a parole commission, and so we are trying to craft a law that will allow for the safe release of individuals under these criteria.

As for the victims, I think that we have to speak to victims and the public and say that we have a responsibility. We have a system that is dysfunctional, that is generating crime, generating more victims. We are not really doing anything. We have a system that is basically a warehousing system. That is what we went to in 1983. We ripped up a lot of rehabilitative systems. We went into overcrowding.

If you work in prisons like I do, you would have witnessed rooms that were dedicated to education, rehabilitation that were ripped out and just literally bunk beds put in. I have been in rooms where hundreds of men are basically held in giant settings with multiple bunks. We are warehousing them.

So we do not have a true correctional system in any modern sense of that term with a rehabilitative element. We have a warehousing system, and as a result, recidivism is soaring. So what I would say to those victims is this: We want to guarantee that people serve time for these crimes, and we want to make sure they serve significant time, but we also want to make society safer, and we need a correctional system that is tied to that purpose, not warehousing, but to reduce crime by reducing people who commit crime. That is your recidivism.

Ms. JACKSON LEE. Mr. Chairman, just as I heard my good friend from Texas, Professor Turley ended where I would like to end. I think the legislative initiatives before us are to reduce crime, are to reduce the number of victims, are to make our communities safer, are to ensure that people who are released can be rehabilitated, that they can be contributing, that they can give back to the community, to get men, particularly in the African-American community, back into their home where their families need them, and I think that the populations that are most impacted are the numbers that are soaring in other areas. So I hope we can move forward on this theme, philosophy, which results in policy and law, and I certainly think we can do it in a bipartisan way and be effective in making America safer and reducing crime.

I yield back. Thank you.

I would like, excuse me, unanimous consent to put this article in the record, "Why Early Release Programs, Especially for the Elderly and Infirm Prisoners Are a Good Way for Kentucky and Other States to Address Budget Shortages." I ask unanimous consent.

Mr. SCOTT. Without objection.

[The information referred to follows:]

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Politics

Dec. 5, 2007, 12:37AM

Early release for nonviolent offenders proposed

Jackson Lee's bill could aid Skilling, Fastow, Wyatt and thousands of other federal prisoners

By MICHELLE MITTELSTADT
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WASHINGTON — Drug traffickers, white-collar criminals, corrupt congressmen and thousands of other federal inmates could see their prison time slashed in half if legislation drafted by Rep. Sheila Jackson Lee becomes law.

The House Judiciary crime subcommittee on Thursday will examine a bill by the Houston Democrat that would mandate early release for federal inmates convicted of nonviolent crimes if they are 45 or older, have served at least half their sentence and have not engaged in violent conduct behind bars.

Jackson Lee described her legislation as a way of returning nonviolent offenders to society so they can be productive citizens, help their families and reduce spiraling incarceration costs.

"This legislation is to reward good behavior," Jackson Lee said in an interview. "It is a process intended to protect the public as well as to provide some relief for the families and these individuals who can be adjudged rehabilitated or ready to be released in some form."

High-profile Houston cases

Jackson Lee's proposal could free some high-profile, white-collar criminals from prison early. Among the possible beneficiaries: former Enron executives Jeffrey Skilling and Andrew Fastow, disgraced lobbyist Jack Abramoff, recently convicted Houston oilman Oscar Wyatt and, according to federal Bureau of Prisons estimates, as many as 12,400 others.

Some civil rights advocates have argued that a 1984 law establishing mandatory minimum sentences, aimed primarily at drug offenders, has resulted in harsh penalties for thousands of minority citizens.

House Republicans oppose the bill, which would undo the sentencing structure that Congress imposed in 1984 when it effectively ended parole in the federal prison system and required that most offenders serve at least 85 percent of their sentences.

"Democrats should think long and hard before supporting a bill that would severely damage our criminal justice system and could have catastrophic effects on society as a whole," said Rep. Randy Forbes of Virginia, the top Republican on the crime subcommittee.

Many could benefit

Forbes said the bill would require the release of about 6 percent of the 200,148 federal inmates currently imprisoned.

"That means criminals convicted of fraud, civil rights violations, immigration violations, or even the sexual solicitation of a minor would receive early release from prison," he said. "Even Skilling would be eligible for an early release."

The Bureau of Prisons and Justice Department declined comment on the proposed legislation. But a House Republican aide familiar with the bill, speaking on condition of anonymity, said arsonists, embezzlers, burglars, money launderers and people convicted of possessing child pornography also could potentially benefit.

Under the federal definition of what constitutes a violent crime, only inmates convicted of murder, rape, robbery, aggravated assault and non-negligent manslaughter would fall under the violent offender category exempt from Jackson Lee's bill, according to GOP aides.

Though Jackson Lee said inmates would have to go through a strict vetting process, her legislation does not establish guidelines, essentially mandating the release of all inmates who fit the age, time served and nonviolent crime criteria.

Jackson Lee described her legislation as a first draft and said she would be happy to work with Republicans or others who have concerns about the measure or wish to limit its impact. "I am willing to compromise," she said.

But the GOP aide suggested there was little room for common ground.

'Ready to listen'

Jackson Lee expressed some consternation that Republicans are criticizing the bill even before it gets a hearing Thursday.

"I'm ready to listen to them. Why don't they wait and listen to the testimony?"

Having a hearing on the bill is a "great first step," Jackson Lee said, adding that she will later push for the Judiciary Committee to approve the legislation.

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leebob200 wrote:
have you ever run a stop sign or ran a red lihjt these are crimes to what shud we do with you?
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Mathis1 wrote:
Mrs Jackson God had to put you in places to free the black man. It is some many that are lock up and need to be home taking care of their family. Please continue to let God use you. My husband got a life sentence for a lie that was told by his so call friends. For a conspiracy charge. We have been fighting for his life for 13 years in Charlotte, NC. The judges has a statement for someone that stated that he was focused to tell a lie to convict him. May God Bless you.
12/5/2007 9:26 PM CST
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2badd wrote:
krummy1954 ;

I think your stretching the evidence part of your post , and as far as changing parts of the proposal that miss lee has issued , hasn't been apparent and if you have concerns ? she must not , doesn't that bother you a little ?
To many laws that these people come up with are usually deemed discrimnating or unconstitutional in some form . this one is just wrong !
They really should be concentrating on changing the laws for power cocaine and meth , because all three when smoked are deadly and turn people into addicts and thieves and ofter prostitutes to finance there habits !
12/5/2007 8:02 PM CST
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krummy1954 wrote:
Many of those men and women in prison are there for circumstantial evidence because with the Feds they do not need proof to put you away. Just their suspicions. There are literally thousands that you wouldn't know from your next door neighbor if you didn't know the background. As a matter of fact there may be one right next to you now.
12/5/2007 7:40 PM CST
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krummy1954 wrote:
Yeah and all of you putting a damper on this proposal would be the first in line to get it if you had a loved one locked up. I think what she is proposing is noble. Maybe you should all take a look around and know what you are talking about before blindly posting. Sure the bill needs some refining; I don't agree with a large portion of it but for the most part it makes sense.
12/5/2007 7:37 PM CST
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Mr. SCOTT. I would like to thank the witnesses for their testimony today. Members may have additional questions which we will forward to you and ask that you answer as promptly as you can.

Without objection, the hearing record will remain open for 1 week for submission of additional material, and we have a list of materials already to be submitted: a letter from the ACLU, some articles from The New York Times, reports about Juvenile Life Without Parole and Sentencing from both Amnesty International and the Human Rights Watch, reports on reducing prison population from the JFA, the James F. Austin, Institute, and a chapter from the book "Capital Consequences" about Mr. Krone's specific case.

Mr. GOHMERT. Mr. Chairman, can I——

Mr. SCOTT. The gentleman from Texas?

Mr. GOHMERT. I just had a question, clarification. Is one of the results of this hearing the inference by this Committee that 45 is elderly? I just wanted to be sure. [Laughter.]

Mr. SCOTT. I think you and I both would not consider 45 elderly.

Mr. GOHMERT. Okay. Thank you. I just wanted to be clear.

Ms. JACKSON LEE. Possibly in mind, though.

Mr. SCOTT. Without objection, the Committee stands adjourned.

[Whereupon, at 2:12 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

WRITTEN STATEMENT OF STEPHEN SALOOM, ESQ.
DIRECTOR OF POLICY, INNOCENCE PROJECT

BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

REGARDING H.B. 4063, THE RESTITUTION FOR THE EXONERATED ACT OF 2007
HEARING HELD ON DECEMBER 6, 2007

On behalf of the Innocence Project, thank you for allowing me to submit testimony to the House Judiciary Committee regarding H.R. 4063, The Restitution for the Exonerated Act of 2007. Having provided direct counsel or consultation to over half of the innocent people proven by post-conviction DNA evidence to have been innocent of the serious crimes for which they had been convicted, we are intensely aware of the tremendously difficult situations these people face upon release, the vital need for services at that time, and the virtually complete lack of assistance – governmental, non-profit, or private - available to them for overcoming those difficulties.

We are extremely pleased that Congress has chosen to address the critical issue of compensating the wrongfully convicted. We are concerned, however, that as written and focused the proposed

legislation has significant potential to fall short of effectuating its intent. We would welcome the opportunity to work with committee members on the suggested changes, detailed below, that seem to better ensure that such a law can effectively and efficiently provide the most comprehensive available services to the wrongfully convicted. This testimony will describe the impacts of incarceration on the wrongfully convicted; describe their extraordinary needs upon release; articulate our concerns with The Restitution for the Exonerated Act as drafted; and provide recommendations for how to best enable the exonerated to receive the services and assistance necessary immediately upon their release from wrongful incarceration.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 209 people who had been wrongly convicted of serious crimes. Not only have DNA exonerations led to a growing public awareness of the possibility of wrongful conviction, but media accounts accompanying these exonerations have brought into stark relief those issues facing individuals who are attempting to re-enter society following protracted incarceration. The exoneration of each wrongfully convicted individual provides us all with an opportunity to examine and consider the re-entry needs and appropriate compensation due to the victims of those errors who, innocent of the crime accused, were nonetheless stripped of their lives and liberty and forced to endure the horror of prison.

Impacts of Incarceration on the Wrongfully Convicted and the Need for Comprehensive Services Upon Release

The Effects of Incarceration

According to a recent report written by the Re-entry Policy Council, a bipartisan group comprised of leading elected officials, policymakers and practitioners working in state and local governments, barriers to successful reentry are profound: "Research shows that when people who are released from prison or jail return to the community, their job prospects are generally dim, their chances of finding their own place to live are bleak, and their health is typically poor."[1]

Psychological literature recognizing the emotional and psychological harm wrought by incarceration is also well established. Indeed, incarceration trends over the past 35 years, characterized by incapacitation and containment as opposed to rehabilitation, have exacerbated the profound reentry issues facing individuals who are returning to society after long prison stays. The 1970's marked the beginning of exponential prison population growth and a concomitant sea change in incarceration policy. As the prison population began to skyrocket, there was an attendant reduction in available resources and staffing, increased prison disturbances, diminished living conditions and limited access to meaningful prison programs,

[1] *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community.* Council of State Governments. Reentry Policy Council. New York: Council of State Governments (2005).

leading psychologists to observe that the transition from prison life to society is today "more difficult and problematic."[2]

Institutionalization reaps profound psychological consequences for the incarcerated, from diminished decision-making capabilities to overwhelming distrust of others to psychological distancing. Prison culture demands the rejection of any behavior that might reveal any sort of emotional weakness or intimacy. As a result, the "emotional flatness" that an individual might have adopted in prison in the service of self-protection can be devastating to his social relationships upon release.[3]

The Specific Effects of Wrongful Incarceration

All of these experiences are only compounded by one's knowledge that he has been wrongfully convicted and incarcerated. A 2004 study that examined the psychological effects of wrongful conviction presented a series of clinical findings based on assessments of a sample of wrongfully convicted men.[4] More than 75% of the sample group experienced enduring personality changes, defined as "characteristics that were not previously seen such as hostile or mistrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of

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[2] Haney, Craig. *The Psychological Impact of Incarcerations: Implications for Post-Prison Adjustment.* Paper prepared for the Urban Institute National Policy Conference, From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities (2002).

[3] Ibid.

[4] Grounds, A. 2004, *Psychological Consequences of Wrongful Conviction and Imprisonment.* Canadian Journal of Criminology and Criminal Justice, 46(2): 165-183.

threat, and estrangement."[5] Two-thirds of those assessed experienced post-traumatic stress disorder, and 90% evidenced some form of a psychiatric disorder. As one might expect, nearly all of individuals interviewed experience incredible feelings of bitterness and "strong and unresolved feelings of loss."[6]

These feelings of loss are not limited to grief and mourning over loved ones – often parents – who died during the course of their incarceration; relationships with family members, including children, are often permanently fractured or destroyed. Feelings of "what might have been" extend to their professional lives. The average prison stay of individuals exonerated through DNA testing is 12 years. During the course of those years, many of the exonerated missed out on educational and workforce development opportunities. They typically return to their communities unable to meet even basic professional expectations and feeling generally out of step – as indeed they have in so many instances proven to be, particularly in light of the conviction and incarceration having been wrongful.

The exonerated also typically face serious medical issues upon release. Research shows that the strain and trauma of prison life yields a higher incidence of medical problems for the incarcerated as compared to the general population. For instance, the health of fifty-year-old prisoner has been found, on average, to be similar to that of the average sixty-year-old in the

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[5] Ibid.

[6] Ibid.

general population.[7] Of course, prison life also increases exposure to communicable and serious diseases, including HIV and Hepatitis B and C, many of which require long-term and comprehensive healthcare upon release. Medical care provided to prisoners is notoriously poor, exacerbating existing conditions and leaving others untreated. Prison rape is also prevalent, with some experts estimating that more than 40% of the prison population has been victimized.[8] In short, the medical and mental health problems facing the wrongfully convicted upon release are enormous.

A *New York Times* expose published last month tracked the experiences of those wrongfully convicted individuals proven innocent through DNA testing and found that most "have struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of years of questionable or wrongful imprisonment."[9] The in-depth investigation further noted a delay in the provision of monetary compensation and services, if these were to come at all.[10] According to their research, "nearly 40 percent …got no money for their years in prison...More than half of those who did receive compensation waited two years or longer after exoneration for the first payment."[11]

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[7] Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences, 65 Fed. Probation 3, 5* (2001).

[8] Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities,* 75 PRISON *i.* 413, 414 (1995).

[9] Roberts, J. & E. Stanton. (2007, November 25). A Long Road Back After Exoneration, and Justice Is Slow to Make Amends. *New York Times*. It is worth noting that from the Innocence Project's experience and perspective, monetary compensation – along with both the services consistent with those contemplated in this legislation and some form of sincere apology from the government - are essential components to the foundation necessary to an exoneree's ability to move beyond his wrongful conviction and incarceration, and successfully build a post-exoneration life.

[10] Ibid.

[11] Ibid.

Exoneree Difficulties Exacerbated by State and Local Inattention to Re-entry Service Needs

Save for an exceptionally small number of jurisdictions[12], state and local governments do not ever provide for the medical, mental health, re-integrative, housing, vocational, and subsistence needs of the wrongfully convicted upon exoneration. This is typically due to the fact that these wrongfully convicted people are not being released to traditional programs for individuals who have completed their prison time (e.g. parole, probation, etc.); they are being released directly "to the street" when the government realized that these people were wrongfully convicted and deserving of immediate release. Yet because the numbers of the exonerated are so small, in combination with the phenomenon of wrongful conviction being newly respected as legitimate, states and local governments have not seen fit to focus on ensuring that the needs of these victims of the criminal justice system are adequately met – or, as is more typically the case, met at all. As a result, upon exoneration the wrongfully convicted are painfully dependent upon the good will of (often previously estranged) family members, the organizations or individuals that

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[12] In Louisiana, the Court may award as part of a compensation package, but not immediately upon exoneration, the costs of job/skills training for one year; medically necessary medical and counseling services for three years; and tuition expenses—not to exceed a total of $40,000 – at a community college or unit of the state university system (see La. Rev. Stat, §15:572.8 and .9 & Code Civ. Proc. Ann. art. 87 (2005)). In Massachusetts, as part of a compensation package, but not immediately upon exoneration, the Court may order that the State pay for services relating to the physical &/or emotional health of the wrongfully convicted individual; educational services at any state of community college; and expungement of the record of conviction (see Mass. Gen. Laws Ann..ch. 258D § 1-9 (2004)). In Texas, as part of a compensation package, but not immediately upon exoneration, an exoneree is entitled to medical and counseling expenses incurred by him as a direct result of the arrest, prosecution, conviction, or wrongful imprisonment Texas (see Tex. Code Ann. tit. 5 §103.001; §103.051; §103.052, §103.1041 (2001) (amended 2007)). In Vermont, as part of a compensation package, but not immediately upon exoneration, an exoneree is entitled to up to ten years of eligibility for the Vermont State Health Plan, as well as compensation for any reasonable reintegrative services and mental and physical health care costs incurred by the exoneree for the time period between his release and the date of his award (see Vt. Stat. Ann. tit.13, §182 (2007)). It is, in fact, only the State of Vermont that contemplates the disconnect between even stated services and what is readily available upon release. Even in the states with existing compensation statutes, it would be immensely beneficial to states to get the help of a social worker, who would be helpful to identifying exoneree needs and how to access the needed services.

helped them prove their innocence, or charity in order to meet the challenges of daily life that confront them upon release to society.

The questions presented to an exoneree upon exoneration typically start with wondering where they can and will sleep on the night of their release, and are followed by how to accomplish virtually any act that most in society take for granted, such as how to find food to eat; how to get from place to place; how to access clean clothes; how to find a place to keep one's belongings and sleep thereafter; etc. This challenge does not even consider how to access the medical and mental health services and prescriptions that might be desperately necessary. These struggles to simply get through the first days – and weeks, months, and years – after release essentially preclude the ability to even properly think about how one might be able to re-build a life after wrongful conviction and incarceration.

It is no wonder, then, that many of exonerated people with whom we have worked conclude after exoneration that they are still living their sentence on the outside, and/or that they were better off in prison[13]

[13] See, e.g., the statements of the following wrongfully convicted individuals exonerated through DNA testing: James Giles: "I never in this world will regain the freedom I had...I can never be free...I'm free from in jail, but being an every day individual, I can't be free because of stuff that happened in my life." (Aguirre, A. et.al. Exonerated, Freed, and What Happened Then. (2007, November 25). *New York Times*.); James Waller: "With so much freedom taken from you, I don't think you can never gain it back in a lifetime...because they took away freedom, years that was yours, and you can't get that back again." (Ibid); Herman Atkins: "my heart is very hard towards the world we live in...I grew up in prison...society is just a bigger prison yard as opposed to the prison yard itself" (Ibid); Alan Crotzer: "All my life is gone...the world as I knew it is gone...the hardest thing since the day I stepped out...was being realistic with the fact that my mother wouldn't be there when I got out." (Ibid); Kirk Bloodsworth: "...you'll always be different...certainly on the outskirts of life." (Ibid); Dennis Fritz: "there's no statute of limitations on a murder charge...if I saw a cop car parked up the road, I thought 'they're coming for me again'...I can never relax." (Ibid); Darryl Hunt: "I'm physically free, but psychological I'm still confined." (Ibid); Dana Holland: "you still have that void, that emptiness...that doesn't end with exoneration." (Ibid); Brandon Moon: "You have everything taken away from you and then you're dumped back off on the street...there's just no support...what do you do?" (Ibid); William Gregory: "I'm still frightened during the daytime! Ya know? Because I hear a bump, or a sound...you got to make sure your back is protected at all

The Many Shortcomings of Statutory Compensation Schemes in Terms of Exonerees' Service Needs

Despite the obvious debt owed by each State to the men and women it has wrongfully convicted, the majority of states have not enacted statutes to provide them with any compensation. Of the states that do compensate the wrongfully convicted in some form,[14] only four states enable access to immediate services through their compensation schemes,[15] and three of those four states do not actually guarantee services but instead consider the services paid for and/or still

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times…I got this house, and I got cameras everywhere, but I'm still laying in bed at night thinking "they can come get me"…and I guess that's why sometimes I get depressed." (Ibid); Nick Yarris: "When you come back to society after a huge gap, its very difficult to have arguments and discord with family members. It is the worst possible thing when you're not used to it…I lived in a world when someone started yelling the next progression was that someone was going to die…" (Ibid); Wilton Dedge: "I still have a problem with trust…I'm getting better as far as people walking up behind me…I only got a little bit of time left, so I gotta enjoy what I have left." (Ibid); James Curtis Giles: "It's been humiliating every day." (Mcgonigle, S. (2007, April 10). Quest to clear name at end: Dallas: Man convicted of rape expects judge to back exoneration today. *The Dallas Morning News.*); Ken Wyniemko: "Any time that anyone has been in prison, even if you are exonerated, there is still a stigma about you, and you are walking around with a scarlet letter." (Roberts, J. & E. Stanton. (2007, November 25). A Long Road Back After Exoneration, and Justice Is Slow to Make Amends. *New York Times.*); Larry Peterson: "Every day I wake up is a challenge. You go to work, you come home... you try to put your life in order, and there's always something above you." (Larry Peterson: Life After Exoneration, *All Things Considered*, National Public Radio, June 13, 2007); Gregory Bright: "It is a tremendous struggle.I'm at a loss ... wondering what's next." (Gyan, J. (2003, September 24). Cleared Inmate: I Should Be Compensated. *The Advocate*); and Michael Williams: "It's been lonely. Very lonely." (Zimmerman, A. (2007, October 30) A Convict Freed By DNA Evidence Tries to Find a Life --- After 24 Years in Prison. *Wall Street Journal.*).

[14] The following twenty-two states, in addition to the District of Columbia (DC Code § 1-1221- 1-1225 (1981)), have compensation statutes of some form: Alabama (Ala. Code § 29-2-151 - 29-2-165 (2004));California (Cal. Penal Code § 4900 - 4906 (1941) (amended 2000)); Illinois (Ill. Rev. Stat. ch. 705 § 505/8 (1945)); Iowa (Iowa Code Ann. § 663A.1 (1997)); Louisiana (La. Rev. Stat, §15:572.8 and .9 & Code Civ. Proc. Ann. art. 87 (2005)); Maine (Me. Rev. Stat. Ann. tit. 14 §8241-8244 (1993)); Maryland (Md. Ann. Code, tit. 10 §501 (1963)); Massachusetts (Mass. Gen. Laws Ann..ch. 258D § 1-9 (2004)); Missouri (Mo. Ann. Stat. §650.055 – 9 (2005)); Montana (Mont. Code Ann. § 53-1-214 (2003)); New Hampshire (N.H. Rev. Stat. Ann. § 541-B:14 (1977)); New Jersey (N.J. Stat. Ann. § 52:4C-1 -52:4C-6 (1997)); New York (N.Y. Ct. Cl. Act §8-b (1984)); North Carolina (N.C. Gen. Stat. § 148-82 to 148-84 (1947) (amended 2001)); Ohio (Ohio Rev. Code. Ann. § 2305.02 & § 2743.48 (1986) (amended 2002)); Oklahoma (51 Okla. Stat. Ann. tit. 51, § 154 (2004)); Tennessee (Tenn. Code Ann. §9-8-108 (1984) (amended 2004)); Texas (Tex. Code Ann. tit. 5 §103.001; §103.051; §103.052, §103.1041 (2001) (amended 2007)); Vermont (Vt. Stat. Ann. tit.13, §182 (2007)); Virginia (Va. Code Ann. §8.01-195.10 (2004)); West Virginia (W. Va. Code Ann. § 14-2-13(a) (1987)); and Wisconsin (Wis. Stat. §775.05 (1913)).

[15] *See supra* note 12.

needed by the exoneree when considering the claim for and amount of compensation[16] - an award which, if granted, is typically delivered years after exoneration.

Even in the minority of states where statutory compensation is available to those who can prove their wrongful conviction, those awards are not granted until after a hearing and judicial determination on the claim for compensation. This compensation hearing process is separate from the judicial exoneration, and therefore requires years of legal work before any monetary compensation is provided – if at all.

In sum, monetary compensation for a wrongful conviction is separate from the immediate services that every wrongfully convicted person needs upon exoneration. Appropriate compensation of the wrongfully convicted can provide financial stability, but compensation is no substitute for immediate access to the appropriate services that the individual needs.

The components of a successful re-integration service plan are numerous and must be based upon the specific needs of the individual. At the Innocence Project, our experience has shown us that while we can be guided by clinical and psychological literature, each case is notably different and requires a distinct, person-specific approach. This is made more difficult by the fact that exonerations happen all around the country, and exonerees return to communities ranging from large metropolitan cities to the barely populated rural regions that are less likely to be able to provide comprehensive social services.

[16] Louisiana (see La. Rev. Stat, §15:572.8 and .9 & Code Civ. Proc. Ann. art. 87 (2005)), Massachusetts (seeMass. Gen. Laws Ann..ch. 258D § 1-9 (2004)), and Texas (see Tex. Code Ann. tit. 5 §103.001; §103.051; §103.052, §103.1041 (2001) (amended 2007)).

Consequently, the wrongfully convicted require the counsel of local, experienced and professional re-entry and/or social services professionals, who can arrange an individualized and appropriate re-entry plan that includes, but is not limited to: vocational and/or occupational training; education; employment counseling; parenting classes for those reuniting with their children; the provision of immediate subsistence; housing; medical and dental care and mental health services; and legal assistance.

Concerns with the Proposed Legislation

The Innocence Project is extremely pleased that attention is being paid by Congress to the substantial needs of the exonerated upon release. We are very concerned, however, that the model this legislation contemplates for most effectively addressing the crises faced by exonerees upon their release seems destined to fail to meet the intended goals. In short, by focusing on providing funding to organizations that "have experience and expertise in coordinating and delivering support services specific to the needs of exonerees" or otherwise leaving unspecified the types of organizations that the Attorney General could approve for such grants, those entities most capable of effectively enabling access to such services in specific cases will likely be denied, and/or those who do receive the grants may likely not be those most capable of effectively meeting the stated goals. As we explain below, a large part what creates this challenge to the legislation as written is the reality that exonerees are spread across the nation; serving them would therefore inevitably require considerable resources of any small organization seeking to serve a meaningful number of exonerees under this grant program.

The Challenges of Grantees' Abilities to Provide the Expected Services and Planning as Envisioned in this Legislation

The bill, as drafted, specifically describes "eligible organizations" as those that "have experience and expertise in coordinating and delivering support services specific to the needs of exonerees." Therefore, certain organizations with a wealth of experience working with clients that share many needs with the exonerated – for example, those that help provide access to re-entry services for those who simply completed their sentences – may be denied this funding because they have yet to demonstrate either experience or expertise "specific to the needs of exonerees."

Similarly, whereas local- or state-level innocence organizations may have distinctive knowledge and expertise regarding the needs of exonerees, they may not have demonstrated institutional experience and/or expertise in "coordinating and delivering support services" for those they helped to exonerate, and would likely fall short of meeting the specified eligibility criteria under this legislation. Indeed, it seems that there are only a few organizations in the entire country that would qualify as a specified "eligible organization," and those are so small, nascent and/or not likely to seek this funding as to seem incapable at present of meeting the deep and widespread needs of exonerees nationwide as this legislation seeks to accomplish.

Section 6(1)(B) of the legislation, of course, provides the Attorney General with the discretion to provide the grant funding to any organization that doesn't meet the Section 6(1)(A) specification of an "eligible organization." This is helpful to enable disbursement of funds to "other" organizations that might be able to try to meet the legislation's goals, particularly in the absence

of an "eligible organization" with specific expertise and experience working with exonerees otherwise qualifying for funding. The Innocence Project feels that this approach is perilous, because it can, in effect, leave the Attorney General without sufficient guidance regarding how to assess the capabilities of such "other" organizations. This presents the serious risk that the organization(s) ultimately receiving the grant cannot effectively serve the population as intended by Congress.

Congress would therefore be best served by instead specifying as "eligible" the actual organizations – or types of organizations – best positioned to carry out the intended functions of this legislation. As can be seen in our recommendations below, it is the view of the Innocence Project that if Congress more specifically focuses on how to differently best define "eligible organizations," it would put this program in a much better position to effectively and efficiently ensure that the exonerees needing significant services upon exoneration actually receive them.

Geographic Spread

Exonerees represent a very small yet widespread national population. A significant challenge to be met by any organization seeking to serve this population of the exonerated, therefore, is this geographic spread.

Any small organization (or department within an organization) is faced with a particular challenge when trying to establish a service plan that would deliver the needed package of services to any single exonerated person. That challenge is compounded when those in need of

services are spread across a large region, and even more so when spread across the nation. This presents a serious problem for the potential efficacy of this legislation, for while there are pockets of exonerees in a certain few locations nationwide, the nation's exoneree population is primarily sprinkled across the country, with many living in areas bereft of organizations well-positioned to coordinate the necessary comprehensive package of services.

Compounding concerns about the geographic spread of the exoneree population is the fact that it takes a tremendous amount of time and effort to: conduct a needs assessment; identify the various entities available to provide such services; establish how to qualify or otherwise access such services; consider how to access the services not presently available within that community; administer the service plan to be sure the exonerated person actually follows through with the service plan; and tend to the various and extremely significant subsistence needs and daily challenges facing a person previously removed from society and denied the ability to make decisions for oneself for multiple years (very real concerns not explicitly addressed in the legislation) for any one exoneree. Identifying and participating completely in a comprehensive and appropriate service plan presents tremendous demands on the individual, of course, but also – and most significantly for the purposes of this legislation – on the organization seeking to ensure provision of such services to the exoneree. It is one thing if the organization is itself located in the same community as the exoneree; it is another thing entirely if that organization is based elsewhere. Indeed, the organization's proximity to the exoneree seems likely to be directly proportional to their ability to successfully administer a needed service plan to that exoneree.

As a result, funding non-local organizations to effectively provide exonerees with necessary re-entry services seems destined to severely limit the number of exonerees that could be served under this legislation, seriously compromise the quality of services delivered to individuals who would be served remotely, or both. We have arrived at this conclusion based on the observed challenges confronted by the various organizations that have specifically attempted to enable exoneree access to such services[17], and also by our own experience attempting to do the same.[18]

Proposed Recommendations

Reconsider the Proposed Approach to Serving Exonerated Persons

The good news is that while it seems to the Innocence Project that this legislation, in its current form, may not enable Congress to effectuate its intent, there may be another way to do so. After years of deliberation and experience regarding how to best provide exonerees across the nation

[17] The Life After Exoneration Program was created for the specific purpose of fostering a successful community re-entry for the wrongfully convicted. Despite their continued efforts, however, they seem to have fallen short of this goal. This is seemingly in part because of the simple difficulties of establishing and funding such an organization, and also because of the tremendous challenges facing any such organization that has to orient anew to each community and social service network where exonerees reside. This is largely because they must either "set up camp" there for a significant time upon each person's exoneration, or attempt to meaningfully coordinate local services from a remote location in order to effectively serve those exonerees.

In addition, many of the various "innocence organizations" nationwide that have helped to exonerate people have also, at many times, sought to provide similar assistance to their former clients. While the pre-exoneration relationships – as well as those organizations' typical relative proximity to the exonerees' community of return – provide the trust and availability that are vitally important to implementation of a successful service plan, these innocence organizations are typically composed of lawyers, students, and legal staff who lack the expertise necessary to best – and even have the requisite available time to – serve exonerees' service needs.

[18] The Innocence Project employs a ¾ time Social Worker. This person works to help the clients we've exonerated to successfully re-build their lives. Our efforts to do so - based in New York City but which includes traveling to exoneree locations upon release in an effort to establish and ensure implementation of a meaningful re-integration plan – have resulted in valuable assistance to these people, yet we also recognize the limitations we operate under. We are not, for instance, members of those communities, and are therefore both not familiar with the social service networks available in such locations and unable to be the *consistent presence* needed in the months and years after an exoneration. As a result, we have decided to hire an additional full-time Social Worker to help meet this challenge, yet we still realize that this, too, will not overcome the problem.

with the reintegrative and restorative assistance they need, and applying that to a federal grant program, we recommend that this legislation:

- Specify that it should be an existing national and/or regional organization(s) with local bases of operations that provides/coordinates services similar to those enumerated in the legislation, which has or will develop an expertise in the specific needs of exonerees and become an eligible organization;
- Provide exonerated people with access to federal and state entitlement and block grant service programs and resources not otherwise specifically intended to serve exonerees, but which could greatly aid their re-integration if otherwise made available at the state and local level; and
- Encourage states to assign Departments of Social Services (or similar offices) to liaise with and provide counsel to the case managers at the recipient grantee organizations seeking to navigate the state bureaucracy in order to facilitate access to the government programs made available to that population.

The benefit of this three-pronged approach is that it relies on organizations that are established and experienced in accessing, coordinating, and providing local services, and simply encourages them to develop an expertise in the area of exoneree needs (and/or the capacity to have that expertise developed locally on a fairly immediate basis) while clearing a path for exonerees to access the government programs the organizations are already familiar with at the local level. By applying such an approach, the legislation would seize upon existing organizational resources and knowledge of local service systems nationwide, create an incentive for these organizations to

expand their expertise to the needs of the exonerated, and establish access to existing government programs and a mode of government cooperation that can, on the short notice with which exonerations occur, be put into practice virtually upon an exoneration. This spares the inefficiency of trying to enable new and relatively inexperienced organizations to re-create social service plans from scratch in each the widespread jurisdictions in which exonerations occur, and thus has the potential to provide high quality services to a much greater number of exonerees.

Bolster Areas of Grant Uses

The drafters of this legislation appropriately identified most of the anticipated needs of exonerees upon release. Indeed, absent strong family ties or the charity or good will of community members or strangers, the exonerated have literally nothing, not even pocket change or the money to buy clothing. Even in those states that provide any monetary compensation to its exonerees, payment can take years.

Although the bill as drafted considers a range of needed services for "grant uses," monetary subsistence has not been included. This is a critical need for the exonerated immediately upon release. Other needs include allowances for food, clothing and transportation. These should be added to the allowable uses of grant monies.

Integrate Government-Facilitated Access to Existing Government Services

While exoneree access to effective and appropriate local service providers will provide a tremendous benefit to exoneree re-entry efforts, and the funding contemplated under this

legislation should be applied to both pay for the service plan coordination and the actual services that would need to be paid for, enabling exoneree access to existing federal- or state-provided services under various existing entitlement, block grant, and other programs could create tremendous efficiencies and ensure service in the event that funding for this legislation ever falls short.

This would include both enabling exonerees to immediately access federal entitlements to individuals and making exonerees eligible for programs available through entities in receipt of block grants. Exonerees should, where appropriate, be designated as a "priority category," and be enabled to "opt" or "waive" in to various existing government programs. Specific programs to consider might include, but are not limited to:

- priority ranking for Section 8 or other subsidized housing programs in the state;
- an immediate grant of Medicaid, which many states do not immediate provide for single men;
- priority for SSI application approval, if needed for a mental or a physical disability;
- waivers for Federal Supplemental Educational Opportunity Grants;
- waivers for the Adult Education State Grant Program;
- waivers for Employment and Training Assistance; and
- expedited applications for public assistance programs, including General Assistance & TANF.

In addition, states should be encouraged to enable exoneree access to similar state and additional services in all appropriate areas of need.

We all encounter difficulties when seeking to navigate the bureaucracy of many government programs. The challenges that an exoneree – and even a non-governmental service coordinator – might encounter when trying to navigate actual access to these government services where there is a special exception being made for exonerated persons is exponentially greater. States should therefore be encouraged to designate a representative from its Department of Social Services (or appropriate analogous entity) to coordinate and facilitate access of these government services into the service plan for a particular exoneree, with the help of the grantee. This would enable the federal government to partner with specific states in order to help the wrongfully convicted, and help ease the bureaucratic burden on individual states with respect to the delivery of services for the exonerated. Such an arrangement would help states to plug into a readymade structure and encourage states to become more involved in – and receive credit for – post-release planning and assistance for exonerees.

Creation of a Technical Assistance Sub-grant Program

Most existing national or regional organizations, which are otherwise well-positioned to coordinate the delivery of critical social services, are not necessarily knowledgeable about the specific needs facing exonerees. This proposed legislation should, therefore, consider establishing a separate sub-grant program within this legislation. This sub-grant program would provide grantees with funding to access consultative services from established exoneree service providers or other psychological or mental health experts who have experience working with this population - and an exoneree organization or a number of individual exonerees. Such groups are in a unique position to offer distinctive technical advice to help grantee organizations best

understand the general needs and concerns of exonerated people, and also the lessons learned about what does and does not work in terms of actually connecting exonerated people to the services they need, in the manner they need. The Committee may consider only granting funds to organizations that include the receipt of such consulting services as part of their service delivery plan, certifying their intention to receive technical assistance and identifying the anticipated provider that will be paid for consultation through the grant program.

Along these lines, we suggest that Congress consider establishing an advisory board to this grant program and its recipients, as a means of effectively monitoring and providing advice upon implementation of this legislation and grant program – from the perspective of exonerees and exoneree service providers. Grantees and governments may also choose to seek the counsel of this group when seeking to most effectively serve their exonerees under this program – and in additional ways.

We realize that the alternative provided here is not written in statutory form, but instead lays out the fundamental components of an alternative approach to serving the immediate post-incarceration needs of exonerees through federal legislation. The Innocence Project would welcome the opportunity to respond to any questions you have about this proposal, and is available to work closely with you to craft the legislative language that could effectuate these concepts.

Conclusion

Having been forced by the government to endure critical years of their lives in the toxic atmosphere of prison for crimes they did not commit, the wrongfully convicted are victims of criminal justice system error (however inadvertent that error may have been). Given the crippling effect of wrongful conviction, the government has a duty to help these people regain a foothold on the potential for a successful life. Indeed, without significant help in the immediate wake of their exonerations, the majority of exonerated people feel they can never overcome their wrongful conviction and incarceration.

The sponsors of this legislation deserve great credit for focusing on how the federal government can help address the service and subsistence needs of exonerated people. The Innocence Project supports this effort wholeheartedly, but strongly urges Congress to consider an alternative approach, which seems to be able to more effectively and efficiently provide exonerees with the meaningful assistance they need upon exoneration. Passage of federal legislation that successfully addresses those concerns will provide a tremendous benefit to the wrongfully convicted, by helping ease the unimaginably difficult transition for the wrongfully convicted from prison life to mainstream society.

Thank you for your attention to this important issue, and the opportunity to submit testimony. We look forward to working with the Committee should we ever be able to help.

WASHINGTON LEGISLATIVE OFFICE
Caroline Fredrickson
Director

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December 6, 2007

The Honorable Robert C. Scott
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

The Honorable J. Randy Forbes
Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

Re: The ACLU supports H.R. 261, the Federal Prison Bureau Nonviolent Offender Relief Act of 2007

On behalf of the American Civil Liberties Union (ACLU) and its 53 affiliates, we write in support of H.R. 261, the Federal Prison Bureau Nonviolent Offender Relief Act of 2007. This legislation provides for the early release of non-violent offenders over the age of 45 who have not been convicted of a violent crime, have not attempted to escape from incarceration and have not violated prison disciplinary rules.

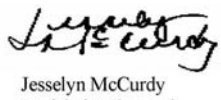
People over the age of 45 are far less likely to commit crimes than young people. For example, in San Bernardino County, California, the rate of crime in 1995 for those under the age of 25 was 2,058 per 100,000 general population and the rate for those over 50 was 305 per 100,000 general population. In addition, in 1999, only 22% of the felony adult arrests in California were for people over the age of 39 and only 5% were for those over 50. A 1994 study by Travis Hirschi and Michael Gottfredson indicates that crime rates are highest among those aged 25-29 and drop sharply among people over 40.

These studies support the fact that there is less criminal behavior among older people and releasing prisoners over 45 who committed non-violent crimes back into the community should have very little impact on public safety. In addition, releasing older inmates will permit them to make a meaningful contribution to society and their families.

In 2003, federal prisons were 40% over capacity and H.R. 261 will help to reduce the level of overcrowding in federal facilities. By releasing those older offenders who have the lowest risk of recidivism and who have demonstrated a commitment to bettering themselves, people will be given a genuine second chance to be productive members of society. If the American people believe that the goal of incarceration is "correction," H.R. 261 affords an excellent opportunity to demonstrate their support for rehabilitating offenders.

We are pleased to support H.R. 261 and urge you and other members of the House Judiciary Committee, Crime, Terrorism, and Homeland Security Subcommittee to support this important legislation. If you have any questions about the ACLU's position on H.R. 261, please contact Jesselyn McCurdy, Legislative Counsel at phone: (202) 675-2314 or e-mail: jmccurdy@dcaclu.org.

Sincerely,



Caroline Fredrickson
Director

Jesselyn McCurdy
Legislative Counsel

CHAPTER 1

It Could Happen to Anyone

On December 30, 1991, Amy Wilkinson called her older brother, Ray Krone, at his home in Phoenix, Arizona, to wish him a happy new year. Amy lived in York, Pennsylvania, in the southeastern part of the state, near Harrisburg, where the family had lived for several generations. She and Ray had both graduated from Dover Area High School, the same school that their parents and grandparents had attended. Both Amy and her younger brother, Dale Jr., still lived in their hometown, near their parents, Carolyn and Dale, who were getting divorced but still lived near each other. Like her mother, Amy worked in the medical profession, overseeing billing for a doctor's office. She was a single parent, raising a two-year-old son named Ben.

Although Ray loved his family and hometown, he had wanted to move west. He particularly loved the Arizona desert, with its wide-open spaces and rugged mountains. After high school, Ray joined the Air Force and was stationed in Maine near the Canadian border. After a couple of years he requested an assignment out west and jumped at the opportunity to move to Arizona.

After serving in the Air Force for six years, he received an honorable discharge and took a job as a mail carrier in Phoenix. Ray enjoyed his bachelor life. He owned his own home, along with a truck, a Corvette, and a motorcycle. He was an extrovert who liked to be with other people. He played softball, usually on the team of a local bar, and was an accomplished dart player who won most of the local competitions. One of the places where he regularly played darts was the CBS Lounge at Seventeenth Avenue and Camelback in Phoenix.

Although the two siblings lived at opposite ends of the country, they were close. In 1987, Amy and her boyfriend had visited Ray while vacationing in Arizona. When they returned home, her boyfriend committed suicide. It was

very hard for Amy to continue living in York with the constant reminders of the tragedy, so when Ray invited her and Ben to live with him in Phoenix, she took him up on the offer. Amy was relieved to have a safe place to live away from the stress of her life in Pennsylvania and grateful that her brother made her feel so welcome. Amy lived in Arizona about two years before returning to Pennsylvania.

Ray's roommate, Steve, an Air Force buddy, answered the phone and told Amy that the police had come by asking questions about a murder, and Ray had agreed to go to the station with them. Steve promised to have Ray call Amy as soon as he returned home.

The murdered woman's name was Kim Ancona. Her killer had bitten her left breast, and the police were looking for matching bite marks. At the station, homicide detective Charles Gregory asked Ray to bite into a Styrofoam cast, which he agreed to do. Dr. John Piakis, the Maricopa County forensic odontologist, took photographs and made a dental cast of Ray's bite mark. Blood, saliva, and hair samples were also taken from him. Detective Gregory interrogated Ray for hours, but Ray continued to maintain his innocence, saying that he was not Kim's boyfriend and knew nothing of her murder. After several hours he was released. Later that afternoon, Ray called Amy.

AMY: Ray told me that Kim Ancona, a bartender at the CBS Lounge, had been murdered in the men's restroom while she was closing down the restaurant. Ray knew her a little, but the police were claiming that they found his phone number in her address book and that someone had told them that Kim had said that a man named Ray was going to help her close the bar that night. They assumed that Ray was her boyfriend. Ray said he was not seeing Kim and had no idea about the murder. He hadn't even left his home the night of the murder. He told me not to worry. He said that the whole thing was a big mistake and he was confident the police would figure it out. He told me not to tell our parents because there was no point in worrying them about nothing.

There was never any doubt in my mind that Ray was innocent. If he had killed someone, he would have told me. I trusted him completely. Ray was a rock in our family. Totally reliable.

While Ray was reassuring his sister, Detective Gregory was making his case against Ray. Dr. Piakis examined Ray's bite mark, along with those of several

other suspects, and rendered his opinion that it was "highly probable" that Ray had bitten Kim Ancona. The mark was somewhat unusual because it was caused by someone who had one front tooth that jutted out more than the others, as did Ray. Dr. Piakas contacted Dr. Ray Rawson, a forensic odontologist from Las Vegas, Nevada, and he concurred with Dr. Piakas that the bite mark was a very good match.

Phoenix Police Department criminalist Scott Piette examined the blood, hair, and saliva. None of the blood at the scene could be attributed to Ray, nor could the pubic hairs found on the victim's body. However, swabs taken from the breast near the bite mark tested positive for salivary amylase with an H antigen. This could have been made by a person with type O blood who is a secretor—someone who secretes antigens into his saliva—which Ray was, but so were nearly half the population. However, based on this information, the police returned to Ray's home and on New Year's Eve 1991 arrested him for the kidnapping and murder of Kim Ancona.

Ray called Amy from jail and continued to reassure her that everything would get worked out. "How can they prove I did something that I didn't do?" he asked. He asked Amy again not to mention anything to anyone. Amy kept her word but wondered if she shouldn't be doing something to help her brother. Three weeks later, a Maricopa County grand jury indicted Ray for first-degree murder, kidnapping, and rape. Ray called Amy and told her that she had better tell the family what was going on.

AMY: Those three weeks were hell because I couldn't tell anybody and I didn't know what to do. I thought maybe I should tell people even though Ray had told me not to. The first person I told was our mom. I went down to my mom's place and she was having dinner with Jim Leming [at the time, Jim and Carolyn were dating, and they would later marry]. I told them that Ray had been arrested. Mom said, "For what?" And I told her murder. My mom pretty much lost it. I don't remember what happened after that. I then went to my dad's house, and he didn't say anything. He didn't know how to react.

CAROLYN: When Amy told us that Ray had been arrested for murder I said, "You've got to be kidding. Is this some kind of a joke?" Amy told us that Ray said that he hadn't done it and told us not to worry. Of course, I was very worried, but I believed Ray. He had never been in trouble with the law. If he said he hadn't done it, than I knew he was innocent.

Amy Wilkinson (left), Ray Krone, and Carolyn Leming.
Provided with permission of the family.

Some of Ray's friends looked into hiring him a lawyer, but most wanted between $30,000 and $40,000 up front as a retainer. Carolyn worked as the manager of a billing department at the local hospital. She would have liked to help Ray, but she was going through a divorce and all her assets were tied up in the legal battle. Ray didn't see any point in draining the family's finances to defend himself for a crime he hadn't committed. The court appointed Geoffrey Jones to represent Ray.

Though the state had indicted Ray, it had very little evidence against him. Its case was based on the bite mark and the innuendos that Ray and Kim were dating and had made plans to meet that night. It was relatively unusual for the state to base its entire case on bite mark evidence without other forensic evidence; however, Detective Gregory was convinced that Ray was the killer.

Geoffrey did not have extensive experience representing clients in serious felony cases. He was also hamstrung by the fact that the court, as was common in Arizona, limited the funds he could use for hiring expert witnesses and an investigator. When Geoffrey requested funds to hire a bite mark expert, the court ordered a mere $1,500, a fraction of the $10,000 the state had already paid its expert.

Instead of consulting with a forensic expert, Geoffrey asked his friend Dr. Bruce Etkin, an area dentist, to look at the bite mark evidence and help him understand it. After looking at the photographs and dental cast, Dr. Etkin told Geoffrey that it appeared to him that the mark could have been made by Ray. However, he admitted that he was not a forensic odontologist and had never before examined bite mark evidence. Geoffrey did not contact any other forensic bite mark experts.

In March, Carolyn and Jim were able to arrange time to make the cross-country trip to Arizona to visit Ray. The couple met with Geoffrey Jones, who told them that he "lived, slept, and breathed" Ray's case and said he would do everything he could to help Ray. He told Carolyn and Jim that he was limited by the court's refusal to allocate more money for experts. On the spot, Jim wrote out a check for $2,000 to help pay for expenses.

During their visit, prosecutor Noel Levy offered Ray a plea agreement to plead to a less serious form of homicide and avoid the death penalty. Geoffrey told Ray about this offer, and Ray was furious. "I'm innocent. I'm not going to plead to any murder." Ray questioned whether Geoffrey was prepared for trial, but continued to be confident that he would win.

Carolyn and Jim spent most of their time in Phoenix visiting with Ray at the infamous Maricopa County Jail run by Sheriff Joe Arpio, who called himself "the toughest sheriff in America." He bragged that he kept his costs low and could feed the inmates on forty-five cents a day. He had been known to serve bologna sandwiches green with mold. He also dyed the jail clothes pink; they became something of a novelty and were selling for significant amounts of money on eBay. When the sheriff learned of the moneymaking opportunities, he sold the uniforms himself on eBay and used the money that he made to buy a huge neon vacancy sign, which he hung outside the jail. His motto was that there was always room for more criminals, even though most people housed in county jail had not yet been convicted and were presumed innocent.

CAROLYN: I had never been in a jail. I've got to tell you the authorities don't make it easy on people. They are used to the criminals having families and friends that are somewhat of the same breed as they are. It is a rough bunch of people, and they get to know the system. We had no idea what to do.

It was difficult to even find Maricopa County Jail. The entrance was a small room, about ten by ten feet, with one window and a few chairs.

Nobody was around. Finally someone came. We said that we were there to visit Ray, and they were very rude. They told us to "Sit down!" We had to give identification and all that kind of thing. We had to leave our things in a locker, get a number, and wait in line.

They would call a certain number of people for one-hour visits unless you were from out of state. Then you were allowed two hours if you got it approved ahead of time. There were times you would go and sit there and your number never got called. There was also one time our number got called and after one hour we were told our time was up. I said we were approved for two hours, and the guard yelled, "I'm telling you your time is up." You can't argue with them. The guy upstairs refused to accept what they approved downstairs. I cannot explain to you the feeling that you are as guilty of something as the prisoners. They just make you feel terrible. They really didn't care that we had just arrived from out of state.

It was one large room where all the prisoners were, and we talked to Ray through wire. There was no contact allowed. Other people were around talking and kids were running around and it was dirty. Some of the young people are right in with the hardened criminals. There is no segregation—they are all thrown together. There are a lot of people in jail. You can have a boy that is in there for smoking marijuana and someone else who is in there for killing someone. It is a traumatizing experience for anybody.

Ray and Jim had never met before, but Jim made it very clear that he would do whatever he could to help Ray. Ray knew it was a financial hardship for his family to go to Phoenix for the trial, so he urged them not to attend. In the meantime, Ray's local friends tried to keep things going for him. The post office had suspended Ray as soon as he was indicted, but Ray had savings, and between that and money from renters he was able to continue to pay his mortgage and managed to hold his life together, barely.

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The trial was scheduled to begin on July 29, 1992, before Superior Court Judge Jeffrey A. Hotham. Six months between indictment and trial was record speed for a serious homicide case. Prosecutor Levy's theory of the case was that Kim and Ray had been dating and had made arrangements for Ray

to meet her at the bar on the night of her murder to help her close. That theory, along with the bite mark evidence, was the sum total of the state's case against Ray. In fact, the bite mark was so much at issue that the case was nicknamed the "Snaggletooth Case."

Because of lack of resources or, perhaps, initiative, Geoffrey Jones had not adequately prepared to challenge the state's bite mark evidence. Things got much worse for the defense when, the Friday before the trial was scheduled to begin, prosecutor Levy gave Geoffrey a video prepared by his bite mark expert, Dr. Ray Rawson, which he intended to use at trial. The video was professionally produced with rotating graphics that overlaid the Styrofoam impression made by Ray on the bite mark on Kim's breast. The video explained in layperson's terms how Dr. Rawson had come to the conclusion that Ray was the biter. Ray was shown the video on Sunday, the day before his trial was scheduled to begin.

Arizona discovery rules require the prosecution to turn over evidence well in advance of trial so that the defense can adequately prepare for trial. Geoffrey Jones moved to prevent the state from using the video on the grounds that he could not prepare to impeach the evidence. He asked for the trial to be continued or the evidence excluded. Judge Hotham denied both requests. Geoffrey Jones sent the video to Dr. Homer Campbell, a forensic odontologist from San Antonio, but Dr. Campbell did not have enough time to examine the tape.

The trial began on schedule. The state called nineteen witnesses, the primary ones being criminalist Scott Piette, Detective Gregory, and Dr. Rawson. One weakness in the state's case was the fact that no one had seen Ray at the bar the night of the murder. Instead, the state called Kate Koester, a friend of Kim Ancona's, who testified that Kim had told her that a man named Ray would be closing the bar with her on the night that she was murdered. Geoffrey objected to this statement on the grounds that it was hearsay—a statement made by a person who does not have firsthand knowledge of a fact but was merely told something by someone else. Hearsay is usually not admissible because it is impossible for a defendant to "cross-examine" a statement of a witness who is not in court. There are some exceptions to the hearsay rule, one of which applies if the statement is offered to show the state of mind of a person, instead of to prove a fact. The state argued that Kate's statement demonstrated Kim's state of mind on the night of the murder. The defense argued that the statement was offered to prove that Ray had plans to go to the bar on the night of the murder. Judge Hotham allowed the statement.

But the state's star witness was, without a doubt, Dr. Ray Rawson. Although he had impressive paper credentials, he was not an experienced forensic witness. What Dr. Rawson lacked in experience, however, he made up with charisma. Along with his high-tech video, Dr. Rawson made a compelling case that Ray's teeth marks matched the biter's.

Geoffrey Jones called five witnesses, including Ray, and no expert witnesses. Ray himself was not in any shape to testify. Because of all the noise at the jail and the fact that he had to get up at 4:30 A.M. on trial days, he asked for something to help him sleep. The jailers gave him Thorazine, a powerful antipsychotic medicine that usually puts people into a catatonic state. Although physically present at his trial, Ray was not mentally sharp. After a short trial—five days—the jury deliberated for two hours and returned its verdict on August 7, 1992: guilty.

CAROLYN: We were at home when Geoffrey Jones called and said it was over and Ray had been convicted. Geoffrey broke down crying. He was very upset. He could hardly talk, he felt so bad about it. It was a couple of days before Ray could even call. I'm not one who gets hysterical or goes into a fit or anything. I was just numb. I was hearing the words but the words weren't really sinking in. I remember just lying on the bed and crying. I don't think you can explain the disbelief and the horror and the helpless feeling that you get. We couldn't believe this had happened and we didn't know what to do.

After Ray was convicted, the post office sent him a letter terminating his employment. His savings were starting to dwindle, and he feared that he would soon lose his house. Things got worse on November 20, 1992, when Judge Hotham sentenced Ray to death.

CAROLYN: Looking back, I see that we were very ignorant and naïve. We knew Ray was innocent, and we really thought that everything would work out okay. Ray has always been the kind of person who says, "I can handle this. It is my problem. Don't let it change your life." He kept telling us that there was no way they could find him guilty. Ray was adamant that I should not come out to Phoenix for the trial. He thought it was enough of a worry for us just going through it.

I was glad that Jim and I had gone out there to see him. His attorney said they had nothing on him, and we were told that it was going to be a

very brief trial and there wasn't anything much we could do. I trusted that the system would work. The one thing we learned is not to have blind faith in the system. From then on we never took anything for granted. We never left any stone unturned or let any possible lead go unearthed.

After he was sentenced to death, Ray was transferred to the Arizona Department of Corrections facility in Florence, about an hour and a half south of Phoenix. Steve had married and moved out, and Ray couldn't pay the mortgage. The bank foreclosed on his house.

RAY: When I was first arrested, I was sure that I'd be going home once they realized that everything I had told them was the truth. The first few days and weeks I was annoyed. It was really a matter of thinking about the inconveniences to my life like making sure the dog got fed, or missing my softball games. But then my attorney told me that my bite mark matched the one on the victim. I was outraged. Then things moved quickly. I was in trial within six months. In less than a year I was on death row.

At first I managed to pay all my bills, but then my savings ran out. After the bank foreclosed on my mortgage, the VA (Veterans Administration) sent me a letter telling me that I owed $28,000. I wrote back and said there was no way that I could pay because I was on death row. I said that I had always paid my bills and even paid my mortgage from prison but I couldn't keep doing it. They wrote back a letter and said that under the circumstances I qualified for a waiver, so it didn't end up hurting my credit.

I ended up losing all my stuff. I had a Corvette, a four-wheel-drive truck, and a Volkswagen camper bus, and I raced stock cars. I wasn't stuck on any one type of activity. I played softball and golf and snow-skied and water-skied. But a guy who was living in the place after Steve left pretty much cleaned me out—he had taken guns, stereo equipment, skis, a lot of that stuff was gone. A friend got my Corvette and some clothes and photo albums to hold on to for me. Anything else that was left I gave to friends or got taken away by whoever took the property.

I was glad to have the photo albums. I certainly couldn't replace photos from growing up. But I was in prison, and all the stuff in the outside world didn't mean anything to me. What kept me going was my friends

and family. They were rooting for me, and I didn't want to let anyone down. I had always played sports. I was a team player. I didn't want to be the weak link. Plus you just have to keep going. You don't have a choice.

Also, I had to renew my faith. I read Bible passages that give me hope, like "Out of the darkness shall come the light." I knew that this whole thing was bigger than me. I needed the Lord to help fix this and make it right. I had to have faith to bring this into a logical perspective. Otherwise none of it made any sense.

You are never treated well on death row, period. If guards are nice to you then other inmates will be suspicious. You don't fraternize with the guards. You keep your distance from them, and you almost have to have a sharp tongue or the rest of the inmates will think you are weak.

As far as conditions go, it is hot in the summer and cold in the winter. You are treated like an animal. You are in your cell all the time. You are let out only on Monday, Wednesday, and Friday for an hour on rec days, and you get three fifteen-minute showers a week, after rec. During the time when you walk to the shower you get any cleaning supplies that you might want to use in your cell. You might also get a health visit if are sick.

The worst thing was that you are never trusted. Before you left your cell you were always strip-searched. They stripped you down and spun and twisted you and bent you over, then they handcuffed you, belted you, and shackled your feet before you could even leave your cellblock. That treatment alone was incredible to me. I had top secret clearance in the military. In the post office I handled people's mail. In there I couldn't even have my hands loose.

The other thing that was really hard is that you are almost always alone. I'm a people person, but in there you had to keep to yourself. There were other deprivations, like the food was never warm. It was prepared in another yard and delivered over, and it sat out until the guards felt like delivering it. Sometimes they let the food get totally cold, causing a lot of strife and turmoil. Once in a while we stood up to the abuse and mistreatment. If all the inmates threw their trays the captain and sergeant had to come down and address the problem. But if one person did it you didn't get attention, and you might get in trouble.

We were allowed one phone call every two weeks. You could request for either A.M. or P.M. Since my family was all back east, it did me no good to make a phone call in the daytime because everybody was at

work, but if you requested P.M. they were more likely to give you A.M. just to be spiteful. So I'd put down that I wanted A.M. If you complained about the time they'd say you had refused the call and walk away, and then it was another two weeks before you'd get another. I usually requested a weekend time, but that was when everybody else wanted to call, too. Since I never knew when I was going to be taken out for a call, my family would have to wait all day long until I called.

I tried not to cause the officers too much trouble. I caused just enough trouble to cover myself with the inmates, but didn't cause excessive trouble. I tried to treat the guards with respect. Being aggressive, you aren't going to win with them. I wasn't treated as bad as some of the inmates were. If the guards didn't like you, they would do things like not feed you for days. I just tried to take the path of least resistance. I tried to get along with everybody. You had to get along. These people could take your life or save your life.

I didn't go around talking about the fact that I was innocent. You got to act like you are the toughest dog in there. Everybody was always suspicious of everybody else. Jailhouse snitches are always telling on people. I didn't want people to think that I was going to be a snitch. Besides, it is hard to talk to people on death row at all. You have to yell out of your cell. But I did tell some people, and they believed me. I also met others who were innocent. You feel a type of bond and camaraderie. It helped make it easier to withstand it. When you see other people getting out, that gives you encouragement.

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The family struggled to maintain hope and continually plotted how to help Ray. Their roots ran deep in York. Almost everyone knew the family or knew of them, and most people believed Ray was innocent. Jim Leming visited the editor of the local paper, the *York Daily Record,* with a stack of paperwork making the case that Ray was innocent. The paper took an interest and started covering it. Total strangers sent notes of encouragement, and entire congregations put Ray on their "prayer chain." Carolyn's employees made it a point to be kind—to give her hugs and supportive notes. In spite of all the support, there was never any respite from the situation. It was like living with a terminal illness: The fear and pain were always present.

CAROLYN: I would think about Ray all the time. When fixing dinner, I'd wonder what he was eating. Driving to work, I'd notice new construction and I'd imagine what Ray would think of it. It was hard for me sometimes, especially at work, to deal with other people's problems. I'm in charge of a department, and I found that I had little patience for all the petty problems and squabbles that would go on. It's hard to care about little stuff when your son is on death row for a crime he didn't commit. I tried never to show my impatience, but it was a challenge.

The thing that kept me going was my faith. I believed that God has a purpose for everything that happens, but it was pretty hard to figure out this one.

AMY: I felt helpless, but I never felt hopeless. You have this notion that you need to go rescue him, and then you realize those feelings are dumb because it was the legal system that has him. It wasn't like a bunch of criminals came and held him for ransom. It was shocking. It just kind of puts you into a state of numbness.

You can't really call up your friends and talk to them about it because no one understands what you are going through. There is nowhere you can go to talk. Even when you go to a counselor, it is not like that counselor has ever dealt with this problem before. There is not too much they can do for you. There is nothing they can say to make it any better. Basically you feel like you have stumped them. You came in with a problem they haven't heard before. There weren't any Web sites for family members of wrongfully accused people. In one way, you are really dealing with it all yourself. Our whole family lives in this area, and we are close, but we don't cry on each other's shoulders easily.

I got to the point where I couldn't sleep. I'd be lying on my comfortable king-sized bed getting ready to sleep, and then my next thought would be wondering where Ray was sleeping. I'd wonder if he was being treated badly, tortured or who knows what. Ray didn't complain, but sometimes he'd talk about prison and tell stories, and I knew there was a lot he didn't tell us.

Once I started thinking these thoughts, the night was done. I wouldn't be able to sleep. When this happens most nights, it really messes up your life and your kid's life and your relationships. Then I started taking sleeping pills because you can't survive without sleeping. I'd lie awake and think about all the things I could or should do to help Ray. Maybe I

should go down to the courthouse and picket. Or maybe I should knock on every door in Phoenix, Arizona, and tell them that Ray should not be there. On days when I did feel happy, I'd feel guilty. It's not as though life isn't hard enough to begin with. I was a single parent, and I had a lot of trouble just keeping my head above water.

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In the spring of 1993, Jim Rix, Carolyn's first cousin, called his eighty-year-old mother, Dorothy. They were chatting about nothing in particular when he mentioned to her a television program that he had seen the previous night about a person who had been released from death row after being wrongfully convicted. Dorothy said, "You have a cousin on death row that is innocent." Taken aback, Jim asked who. "Carolyn's son, Ray."

Carolyn's and Jim's mothers, Hazel and Dorothy, were sisters. They were born and raised in Pennsylvania, but Dorothy headed west, married a man from California, and settled there. She did not get back to Pennsylvania often. Jim had only met Carolyn a couple of times at family occasions and did not know her children at all.

Jim had worked in the high-tech industry and had started a successful business developing medical and dental software programs. He had raised three children from his first marriage and was living with his second wife and their child in Lake Tahoe, Nevada. Jim's business was comfortably established, and he found himself in the enviable position of having time to look into Ray's situation. Jim found it hard to imagine that someone in his family was on death row. As far as he knew, no one in his family had ever been in prison before.

JIM: Apparently Ray's family did not advertise the fact that Ray was in trouble until after he was convicted. My mom had heard about it, but I didn't hear about it until I mentioned this program to her and it triggered her memory. If I hadn't brought up the subject, I'm not sure she would have mentioned it. I called Carolyn and asked if she minded if I contacted Ray, and she encouraged me to.

I've always been interested and concerned about the issue of innocent people being wrongfully convicted. I followed the Ruben Carter case and I thought he got railroaded, so I knew that innocent people could get

convicted. However, I never thought that would be the situation when I first got involved in the case.

Jim wrote Ray, who replied in June with a detailed explanation of what had happened. From what Ray told him, it seemed to Jim that Ray had not gotten a fair trial. He called an old friend, Gene Burdick, who was an attorney in Phoenix, and asked him what he knew of the case. Gene told Jim that he was familiar with the "bite mark" case, the case where the boyfriend killed his girlfriend at the bar. Jim asked Gene how he could learn more about the case, and Gene offered to get the trial transcripts for him. It took several weeks to receive the transcripts. Jim read all 1,425 pages. By the end, he believed that his cousin had been railroaded, too.

JIM: Except for the bite mark they had no evidence. It appeared that Ray had been railroaded. The lead detective ignored any evidence that didn't point to Ray. For example, there were tons of footprints at the crime scene. Initial police reports recorded the size of the prints as nine and a half. Ray is an eleven. In later reports the footprint size is changed to eleven. Instead of explaining why the killer has a different shoe size than Ray, they just changed the reports to make it fit with Ray.

Witnesses would suggest other leads, and the detective in charge never followed up on them. Once they realized the DNA testing was not consistent with Ray they didn't do further testing but just reported the results as "inconclusive." Instead of investigating Kim Ancona's murder, it became the "Ray Krone did it" investigation.

Since the bite mark was the basis of the state's case, Jim was particularly concerned about the fact that Geoffrey Jones had not called an expert witness to contradict the testimony of Dr. Rawson. Jim decided to hire an expert to examine the evidence. He started with Homer Campbell, the expert to whom Geoffrey had sent the video on the eve of trial. Dr. Campbell told him he needed to examine all of the evidence—the transcripts, the bite mark cast, the photographs, and the video—before he could render an opinion. Jim had the transcripts, but the rest of the material was housed in the evidence room in the basement of the Phoenix Superior Courthouse. To view the evidence, a person had to physically go to the courthouse, which would be difficult and time consuming for Dr. Campbell, who lived out of state. Gene

suggested that Jim hire Mike Pain, a private investigator, to help. Mike hired a photographer to take pictures of the photographs and obtained a copy of the videotape from John Antieau, Ray's appeals lawyer. However, no one could figure out how to make copies of the dental casts.

By early 1994, Jim asked Dr. Campbell to evaluate the materials without the cast. He agreed but said he couldn't do it until he returned from the annual meeting of the American Academy of Forensic Sciences held that year in San Antonio. Jim suggested that he meet Dr. Campbell at the conference; that way he could learn more about bite mark evidence himself.

The Southwest Airlines flight to San Antonio went through Phoenix, so Jim decided to stop over and visit Gene and his wife, Carolyn, and also visit Ray in prison.

Jim rented a car for the trip to Florence. Having never been to a prison before, he was unsure of the procedures. He parked the car in a lot outside the prison complex and walked about half a mile to an outside window, where he was told that he had to leave everything in the car except his keys and driver's license. In the sweltering heat, he walked back to his car, deposited his possessions, and returned to the prison. After passing through a metal detector and security, he boarded a prisoner transport bus for death row.

JIM: The guards brought Ray in with his hands cuffed and shackled to a leather belt secured around his waist. They removed the handcuffs. I noticed that Ray kept smiling through this entire process. At first we reminisced about family, but Ray was more interested in hearing about my contacts with Dr. Campbell. I told him what had been going on, and he listened carefully and asked a few questions. I told him that I thought Dr. Campbell would exclude him as the source of the bite mark, and he said, "I couldn't understand how it was possible for the murderer and me to have the same teeth pattern." It hadn't occurred to Ray that Dr. Rawson had made a mistake. He just assumed that he had the bad luck to have the same dentition pattern as the murderer.

Throughout the visit I was impressed with Ray. He never complained about his situation. He didn't try to exaggerate the case. If I asked him a question and he didn't know the answer he'd say so, which made me have confidence in the information he gave me. We discussed his options. He could either wait for the appeal or attack the conviction by moving for a new trial, called a Rule 32 motion, based on the new evidence, assuming Dr. Campbell gave a positive opinion. Most people on

death row wanted to wait for the appeal to finish before raising any new claims. That way the process took longer, thus prolonging the execution date. Not Ray. When I asked if he wanted to go forward with the Rule 32 now or wait he said, "Let's do it!"

Jim's trip to San Antonio was successful. Dr. Campbell reviewed the evidence and concluded the initial photograph of the bite mark had been improperly labeled, so that what Dr. Rawson was looking at when he opined that Ray was the biter was not even the correct configuration of teeth. Not only had Dr. Rawson misidentified Ray as the biter, he had misidentified the type of teeth that were in the photograph. Dr. Campbell showed the evidence to other colleagues. Many concurred that Ray was not the biter, or at the very least they determined that the evidence was inconclusive. No one concurred that Ray was the biter. However, Dr. Campbell refused to render a final opinion until he saw the dental casts. Jim offered to pay Dr. Campbell's expenses to travel to Phoenix, and he agreed to go.

Dr. Campbell also introduced Jim to a defense attorney named Christopher Plourd who was based in San Diego and an expert in DNA and forensic evidence. Chris kept abreast of the latest technological developments by attending forensic evidence conferences. Jim took to Chris right away and asked him for his business card.

On June 2, Jim and Dr. Campbell went to the evidence room of the Phoenix courthouse. All of the trial exhibits were carefully sealed in plastic and labeled. Jim removed the casts from the plastic bag so that Dr. Campbell could measure them. When he returned the evidence, the custodian noticed that the bag had been opened. On June 7, Carol Schreiber, director of court file services, wrote a memorandum expressing her concerns that Jim might be "tampering" with the evidence. She called the attorney general's office, and on June 8 Noel Levy went to the courthouse to examine the evidence. Although Levy concluded that the evidence had not been tampered with, he dispatched investigators to check out "Mr. Rix."[1]

Within a week, Homer Campbell issued a report excluding Ray as the biter. The following Sunday, Jim flew to San Diego to meet Chris Plourd.

Chris's office was in a renovated house, and among its homey features was a large outside deck. The two discussed the case over a beer. Chris was dressed casually and smoking a cigar. Jim liked Chris and found him very approachable. After Jim had a quick consultation with the family, they retained Chris to represent Ray in a postconviction new trial motion.

Since so little investigation had been done by the defense in the first trial, Chris wanted to conduct additional DNA tests. He met with Ray in prison and explained to him the risks of DNA testing. There were several types of evidence that could be tested—saliva from the bite mark and blood evidence from the victim's bra. Chris needed Ray to understand that if the tests came back positive, Ray would be in worse shape than he was now. Chris was impressed when Ray answered, without hesitating, "Test it all!"

Soon after being retained, Chris contacted a local forensic odontologist he worked with, Dr. Norman Sperber. Dr. Sperber told Chris that the case seemed familiar to him, and then he remembered that Dr. Piakas from the Phoenix crime lab had contacted him soon after the murder—and Sperber had told him that the bite mark evidence excluded Ray! However, prosecutor Noel Levy, who had a legal obligation to give the defense any exculpatory evidence, never informed Ray about his consultation with Dr. Sperber.

Chris filed several hundred pages of documents in support of his new trial motion. He presented affidavits from Dr. Campbell explaining how Dr. Rawson had actually misidentified teeth from the bite mark, thus invalidating his conclusion. Dr. Campbell's affidavit concluded by stating that "the video tapes are of no evidentiary value and obscure rather than enhance any analysis" and that he "totally disagreed with the analysis that was done and the conclusions that were reached."[2]

Chris even obtained an affidavit from Dr. Bruce Etkin admitting that he was incompetent to advise Geoffrey Jones about bite mark evidence.[3] Dr. Richard Souviron, another forensic odontologist, filed an affidavit concluding that "the defense provided no competent forensic dental expert" and that this failure to consult with an expert meant that "Mr. Krone did not receive fair representation."[4]

He also submitted affidavits from several other experts challenging virtually every aspect of the state's evidence against Ray, including one from Thomas Wahl, a senior forensic geneticist for the Analytical Genetic Testing Center in Denver, challenging the state's DNA evidence.[5]

Prosecutor Levy vigorously opposed the new trial motion:

> The thrust of defendant's pleadings is based upon defense counsel's personal view, based upon a misstatement of the trial, the evidence, and in an attempt to misrepresent the facts in support of his pseudo-scientific conclusions, is to state that all the State's experts are wrong, the prose-

> cution wrongly presented the case, and if only the defendant could get all of the evidence, then he would have his experts handle it and come up with the conclusion that the teeth marks are not Krone's, and none of the biological evidence are related to Krone. Thus, Krone is not the murderer but someone else, and by such a procedure, the defendant would have created newly discovered evidence, by which to justify future Rule 32 proceedings.[6]

Levy also argued that the defense could not file a new trial motion until the appeal was completed. He requested that the judge deny Ray's motion and asked for an order sealing all of the trial evidence, based in part on his claim that Jim Rix had tampered with it. Judge Hotham agreed with the state and denied Ray's Rule 32 motion and ordered all of the trial exhibits sealed, thus preventing the defense from conducting additional tests.[7]

Jim was frustrated and discouraged by the judge's ruling and decided to hire a private investigator named Tex Brown, who had gained notoriety working with the Drug Enforcement Administration in Mexico. Tex promised Jim that he would find the real killer, and Jim flew to Arizona in the fall of 1994. Tex requested a substantial payment up front with the remainder due when "Ray walks." After a few days, Tex claimed to have uncovered a ring of illegal message parlors that he believed was associated with Kim Ancona's murder. Tex was hot on the trail of two alleged witnesses, "Sugar" and "Hot Lips," when Jim decided to end their business arrangement.

As it turned out, the judge's adverse ruling worked to Ray's advantage, because the appeal of the motion went to the Arizona Supreme Court at the same time that the court was considering the appeal from Ray's trial. Although they were two separate proceedings, the judges learned of information from the Rule 32 case that had not been part of the trial record, such as the fact that the state had failed to disclose to the defense Dr. Sperber's opinion that the bite mark was not made by Ray. Meanwhile, Chris briefed Ray's appellate lawyer, John Antieau, on the new trial motion, and on December 12, 1994, Antieau argued Ray's appeal while Chris and Jim watched from the front row of the courtroom. Chris had so thoroughly convinced Antieau of Ray's innocence that he went so far as to call Dr. Rawson a quack and a charlatan.

The appeal focused on two issues: the discovery violation that resulted from the state not giving the defense the videotape until the last minute and

the hearsay statement by Kate Koester that Ray was planning on closing the bar with Kim. Chris and Jim were heartened by the judges' questions, which intimated they had serious concerns about whether Ray had received a fair trial. The coup de grace came when a justice asked John Antieau if he had any evidence that Dr. Rawson's testimony was not based on sound scientific evidence and John referred the judges to Dr. Campbell's affidavit stating that Dr. Rawson's methodology was not accepted within the scientific community.[8] This evidence would not have been before the court had Judge Hotham granted the new trial motion. John finished his remarks:

> This is probably the most anomalous murder case in my experience. The defendant was advancing into middle age with never any problem with the law. He was a veteran gainfully employed for years and years. If in fact Ray Krone did murder Kimberley Ancona, it is the most aberrational murder I've ever seen. It was 180 degrees away from the rest of his life.[9]

The family felt optimistic after the hearing, but were told that it would likely be a year before the court came down with its ruling. However, as it turned out, they did not have to wait that long. On June 22, 1995, the Arizona Supreme Court overturned Ray's conviction and granted him a new trial, ruling:

> The State's discovery violation related to critical evidence in the case against the accused. We cannot say it did not affect the verdict. We reverse the convictions and remand for a new trial, where Krone will have an opportunity to meet the force of the videotape.[10]

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This time, Ray and his family actively participated in preparing for trial. Amy, Jim Leming, and Jim Rix learned as much as they could about forensic odontology, including attending a weeklong conference in New York City to meet with the country's top experts.

Carolyn and Jim made arrangements to take time off from work for the trial. They planned to drive a camper across country and live in it during the trial. Amy made arrangements to be there for as much of the trial as she could.

By the time the trial began, Chris Plourd had familiarized himself with every piece of evidence. He had catalogued every police report, every expert witness statement, and all the transcripts from the first trial into multiple notebooks. Although he was a very experienced defense attorney, Chris had never tried a case in Arizona. Colleagues told him to be careful of Arizona juries because they did strange things.

Superior Court Judge James McDougall's courtroom was small with limited seating—only three benches on each side of the room, each seating eight to ten people. Sitting on Ray's side were Carolyn and Jim Leming, Jim Rix, Amy Wilkinson, several of Ray's friends from Phoenix, and a reporter hired by the *York Daily Record* to cover the story. On the state's side were Kim's mother, accompanied by a victim's advocate, and a close friend of Kim's.

Jury selection began on Monday, February 12, and lasted until February 16. Immediately following jury selection, both sides made their opening statements.

Unlike Geoffrey Jones in the first trial, Chris had retained eight expert witnesses for the defense.[11]

The first witness called was FBI agent Chris Allen, a defense witness. Normally the state puts its case on first, but because of a scheduling conflict, Agent Allen had to testify at the beginning of the trial. He testified that there were two pubic hairs found on Kim Ancona and that they did not belong to her or Ray but were from an American Indian.

The state's case was essentially the same as in the first trial, but because Chris took so long cross-examining the witnesses, it took Noel Levy weeks instead of days to complete it. Levy did call one new witness, Dr. Moses Shanfield, a DNA expert who had examined saliva found on the bite mark and blood found on Kim's bra. Under cross-examination Dr. Shanfield admitted that the saliva on the bite mark was not Ray's. However, the blood on the bra was inconclusive, and he could not exclude Ray as a possible source.

While cross-examining criminologist Scott Piette, Chris asked if he had found blood on any of Kim's clothing besides the bra. The answer was no. Chris asked if any tests had been done to determine the presence of blood. Piette answered that he had not because it was unnecessary. Chris asked him if he would be willing to conduct a simple test called a Kastle-Meyer test, which would determine the presence of blood. Piette agreed and in front of the jury he conducted the test, which showed the presence of blood on Kim Ancona's jeans—blood that the police had never tested.

The state's last and most important witness was Dr. Rawson, who took the stand on March 18. As in the first trial, Dr. Rawson presented very engaging testimony, including the videotape. However, after Chris examined him for two and a half days, Dr. Rawson seemed less sure about his conclusions.

Although it was stressful, being in the courtroom gave the family an opportunity to visit Ray and got Ray out of his small cell. He was not in shackles, and he wore a suit instead of his prison uniform. George Schuester, the bailiff in charge of the courtroom, had serious doubts as to whether Ray was guilty and was much more lenient with him than he would have been with other inmates. He allowed the family to talk to Ray and even hug him as well as to give him things like pieces of candy. Each morning his family brought Ray clean clothes to wear to court.

AMY: One time Ray asked me to get him a package of salt from McDonald's. During a break he said to me, "You gotta get me a pack of salt. I need some salt for my food." The prisoners weren't allowed to use salt. "What am I supposed to do with it?" I asked him. "Stick it in the coat pocket of my suit before you give it to George." I told him I'd think about it.

The food was really horrible. Ray got very thin in prison. It never tasted good, and sometimes they served the prisoners bad food that made them sick. Once in a blue moon they'd give them produce. One time they gave Ray a hot pepper with his meal, and he somehow cut the pepper into fifty little pieces and he saved it and put one piece a day under his tongue just so he could taste something with flavor every day.

You can't imagine how I suffered over that decision. I didn't tell anybody because I didn't want anybody else to get in trouble if we got caught. You don't know how bad he wanted a pack of salt. He had done so much for me in my life and all he asked me for was a stinking pack of salt and I was freaking out about it. I was sure if I got caught they would test it for drugs and accuse me of trying to sneak drugs to Ray.

I never did get the pack of salt for him. I couldn't do it. I decided that if I gave him a pack of salt and got caught it might hurt his case and I wouldn't be able to live with myself. Plus my mom and the lawyers would have killed me. But not getting him a pack of salt was killing me, too. I felt like I should have done it without thinking. I still feel bad about that lousy pack of salt. When I told him I wouldn't do it he said,

"It's all right, don't worry about it." I don't think he realized how bad I felt.

After Dr. Rawson's testimony, the defense opened its case on Thursday, March 21, with the testimony of Dr. Norman Sperber, who told the jury that he had advised the prosecution early on that Ray had not made the bite mark. On Friday, the defense called Dale Henson, a street cleaner who testified that he had seen a person going into the CBS Lounge at closing time and it was not Ray Krone. On Monday, Art Epstein, an expert in blood spatter, testified that the natural folding of the bra, not Ray's teeth, had made the blood pattern on the bra. For the remainder of the week, Chris called three more DNA experts. Then he concluded his case with testimony from Dr. Campbell and Dr. Gerald Vale, prominent forensic odontologists who both excluded Ray as the biter, and a state's expert, who testified that part of what Dr. Rawson was calling a bite mark,was actually a scratch mark that was made postmortem during the autopsy.

Counsel made closing arguments on Tuesday, April 9, and the jury began deliberations that day.

Every morning for five weeks, a group of Ray's supporters had shown up at court, and every day the victim's advocate had brought Kim's mother, Patricia Lou Gasman. The two families had not spoken in nearly two months when Kim's oldest son approached Carolyn.

CAROLYN: It was obvious that Patricia hated Ray. I felt really bad for her. She had lost her daughter, and she didn't seem to have that much support. None of her kids lived with her, and we heard that she had gone through a period of years where she didn't speak to Kim and they had only been back in communication for a matter of months before the murder.

During the jury deliberations, Kim's oldest son, Chris, came over and sat down on a bench next to me. I told him that I was very sorry about his mother and I felt really bad because the person who really did it was still out there somewhere and hadn't been punished. He told me that he was not convinced that Ray did it.

With the exception of Carolyn, everyone in the family felt that the case had gone very well. Carolyn, however, had a bad feeling about the jury.

CAROLYN: The third day of deliberations I couldn't sit still, so I started walking around the city. My husband was feeling positive, and my cousin Jim's wife and son had come down, and Jim had asked Ray where he wanted to have his celebration party. But I didn't want to talk about things like that.

The jury finished deliberating on Thursday evening, and the judge excused them for the night, ordering them to return the next day to read the verdict. Before dismissing the jury, the judge asked all the spectators to leave the hallway so that the jurors did not see anyone. All parties returned the following morning.

The family was already assembled when the jury was brought into the courtroom. Carolyn watched George walk up to Ray and whisper something in his ear. Then the foreman read the verdict: "Guilty."

Chris and Ray did not react at all. At first there was a stunned silence—even the judge looked surprised—but then commotion broke out. Kim's family cheered, and Amy yelled, "This is insane." As is customary, Chris asked to have the jury polled, and all confirmed that they agreed with the verdict, although the ten women of the jury were sobbing as they answered.

CAROLYN: I don't know if I could ever describe it. I heard it, but I didn't really hear it. Ray turned around and said, "It's okay, Mom." And then they took him out. We couldn't even say good-bye. They just took him out. It is like you are no longer human. And there was the prosecutor gloating.

AMY: I remember someone pulling me out of the aisle. The next thing I know, my mom and my stepdad and I were going into an elevator right outside, and a photographer was trying to get into the elevator with us, and everybody was shooting pictures. My stepdad pushed them out of the way. We kind of flew out the front door and down the steps holding hands. With all the craziness we could have gotten separated. I broke off at some point and went behind a sign and sat there for a while. It was kind of scary. I just couldn't believe that it had happened again. We had a bag packed for Ray with new clothes and a reservation at a nice hotel. We even had a dinner reservation. We didn't even remotely think that he would be found guilty again. We had no plan for that.

I had all this adrenaline pumping, and I wanted to do something like go talk to the judge, which you can't do. But we did wait for the jury

to walk out of the courthouse, because we wanted them to have to look at us.

CAROLYN: After the jurors left I made a statement that our family felt bad for the victim's mother, but I said that we were victims, too, because Ray was innocent and we were the victims of false conviction. Patricia got very angry about that statement.

The family met at the investigator's office near the courthouse. Despite his intense disappointment, Chris tried to remain optimistic. "This isn't the end. There's more we can do," he told the family. No one said much at the meeting; all were in a state of shock.

AMY: The feeling of hopelessness was huge, because without a doubt we proved that Ray didn't do it. We pulled out all the stops, and the jury just said he did it. I was there for a lot of the trial, and I heard a lot of the evidence. I was completely 100 percent sure the jury was seeing the same thing I was seeing. When they said guilty I thought they misspoke. It was horrible. Here Ray had had a second chance with a good lawyer with all of us out there and all of the forensic odontologist support (with the exception of one idiot) and still he was convicted. What could we possibly do better? We presented everything. We proved him innocent. It took five weeks, what more could we possibly do to change anybody's mind?

We called his friends. The ones I was staying with came right down. We were all in a very big state of shock. We all pretty much lost it. We were all just saying things and doing things against each other. There wasn't any reason. We were just losing it. My mom exploded, and my stepdad and I did, too. I don't know if that is a typical reaction. We didn't all sit around and hold each other, because it was too big.

Jim and Carolyn went back to their camper. Jim Rix went back to his hotel room, Amy went back to Ray's friends' house. Ray went back to prison.

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The next few days were a blur. Chris was as devastated as the family. He had become very emotionally involved in the case, and the verdict shook his faith in the system. Talking to the jurors after the verdict, Chris learned that they

had discounted the expert evidence. They believed that the bite mark was the crucial piece of evidence—if Ray was the biter he was the killer—but they didn't believe either Dr. Rawson or the defense experts. Instead, they examined the photographs and dental casts on their own and decided that Ray was the biter. As his colleagues had warned him, Arizona juries do strange things.

The family tried to make sense of the verdict. Everyone had a theory. Maybe the jurors had been more influenced by Dr. Rawson because he was a Mormon and 40 percent of the population of Maricopa County was Mormon. Or maybe the fact that Ray was a postman influenced them. The prosecutor kept mentioning throughout the trial that Ray was a postal worker. A postal worker had recently shot up a post office, and everyone was talking about people who had "gone postal."

JIM: There are other ways to influence a jury. The simplest thing to do is that somebody drops the word that Ray confessed but it wasn't able to come into court. We had heard that Rick Romley, the county attorney, had been extremely upset that Ray's conviction was overturned. He had said in no uncertain terms that they had to do whatever was necessary to convict Ray Krone. Who knows what that meant? Of course, this is all highly speculative, but to anyone watching the trial the verdict didn't make any sense.

AMY: Of course we tried to figure out why this had happened. The second trial happened right after O. J. Simpson got off. That was not a good thing for Ray's case. The public was pretty much dissatisfied with that verdict. They didn't want to see anybody else "get off." And I really don't think they cared about the fact that the state was supposed to prove him guilty beyond a reasonable doubt. We had proven that Ray was innocent. I knew that the only hope we had of helping Ray was to find the person who actually did it.

After the verdict, I went out to some barrooms where people that knew Ray went. We had some ideas about who might have done it. I didn't tell anybody I was going to the bars. Some were really hardcore bikers' bars. I thought I'd get there and without telling people I was Ray's sister try to get them to talk. The trial was over. It was in people's minds, and they were talking about the guilty verdicts. I was a single woman going to a bar by myself; I figured some of these guys were going to talk to me. I never found out anything.

The *York Daily Record* also postulated an explanation for the verdict. Staff writer Scott Dodd wrote an article headlined, "Defense May Have Been Too Sure," in which he concluded:

> Although defense attorney Chris Plourd ripped into the prosecution's main witnesses, he didn't always make it clear where he was heading or what conclusions he expected the jury to draw from his cross-examinations. Sometimes he seemed to be playing more for his audience of fans, Krone's supporters, than he did for his audience of skeptics, the jury. And when he gave his closing argument after a strong presentation of the evidence by Prosecutor Noel Levy, Plourd focused more on his conspiracy theories about the police and prosecutors than he did on the evidence that he thought would cement Krone's innocence.[12]

The article concluded with a surprising twist:

> One thing will greatly aid Plourd's struggle for an appeal: a death sentence. Death row inmates have more automatic appeals and a better chance of securing a new trial. "We're hoping he gets the death penalty again," [Jim] Leming said. "That's Ray's wish," Carolyn Leming added.[13]

Before returning home, Jim, Carolyn, and Amy visited Ray one last time. They were not permitted a contact visit so they had to say good-bye through a Plexiglas wall.

> AMY: It was a short visit. I wish that it hadn't been through glass. I couldn't understand why it had to be through glass. I know they have rules but we live on the other side of the country and weren't going to see him for a long time. Ray tried to stay upbeat but we were all depressed. We knew we wouldn't be seeing him for a very long time.

Jim and Carolyn drove straight back to York, taking turns driving around the clock. Amy flew back. Ray stayed in Arizona.

On December 10, 1996, Ray returned to court for sentencing. In a brief statement he said that there was a good explanation for the lack of evidence against him like hair, fingerprints, and blood: "I didn't kill Kim Ancona."[14]

Patricia Gasman stated that she had no doubt whatsoever that Ray had killed her daughter, and she asked the judge to impose whatever sentence was adequate "for this heinous and depraved murder."[15]

Judge McDougall read a seventeen-page prepared statement in which he announced that he would not sentence Ray to death, and he expressed doubts that Ray was even the killer. He pointed out problems with the state's case, such as the fact that the state had failed to disclose to the defense Dr. Sperber's opinion that the bite mark was not made by Ray. He sentenced Ray to twenty-five years to life for the murder and twenty-one years for kidnapping and concluded, "This is one of those cases that will haunt me for the rest of my life, wondering whether I have done the right thing."[16] At age thirty-nine, Ray would have to serve thirty-six years before becoming eligible for release. For better or for worse, he was no longer on death row.

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Ray was lucky to come from such a resilient family, and to come from a community that believed so strongly in his innocence. After recovering from the initial disappointment, the family returned to the task of freeing Ray. Amy and two sisters who had been friends with Ray in high school organized a petition campaign. The *York Daily Record* ran a story on their efforts.

> Wade [Amy's last name at that time] believes that the jury ignored reasonable doubt in her brother's case, not to mention DNA evidence and witness testimony that seemed to prove his outright innocence. Apparently, many people in York County agree with her. "A lot of people are really outraged," she said. Everyone she talked to said they wished they could do something to change the outcome. "After hearing this night after night, I said we really ought to collect this energy," Wade said.
>
> So with half a dozen other people who believe Krone is innocent, including friends of the family and former school buddies, Wade has found a way to keep the fight going for her brother. The group has distributed hundreds of petitions all over York County, asking people to say they believe the justice system failed in Krone's case.[17]

The article also quoted the two sisters involved in the campaign:

"We just felt that after all of this that we had to get the word out," said Melinda Eppolito, who is writing letters with her sister, Laura Meagher. They followed the case "fully expecting the opposite of what happened to happen," Eppolito said.

When it didn't, they decided they needed to act. "The jury system, I mean, something's got to be done," Eppolito said. "We just want to get this out to people and open their eyes, show them this is what's going on."[18]

The article concluded with the text of the petition.

> We, the undersigned, believe that the American justice system has failed greatly in the Ray Krone/Kim Ancona case in Phoenix, Arizona. In particular, it points out a severe problem with the current jury system. It puts too much responsibility on people who are uneducated in very technical evidence and who do not understand the law. We believe Ray Krone was wrongfully convicted of this crime and would like to see it solved as soon as possible for the benefit of all Americans who care about justice.[19]

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For the second appeal, the court appointed James Kemper. As he had with John Antieu before the first appeal, Chris met with James to go over the evidence with him. Once again, the main issue on appeal was the hearsay statement of Kate Koester. And once again there was new evidence—the blood on Kim Ancona's jeans, which no one knew the source of. Chris suspected the blood was Kim's, but he wanted to make absolutely certain that it wasn't someone else's.

As before, Ray's case proceeded on two tracks: the appeal from the conviction and a motion for a new trial. However, this time, Chris thought it better to wait before filing the new trial motion. Emotions were running high after the second verdict and needed time to dissipate, and Chris did not think it likely that the state would pay for new DNA testing at the same time it was paying for Ray's appeal.

Unfortunately, this meant a long wait for Ray. It took five years before the appeal ran its course—first to the Arizona Court of Appeals, then the Arizona

Supreme Court, and finally the United States Supreme Court. All three affirmed Ray's conviction.

JIM: We had to cover all possible legal routes, but I did not think Ray would get any relief in Arizona courts. I thought that once we got out of state court and into federal court we might have some hope. I read a book written by Ruby Gerber, a retired Arizona judge who knew Gene. The book was all about how the system in Arizona gives prosecutors so much power. Many of the judges are former prosecutors. Judges are afraid they will lose their jobs or get really bad assignments if they go against prosecutors. The first judge, Hotham, was the worst. He was nothing more than a prosecutor in a robe. He never made a favorable decision for Ray in the whole case.

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The weeks stretched into months that stretched into years. The family did all they could to keep hope alive. Since Ray was no longer on death row, the rules were less strict. He was allowed to have a television, so Carolyn sent him one. Phone calls were more liberal, so Ray had more contact with friends and family. In most ways, prison life improved for Ray.

RAY: Unlike on death row, we didn't have to stay in our cells all the time. In maximum security, they'd open your door up and let you out of your cell for breakfast, lunch, and supper. And we had rec once a day. It's not like you could walk just anywhere, but at least you got out of your cell each day. You could put in for a visit at the law library and go over there.

Of course, when interacting with that many people there are more problems: egos, violence, people looking to cause some type of trouble. You had to be involved with prisoner politics. Prisons are very segregated. You don't cross those lines without severe repercussions. You have to be a lot more careful about your physical safety. If you are walking down the hallway or chow hall you might get stabbed, or raped.

There were stabbings of inmates if not daily then at least weekly. I've been stabbed, lived through riots. It's just part of life. You just hope they don't get you in the neck or the throat. On death row there was not the same racial segregation or tensions. We knew they were going to kill us all.

Ray's hometown community continued to support him. Old friends sent Ray letters including pictures of their kids. A Sunday school teacher told her class about Ray, and many of the young children wrote Ray letters with drawings they had made. Everyone put Ray on their "prayer chains." Amy and her friends continued their campaign, meeting once a week to write letters on Ray's behalf. They wrote to everyone they could think of—politicians, movie stars, news shows—and got a lot of form letters back.

AMY: The media didn't want to cover the story until it was over. They always wanted an ending. "Contact us when the case is resolved." They didn't seem to think their role was to bring attention to the case. The only paper that covered it regularly was the *York Daily Record.*

Desperate enough to try anything, Amy contacted a psychic she had seen on *The Montel Williams Show* who had helped police departments solve crimes. The psychic had a web page and for $750 promised to answer one question.

AMY: I spent a long time trying to come up with one question to ask and decided I'd ask her if Ray would ever get out of jail. They had rules against asking things like what is the name of the killer. That cost a lot more money. I tried to get the money together, then I went through in my head how I would feel if the answer was no. When I thought about it more I realized that if she said no I was going to be devastated, and if the answer was no then I didn't want to hear that answer. I guess I thought if she would have said Ray was going to get out of jail that would have given me more desire, more power to keep going. In the end I didn't pay to have it done. I don't know, maybe subconsciously I needed reassurance that we were working in the right direction. I never told anybody that I had been doing that.

After Ray lost all his appeals, Chris believed it was time to request to have the blood found on Kim's clothes tested. He wanted to have a local lawyer handle the motion both because it was easier to have someone local and because he thought it would help Ray if he stayed in the background. In July of 2000 the family retained Phoenix lawyer Alan Simpson, who, like Chris, was an expert in forensic technology.

Chris's instincts proved to be correct. On April 16, 2001, five years and four days after the second jury found him guilty, the court released the bloody

jeans for DNA testing. The judge ordered that the blood on the jeans be tested and that the results be run through the CODIS databank (a national database with DNA records of convicted offenders) to check for matches. It was six months before the state got around to testing the blood, but the family was not given any results.

At the beginning of the year, the family learned through a lab technician who knew Chris that the state had results that it had not turned over. Chris began making inquiries, but it took until April 4, 2002, before the police released a report that confirmed that the blood on Kim Ancona's pants was not from Kim or Ray but from Kenneth Phillips, a man serving time on a sex offense, due to be released in July. The defense contacted Kenneth Phillips in prison. He admitted that when he heard the news of Kim Ancona's murder he wondered if he had killed her, but couldn't remember because he was in an alcoholic blackout. At the time of the murder, Kenneth Phillips had been living six hundred yards from the CBS Lounge.

On April 5, 2002, Alan Simpson petitioned the court for Ray's immediate release. The judge denied the request but set a hearing for April 29 to hear testimony on the new evidence. Alan Simpson was quoted in the press, "This proves with certainty that Ray Krone is an innocent man. Every day from this point on that Ray spends in jail is a day the county acts at their own peril."[20]

Three days later, on April 8, the Maricopa County Attorney's Office called a news conference and announced that it was petitioning for Ray's release pending the April 29 hearing. That afternoon, Ray, pale and thin, and wearing sunglasses to protect his eyes from the bright light, walked out of prison accompanied by Chris Plourd. Standing outside the prison, Ray said in an interview with KPNX-TV, "For ten years I felt less than human. This is certainly a strange feeling, and I think it'll take a while for it to set in."

AMY: None of us really expected anything to come from the DNA testing. There had been so many times when we had gotten our hopes up just to have them dashed down again. I thought this would be one more time.

On April 8, I was over at my dad's with my daughter picking up sticks in the front yard from the oak tree. I had spent most of the day with him. The three of us were having fun. A van pulled over, and I realized it was a lady that my mom worked with and she yelled at me, "Where have you been—your mother's looking for you!" She's still yelling from a distance and I think I hear her say, "They are going to leave your brother out of jail! They're going to leave your brother out of jail!" I said, "Dad, I've got

Jim Rix (left) with attorney Christopher Plourd.
Provided with permission of Jim Rix.

to go, I'll let you know." By the time I got to my mom's place, there was a reporter there already.

Everybody was there with big smiles on their faces, and they started telling me the details that at that moment they were sending a fax that would order Ray's release. It was kind of weird having a reporter there to capture every detail of what you are thinking. I was still past disbelief until I watched him on TV walking out of jail and then he called on the phone.

Carolyn and Jim packed the car immediately to drive to Arizona. Dale offered to come along and help with the driving so that they could drive straight through. Amy wanted to go, but she had a two-year-old daughter, and someone had to stay behind to handle all the media questions.

AMY: I didn't mind dealing with the local media. They had always been really good. The people around here totally believed in Ray. But then I started getting all these calls from other people that I had written to about Ray's case, and I felt like saying, "You know what? I wrote a letter last year, and if you show me that letter maybe I'll talk to you about it. If

you had paid attention you would have had the story long before anyone else." I tried not to let that attitude come through too much.

For the next five or six weeks there was someone from the media around all the time. It was strange to have a house full of cameras and an interview scheduled every day and night. Because the rest of my family wasn't here, I was the one they had to talk to. It did get frustrating. Sometimes you think the questions are kind of dumb. Like, "Were you excited to hear he was getting out?" It still didn't seem real. I thought that the prison would find some way to keep him. They'd realize a mistake had been made and put Ray back in prison.

Two days later, Carolyn, Jim, and Dale arrived in Phoenix after a record two-day drive across the country. The three had slept only four hours during the 2,400-mile journey. Carolyn brought some of Ray's possessions that she had been holding for him for more than a decade: a leather bracelet, a necklace, his driver's license and Social Security card.[21]

Ray spent the next couple of weeks relaxing with his family, enjoying the freedom of things like eating whenever and whatever he wanted and swimming in the pool. Only one piece of news marred his happiness—his grandmother, ninety-three-year-old Bertna Mae Krone, died in her home in Dover Township before he had a chance to see her again. Ray had desperately hoped to see her before she passed away, but he could not leave the state until his case was resolved, and she was too sick to travel. Fortunately, she had lived long enough to learn that Ray had been released from prison.[22]

On April 24, 2002, Maricopa County Attorney Richard Romley dismissed the charges against Ray and charged Kenneth Phillips with Kim Ancona's murder.[23] Ray was going home.

Before the family returned to Pennsylvania, a local television anchor arranged a meeting between Carolyn and Patricia Gassman.

CAROLYN: Patricia told me that she had believed all the things that the prosecutor had told her about Ray. She now realized that she had been lied to. She apologized for all the things she had said about Ray. I told her that I felt bad for her because now she would have to go through another trial and hear and see the murder all over again.

The family loaded up the car and left the state, for good. They estimated that they would be back in York by May 3. The media were particularly inter-

ested in covering Ray's release because he was the one hundredth innocent person to be released from death row since the death penalty was reinstated in 1976.

> AMY: Relatives and friends and the media all gathered together at my house. It was a circus until he finally got here. I didn't know what I would do or how I would react. My stepdad pulled into the driveway, and Ray got out of the car. It seemed like nobody moved, and I said, "I'm not standing here!" I ran down the yard to the side of the car and I hugged him for I don't know how long. Ray looked skinny and very pale, white as a ghost, an unhealthy look, like he had cancer or something. Then I introduced him to my daughter, Hannah Rae, named after him.

Two days later the entire community welcomed Ray home at a party organized by Amy and his supporters held at Quickel's Lutheran Church picnic grove. The theme was "Christmas in May"—the idea was to make up for all of the Christmases and birthdays Ray had missed while he was in prison. Half of the room was decorated for Christmas and the other half for a birthday party. People brought wrapped presents and placed them on either side of the room. Barbecue was served, which was a thrill for Ray; he rarely ate meat all the years he had been in prison, either because it wasn't served or because when it was, he feared that it was spoiled.

The party brought together the people who had continued to believe in Ray and kept him going through his ordeal. Everyone signed a guestbook with warm, welcoming words. There were a couple of fund-raising events, too, to help Ray get back on his feet financially. Someone organized a 50/50 lottery—the winner was to split the pot with Ray—but both winners of the lottery refused their share of the cash. Ray's television that he had watched while in prison was auctioned off to the highest bidder.[24] The party helped Ray make the transition back into "real life" by reminding him of how much love and support he had.

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More than a year after his release, Ray is still unsure of what the future holds. He lives in an apartment owned by his mother. He spends most of his time traveling and speaking about his experience and speaking out against the death penalty. Although he had no experience in public speaking, Ray is

proving to be a natural. He inspires audiences with his quick wit and upbeat attitude. Unfortunately, these engagements are not earning him regular income. When at home, he helps his family and works for a friend who owns a plumbing business. He has tried to get his job back at the postal service, but so far has been unsuccessful.

AMY: It is amazing how well Ray has held up. However, I wonder if he will ever really be back to "normal" again. I have met various people that this has happened to, and I checked into some of the statistics before he got out. A lot of them become drug addicts, alcoholics, or homeless or are back in jail.

I worry about him. It's not like it is over. I know deep down he is damaged like no one can imagine, but his spirit and his attitude are outstanding. Anybody who meets him and talks to him is pretty much amazed. It's been that way since he got out. He was that way when he got home. He hasn't shown any anger or bitterness.

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CAROLYN: It's hard to know how Ray is really doing. We know and he has told us that only about 15 percent of the guys who come out make it okay. A lot of guys have a lot of trouble. He considers himself one of the very lucky ones. I'm sure there are scars that will never heal and there will be things that he has to deal with for years. His attitude is certainly commendable. I know that the whole time that Ray was in prison he'd call us and say, "I'm fine. I'm doing okay." He always tried to protect us, and I feel sometimes he is still doing that. He is not really opening up. He doesn't have a lot of time to himself. When he visits us his cell phone is ringing off the hook. You can't even have a meal without lots of people calling, but he has a good attitude about all of it.

Our family is deeply religious, which helped us get through this ordeal. I believe everything happens for a reason. When Ray was released, he became the one hundredth innocent to be released from death row. That has given Ray a lot of opportunities to speak. Ray seems to have the knack and natural ability to talk. One pastor at a church where Ray spoke said Ray put him to shame because he doesn't talk with "ahhs" and "ums." All Ray has ever wanted to do was get out and start his life again, but maybe God has other plans for him.

> Ray can also speak with credibility because he has never been in trouble with the law before. Many of the people that you hear about that were wrongfully convicted had been in trouble before, which is why the police focused on them. But in Ray's case there was no reason to suspect him of murder. They made a case out of nothing. They needed to find someone to convict and they chose Ray.

Ray lost all of his possessions while in prison, except the Corvette his friend saved for him. However, with any luck, Ray may receive some financial compensation for his lost years and for the untold resources spent untangling himself from the legal nightmare. A year after his release, Ray filed a $100 million lawsuit against the Maricopa County Attorney's Office and the Phoenix police alleging police incompetence, fraud, misconduct by prosecutors and perjury by witnesses. Ray is not looking to get rich. Any money he gets will be used to repay his family, especially his parents, who depleted their retirement and other savings to pay for his defense.

Before he returned to Arizona to file his suit, people warned Ray to be careful of the police who were very angry at him and might try to tarnish him in some way. However, public sentiment appears to be on Ray's side. The *Arizona Republic* published an editorial called "Pay Ray Krone His $100 Million," that stated in part:

> We should pay the $100 million not because his conviction, as the lawsuit alleges, was based on prosecutorial and police misconduct, altered evidence, evidence not tested, exculpatory evidence not disclosed to the defense or a prosecution that shopped for and got an expert who said what it wanted. We should pay because we should collectively be held accountable for the mistakes made in our name, particularly when they cause such great harm.[25]

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The people of York, Pennsylvania, who pride themselves on being good law-and-order citizens, no longer have blind trust in the system.

> CAROLYN: We always believed in an eye for an eye. When we heard about a horrible thing, like a kid being brutally killed, we'd say we wanted justice. Now when I hear about a horrible crime I don't automatically assume

the person is guilty. The system is not designed for justice, it is about showboating and notches on the belt. There are people who are completely innocent and are treated like Ray. The death penalty does not deter anybody from doing anything. Too many people won't admit that it doesn't work.

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JIM: From a practical point of view the death penalty serves no useful purpose. It is very expensive. It serves only our animal instincts for revenge, retribution, and retaliation. If they could get the right person I probably wouldn't have a problem with it. But too often they get the wrong person. We'll never have a perfect system, so some innocent people will always be convicted. The best thing to do is eliminate it. But there are many more changes that need to be made besides getting rid of the death penalty. Prosecutors and police can get away with anything. They have blanket immunity. They pay an expert an amount of money to say it is their guy, and then if it turns out they are wrong they just say, "I just believed my expert." That is the immunity they get. What incentive do they have to play by the rules when nothing happens to them? In our case they knew for months that the DNA showed Ray was innocent, but they spent all that time trying to come up with some connection between Kenneth Phililps and Ray to cover up all their mistakes. To them it was nothing. To Ray, it was another six months of his life in prison for a crime he didn't commit.

THE GET OUT OF JAIL FREE ACT OF 2007

- The so-called "Literacy, Education, and Rehabilitation Act" would more than double the time that can be taken off federal prison terms based on offenders' conduct in prison. Currently, 18 U.S.C. 3624(b) allows inmates to earn a reduction of up to about 15% of their sentences (54 days a year) through good behavior. This bill would increase the allowed reduction to over 30% of the sentence (an additional 60 days a year).

- The bill superficially conditions the increased sentence reduction on participation in correctional programs, such as educational, treatment, or work programs. But since most federal inmates can participate in such programs, the practical effect is to increase enormously the prison time that can be taken off for federal offenders generally. Those eligible for these increased sentence reductions would include, for example, terrorists, spies, murderers, rapists, child molesters, gangsters, and career criminals.

- Since federal inmates broadly participate in correctional programs any way on the basis of existing incentives, adding this new sentence reduction incentive for participation would be superfluous, and would effectively hand a get-out-of-jail-free card to much of the federal prison population for no reason. Existing programs include, for example, Federal Prison Industries jobs, functional literacy and high school equivalency education, and apprenticeship and vocational training programs. Tens of thousands of federal prison inmates already participate in these programs for such reasons as relieving the tedium of imprisonment, obtaining marketable skills, obtaining wages for work done in prison, and obtaining favorable consideration for the currently authorized (15%) good conduct credit.

- For example, existing law provides potent incentives for participation in educational programs – under 18 U.S.C. 3624(f), participation in literacy programs is mandatory for inmates who are not functionally literate, and 18 U.S.C. 3624(b)(1) requires the Bureau of Prisons to consider whether a prisoner has earned or is satisfactorily progressing towards high school equivalency in deciding whether to grant good conduct credit. As for work programs, Federal Prison Industries (FPI) jobs are highly sought after by inmates, offering wages and the opportunity to develop marketable skills. Similarly, participation in apprenticeship and vocational training programs offers inmates the opportunity to acquire marketable skills, and positions them to be eligible for FPI employment.

- Given these existing incentives, proposing to reward prisoners for program participation by more than doubling the available good conduct credit is unnecessary and counterproductive. It would turn tens of thousands of criminals loose on the public prematurely – and in the long run, hundreds of thousands and millions – solely because of participation in programs they would have participated in any way for other reasons.

- The vast expansion of early release of federal offenders contemplated by this bill has dire consequences for the integrity of the federal sentencing system and public safety. The objectives of federal criminal sanctions include reflecting the seriousness of the offense, affording adequate deterrence to criminal conduct, and protecting the public from further

crimes of the offender. See 18 U.S.C. 3553(a)(2)(A)-(C). To realize these objectives, the sanctions imposed, including terms of imprisonment, must be carried out in practice. Since the enactment of the Sentencing Reform Act of 1984, the federal sentencing system has been premised on this philosophy, abolishing parole and adopting a system of determinate sentencing and truth in sentencing.

- Under this system, time served is close to that prescribed by the court in imposing sentence, subject only to carefully controlled and limited qualifications or exceptions. The main qualifications are that inmates can earn good conduct credit of up to 15% of the sentence through exemplary compliance with institutional rules (18 U.S.C. 3624(b)), and nonviolent inmates who participate successfully in drug treatment programs can be released up to a year early (18 U.S.C. 3621(e)). Beyond these two qualifications, there is very little authorization in existing federal law for releasing federal inmates before they have served the prison term imposed by the court in sentencing.

- In contrast, the huge increase in good conduct credit proposed in this bill would undermine the transparency of the federal sentencing process which, as it now stands, gives the public – including crime victims – assurance that the sentence imposed will likely be the approximate sentence served. The certainty of sentences, which is a key strength of the federal sentencing system, would be correspondingly weakened. Cutting short the prison terms of innumerable federal offenders would mean that the actual sentence served will less adequately reflect the seriousness of offense, less adequately deter criminal conduct, and be less effective in protecting the public from further crimes of these offenders. Criminals who remain in prison are not committing more crimes against the general public. Those who are let out of prison become free to do so.

- It is no answer to say that this bill only conveys discretionary authority to grant additional good conduct credit, so the Justice Department and the Bureau of Prisons can avoid any adverse effects by limiting its use. If authority of this sort is granted, it is with the expectation that it will be utilized. So if it is enacted, then the next time the Justice Department presents its budgetary needs for the federal prison system, the budget request may be denied, on the ground that the Department could instead reduce correctional costs by using the expanded sentence reduction authority to release federal prisoners en masse. It's a one-two punch against public safety: grant broader authority to let criminals out of prison, and then turn the budget screws to compel the use of that authority to free tens of thousands of offenders long before they have completed their sentences.

- Bad laws should not be enacted with the uncertain hope that executive branch officials will be able to prevent the harm they threaten by nullifying them in practice. The enormous, virtually across-the-board reduction of federal prison sentences this bill authorizes offers no benefit, while threatening great harm to the integrity of the federal sentencing and correctional systems and the public safety objectives those systems serve. It is without justification and should be rejected.

THE JUVENILE MASS MURDERER EARLY RELEASE ACT OF 2007

- The so-called "Juvenile Justice Accountability and Improvement Act of 2007" requires that every offender sentenced to life imprisonment (or an equivalent sentence) be eligible for parole after 15 years, if the offender was less than 18 years old when he committed the crime. This policy would be forced on the states by cutting their justice assistance funding if they do not comply, and would be directly imposed by the bill in federal cases.

- This bill threatens to loose on the public the perpetrators of the most atrocious crimes, precluding any assured term of imprisonment beyond 15 years, merely because they were slightly short of the normal age of majority when they snuffed out their victims' lives forever. Examples of the types of offenders who would benefit from the bill include:

  - Lee Boyd Malvo was the 17 year old perpetrator and accomplice in the sniper killings that terrorized this area and killed 10 people. The sentence of life imprisonment imposed by the state of Virginia on Malvo in 2004 will no longer be life imprisonment. This bill would require that he be eligible for release in 12 years.

  - Mark Anthony Duke, then 16 years old, orchestrated and carried out the cold-blooded murders of four people. Attended by three accomplices he enlisted for the purpose, Duke slaughtered his father, Randy Duke, his father's girlfriend, Dedra Hunt, and Dedra Hunt's two little daughters, Chelisa and Chelsea, who were six and seven years old respectively. The sentence of life imprisonment imposed by the state of Alabama on Duke in 2005 cannot be life imprisonment according to this bill. Rather, he must be eligible for release in 2020.

- Examples of persons under the age of 18 committing such monstrous crimes can readily be multiplied. *See, e.g., Roper v. Simmons,* 543 U.S. 551 (2005); *id.* at 618-19 (Scalia et al. dissenting); *id.* Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, 2004 WL 865268.

- This bill is specifically designed to benefit offenders of this type. Juveniles are not transferred for adult prosecution and sentenced to life in prison for spitting on the sidewalk. Rather, this treatment is likely to be accorded to the most savage and dangerous predators, and it is precisely these offenders that this bill threatens to loose on the public. Indeed, the bill favors the very worst of the worst. A juvenile convicted for murder and sentenced to 20 or 30 years of imprisonment would not be affected by the bill and could serve the prison term imposed by the court. But a juvenile convicted for a particularly atrocious murder or for numerous murders and sentenced to life imprisonment would have to be eligible for release after 15 years. This goes beyond being unjust and indifferent to public safety. It is simply irrational.

- This bill's designation as the "Juvenile Justice Accountability and Improvement Act" is a bad joke. How does it "improve" the "accountability" of juvenile offenders to tell them

that even if they commit such heinous crimes that they are sentenced to life imprisonment – including mass murder – they cannot face any assured penalty beyond 15 years?

- *In Roper v. Simmons,* 543 U.S. 551 (2005), the Supreme Court held in a five to four decision that juveniles can never be subject to capital punishment, even for atrocious murders like the one committed by the defendant Simmons in that case. Simmons had assured the accomplices he enlisted to help with the killing that they could get away with murder "because they were minors." 543 U.S. at 556. The Supreme Court's decision in *Simmons* ensures that that must be true as far as capital punishment is concerned.

- This leaves life imprisonment as the only remaining option to impose a penalty that has some semblance of adequacy in conveying the seriousness of such crimes, deterring their commission, and ensuring that the perpetrators will never be released to do more of the same. This bill now seeks to take away that option as well, telling would-be killers that there will always be a chance for forgiveness and freedom further down the road, regardless of how many they kill or how savagely they do so. The victims of these crimes, of course, will never have such a second chance. Human life is cheap by this bill's reckoning, as long as you beat the clock and take it before reaching the magic age of 18.

- The bill is as cruel to crime victims as it is heedless of public safety. One of the evils of parole is that the victims' wounds are periodically reopened and they must relive the crime, as the offender periodically comes up for release, and they must fear the consequences and appear at parole hearings to oppose this injustice. This bill will force the survivors of victims murdered by juvenile killers to undergo this ordeal again and again, as the system endlessly revisits their cases, and the prospect is never foreclosed that the person who killed their loved one and ruined their lives will be released.

- The bill laughably refers to the criminals it seeks to benefit as "child offenders," as if they were just naughty kids in need of a scolding. The reality is that it will benefit criminals who commit crimes of such seriousness at an early age that the responsible jurisdictions prosecute them as adults, and judge that is necessary to imprison them for life upon conviction. There is no basis for this bill to declare that all such judgments are wrong, regardless of the history and characteristics of the offender, and regardless of the atrociousness and number of his crimes. We cannot responsibly and in good conscience accept any such provision, consistent with the demands of justice, with the right of all jurisdictions to take appropriate measures for the security of their people, and with our own responsibility to protect the public from the most aggravated crimes and those who commit them.

MANDATORY MASS RELEASE FROM PRISON OF MIDDLE-AGED FEDERAL OFFENDERS – THE SO-CALLED "FEDERAL PRISON BUREAU NONVIOLENT OFFENDER RELIEF ACT OF 2007" (H.R. 261)

- H.R. 261 generally mandates the release from prison of all federal offenders who have served half of their sentences and have reached the age of 45. The only exception is for offenders who have been convicted of a crime of violence or engaged in a violent disciplinary violation.

- The effect of this legislation would be the immediate wholesale release of federal offenders who have served half of the prison terms to which they were sentenced, merely because they have reached an arbitrarily specified age. The criminals who would be turned loose on the public would include, for example: (i) spies who have betrayed the United States to its enemies, (ii) members of terrorist organizations, (iii) gangsters and other organized crime figures, (iv) major drug traffickers, (v) defrauders and con artists who have swindled elderly victims out of their life savings, (v) child pornography offenders, (vi) money launderers, and (vii) corrupt public officials convicted of the most egregious violations of the public trust.

- Crimes of these sorts, though technically "nonviolent," are real threats to the United States and its people. The sentences imposed on their perpetrators reflect the judgments of Congress, the Sentencing Commission, and federal sentencing judges concerning the prison terms needed to reflect the seriousness of these offenses, to protect the public from those who commit them, and to deter the commission of these crimes. Cutting these sentences in half en masse merely because the criminal has reached some arbitrary age is the height of irresponsibility. It reflects indifference to the demands of justice, indifference to the vital public interests protected by the imposition of just criminal sanctions, and indifference to the critical, national public safety objectives that the federal sentencing system serves.

- To cite but a few examples from the area of espionage: (i) Former FBI agent Earl Pitts received a 27.5 year sentence in 1997 and is over the age of 45. H.R. 261 would require that he be released in 2011. (ii) Former CIA officer Harold Nicholson received a 23 year sentence in 1997 and is also over the age of 45. H.R. 261 would require his release in two years. (iii) Former NSA analyst David Boone received a 24 year sentence in 1999 and is over 45. H.R. 261 would require his release in 2011. (iv) If H.R. 261's "half of the sentence" standard is understood as referring to some years-equivalent for life terms, the release of spies sentenced to life imprisonment would also be required – for example, ex-CIA Officer Eldridge Ames, ex-FBI agent Robert Hanson, and other spies such as Jonathan Pollard.

- Examples could be multiplied endlessly in all of the offense areas noted above. Moreover, even highly violent offenders will be set loose after reaching the magic age of 45, merely because the offense of conviction was not facially a violent crime – e.g., a firearms offense rather than an overt homicide or assault offense. The bill's mandatory

release requirement will apply regardless of the offender's history of recidivism, regardless of the likelihood of his committing more crimes if released, and regardless of the undermining of deterrence and depreciation of the seriousness of the offense. All that matters under the bill is how old the offender is and whether he has served the specified fraction of the prison term he was supposed to serve.

- In addition, the bill is as unfair to offenders as it is dangerous to the public. A current offender who was sentenced to 20 years of imprisonment at the age of 25 for a very serious (but "nonviolent") crime will serve the full 20 year sentence under H.R. 261. But an offender with an identical criminal history who was sentenced to 20 years of imprisonment at the age of 35 for an identical crime will have to be set free after only 10 years, when he reaches the age of 45. This will occur for no reason other than that the second offender was convicted and sentenced for the crime at a somewhat later point in his life. It is impossible to imagine a more arbitrary and egregious violation of the federal sentencing system's fundamental principles, which aim to ensure that similarly situated offenders receive similar penalties and serve out similar sentences.

- Looking forward, the bill will produce additional distortions in the federal sentencing system, defeating the objectives of truth in sentencing and fairness in sentencing which underlie that system. Consider a judge sentencing a 35 year old defendant for a serious crime, where the sentencing guidelines call for a 20-year prison term. What should the judge do, knowing that H.R. 261 will likely require that the offender be released after serving only half of whatever prison term the judge imposes? Some judges may double the sentence imposed to 40 years, thereby achieving at a practical level the 20 year sentence that the sentencing guidelines contemplate. Others may ignore the effect of H.R. 261 and simply impose a 20 year term, resulting in release after 10 years. This is half the time the sentencing guidelines deem necessary and appropriate to reflect the seriousness of the offense, protect the public, and deter the commission of such crimes. Still other judges may do something in between. The result will be utterly arbitrary differences in the sentences imposed and prison time served for essentially the same offenses by different offenders.

- For many good reasons, Congress in the Sentencing Reform Act of 1984 abolished parole in federal cases. One of the reasons was to eliminate the discrepancies in sentencing that resulted from federal judges' knowledge that only a fraction of the sentence imposed would likely be served. H.R. 261 would restore the arbitrariness and unfairness of the old parole system in an aggravated form. In some ways H.R. 261 is even worse than parole, considering its mandatory and indiscriminate character, and the enormous weight it accords to a single age-based criterion – whether the offender has reached 45 – that has nothing to do with the proper objectives of criminal sanctions. If we care at all about justice, if we care at all about protecting the public from crime, if we care at all about deterring and preventing crime, we need to reject this ill-advised proposal.