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Representation at All Stages of the Proceedings: The Loss of State and Federal Post-Conviction Review, Including the Impact of the AEDPA and the Need for a Independent State Judiciary

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not only in the news, but in the forefront of scholarly work on these issues. So, it's my great pleasure to introduce Jim Liebman.

MORNING PANEL A: Representation at all stages of the proceedings: The loss of state and federal post-conviction review, including the impact of the AEDPA and the need for an independent state judiciary.

PROFESSOR JAMES LIEBMAN:

Thank you, Larry, very much for that heavenly, but undeserved introduction. What we're going to try to do here are really two things. First, we will review why action of some sort in regard to the administration of the death penalty in the country is called for now. For some of you that means giving you information that can help you make judgments about how you want to be involved; whether you want to be involved, and how. For others, who are already engaged in that process, it is designed to add to the information base . . . about the kinds of arguments that need to be made and in what form. Secondly, we will begin the process of discussing some of the particular reforms that might be connected to some of the problems. That, by and large, will be the focus of this panel. The emphasis here on this panel is on the "Call to Action" part of the program. There are people on the program who are committed to the moratorium. There are others who are in places where it's important to be working on a broader front towards a variety of reforms with moratoria being one of those reforms.

We will proceed as follows: I'm going to introduce everybody now so that people can then come up in order. First of all, we're going to ask Steve Bright, who is the very distinguished director of the Southern Center for Human Rights here in Atlanta and one of the most experienced and most impressive death penalty litigators in the country, to discuss some more of the trial counsel, lawyering and representation situations in death penalty cases today across the country.

Steve and I will then split an 11-minute segment to discuss some of the concerns concerning the capacity of the courts to respond to the errors that are so ingrained and so common in our capital cases. Elisabeth Semel, Director of the ABA's own Death Penalty Representation Project, will follow Steve to the podium to discuss the situation with providing counsel at the appellate and state post-conviction levels. Next, the Honorable Gerald Kogan, former Chief Justice of the Florida Supreme Court, former Florida

prosecutor and current co-chair of the National Committee to Prevent Wrongful Executions, will address the judicial independence issue. He will also discuss some Florida events and reforms that are perhaps some of the answers to some of the problems experienced here. Then, we are honored to have batting "clean-up," if I can use the sports metaphor at this time of year, the Honorable Rodney Ellis, Senator from the State of Texas. Senator Ellis will tie everything together that we have done by discussing some problems and proposed solutions in Texas.

STEPHEN BRIGHT:

Thank you, Professor Liebman, and good morning everyone. It's a pleasure to be here. About three years ago in 1997, our center, the Southern Center for Human Rights, the Carter Center and Emory Law School, had a conference to look at the death penalty 25 years after the *Furman v. Georgia*⁸ decision. That decision struck down capital punishment as it had been used up until that time because of various flaws. We looked at how the system is working today compared to those flaws identified back then. That was prompted in part by the American Bar Association's resolution calling for a moratorium earlier that year. It was also prompted in part by the concern and commitment for fairness of Rosalynn and Jimmy Carter, and also by an equal concern on the part of Dean Howard Hunter at Emory Law School. Here we are three years later to take another look. I am sad to report that things in many of the areas that we looked at then are of even greater concern today.

In 1972, the Supreme Court in part declared the death penalty unconstitutional because of its arbitrariness. One example given was a case out of Georgia of two people. One was James Avery, whose lawyer challenged the use of "tickets," these racial discrimination tickets that were one color for black people and another color for white people in Fulton County, and was successful in having that declared unconstitutional. The Court pointed out that another person, Audrey Williams, convicted in the same jurisdiction with the same racial discrimination was put to death simply because his lawyer didn't raise the issue. The Court said nothing could be more arbitrary or unfair than the luck of who got the better lawyer.

In 1982, the first person executed in Georgia, John Eldon Smith, had a co-defendant who won because women had been ex-

⁸ *Furman*, 408 U.S. 238.

cluded from the jury pool. Yet, when Smith's case got to the 11th Circuit they said, because your lawyer didn't raise the issue you can't present it. Therefore, he was put to death. Exactly the same situation. If you switch the lawyers in those two cases, the outcomes would have been different. Smith would have lived and the other person would have died.

Tony talked about the argument in Calvin Burdine's case. I was in the courtroom for that argument. The State argued that a lawyer who had slept through trial is no different than a lawyer under the influence of alcohol, a lawyer under the influence of drugs, or a lawyer suffering from Alzheimer's. Hence, because capital cases had been upheld in those situations, it should be upheld in Calvin Burdine's case. Remarkably, the court engaged the Attorney General on that. Judge Benavides leaned over the bench and said, "Well, don't you think there's a difference between a lawyer who's under the influence of alcohol, and we can at least assess the extent of the alcohol's influence on the lawyer's performance, and a lawyer who's completely unconscious?"

Martha said we should worry about the judgment of history. But I, as a lawyer, was glad there was not a high school class visiting the courtroom that day because, as a member of the legal profession, I was ashamed that that argument would be made and taken seriously. Unfortunately, I think it's hard to know what will happen in that case. Another person, Calvin Johnson, who was represented by that same sleeping lawyer Joe Frank, has been put to death, and so there'll be no relief for him.

Recently, the United States Court of Appeals, 11th Circuit, upheld the death sentence for a man named Ronald Chandler, even though his lawyer didn't even begin preparing for the penalty phase until after the jury came back with a guilt verdict. John Young, who was sentenced to death here in Georgia, met his lawyer in jail after he was sentenced, because the lawyer was there on State and Federal drug charges. Just last Tuesday in Virginia, a man named Ramdass was put to death even though jurors said, if only we had known that this man would not be eligible for parole and he would serve the rest of his life in prison, we would not have voted for the death penalty. Here in Georgia, Alexander Williams, who is to be executed, got a stay just recently. He was 17 years old at the time of crime, a child, profoundly mentally ill, out of touch with reality and represented by perhaps the worst lawyer to be appointed in capital cases in Georgia, O.L. Collins. He was asked to name all the criminal cases he could name, and after a lot of hard

thought, Collins said, "Well, there's the *Miranda* case.⁹ We all know the *Miranda* case, and then there's the *Dred Scott* case."¹⁰ And he was appointed over and over, as was Joe Cannon in Houston, to defend people facing the death penalty.

We still have states like Texas, Georgia, Alabama, Mississippi, and many others that have no public defender system. Does it make a difference? Yes. Look at Illinois. In Illinois nine of the thirteen innocent people were in Cook County. Not one of those innocent people was represented by the homicide division of the Cook County Public Defender's Office. None of them were represented by competent public defenders.

Secondly, no resources. The 5th Circuit said in one case, you get what you pay for. We are paying less for lawyers to defend capital cases than virtually any other kind of legal work. You can make more as a paralegal on a bankruptcy case here in Atlanta than you can make being appointed to defend a capital case as a lawyer.

Third, independence from the judiciary. Some day, we have to come to grips with the reality that the judges are unfortunately part of the problem here with what we've had. A poll in Texas revealed recently that half the judges in Texas said that political contributions influenced whom other judges appointed to be defense counsel. In addition, a fourth of them said it influenced their own decisions. Forty-nine percent of the judges said, that the lawyers' ability to move a case swiftly through the system regardless of the lawyer's capability was a factor used in appointing lawyers. Here in Georgia, virtually every effort has been made to improve indigent defense. This is being fought by some members of the judiciary, certainly not all of them, but some of those, including one of the judges that loved to appoint Mr. Collins to case after case, Judge McMillan.

Finally, the standard that's been used with regard to ineffectiveness of counsel is really an embarrassment to the legal profession. Judge Alvin Rubin said, in a case in the 5th Circuit, "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by 'not legally ineffective' lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence."¹¹ This is a judge

⁹ *Miranda v. Arizona*, 396 U.S. 868 (1969).

¹⁰ *Dred Scot v. Sanford*, 60 U.S. (19 How.) 393 (1857).

¹¹ *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

on the United States Court of Appeals for the 5th Circuit, saying the Constitution does not require even in a capital case that the accused be represented by capable or effective counsel.

The 5th Circuit has certainly proven that in case after case after case. The last client that I had who was executed, Larry Eugene Heath, was represented by a lawyer who filed a one page brief to the Alabama Supreme Court. One page. It wouldn't have passed a first year legal writing class. It would not have passed a high school English class. And the lawyer didn't show up for oral argument. Did the court appoint another lawyer and say we've got to have a brief, we can't do our job as a court? Did they say we've got to have somebody argue this case before us so that we can hear the arguments before we decide whether a human being's going to live or die? The court affirmed without argument. I put out two handouts: one called "Death in Texas," and a Law Review article, that explain these in greater length than I have time.¹²

There are few encouraging signs, but many discouraging signs. There are some efforts at structure. Arkansas and North Carolina are setting up public defender systems that are improving. But states like Georgia, Mississippi, Alabama, and Texas steadfastly refuse to establish statewide defender offices where people specialize in defending cases, just as people on the other side of the aisle in the cases specialize in prosecuting them. There are not encouraging signs with regard to funding. Robert Kennedy said, "The poor person accused of a crime has no lobby." That is as true today as it was then. I hope the American Bar Association will become the lobby that the Attorney General of the United States was at that time.

Independence: last year, Senator Ellis introduced a bill which was passed by both houses of the Texas legislature to make defense lawyers in Texas independent of the judges. The judges prevailed upon the Governor to veto that bill. The standard of representation: we had some encouraging news from the Supreme Court this year in the case of *Williams v. Taylor*,¹³ in which the Court, for the first time in its history, found that the performance of a lawyer in failing to put on evidence about the life and background of the person was ineffective assistance of counsel. But, then shortly after that we had the United States Court of Appeals for the 11th Cir-

¹² *Death in Texas*, THE CHAMPION: THE MAGAZINE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, July 1999; *Elected Judges and the Death Penalty in Texas*, 78 TEX. REV. 805 (2000).

¹³ *Williams v. Taylor*, 529 U.S. 420 (2000).

cuit, by a six to five decision, uphold a shameful performance by a lawyer who, as I said, didn't even begin to prepare for the penalty phase until after the guilt verdict came back.

So there's a long way to go. There are many problems and the question of whether we're ready to pay the price for effective legal representation is one for which the signs are not at all encouraging. Thank you.

JAMES LIEBMAN:

Thank you, Steve. As Larry mentioned in the introduction, my colleagues and I published a study this past summer that looked at this question. We've got a death penalty system that's got its own inspectors. Those inspectors are the state and federal judges who look at every death penalty case. What did they think about the quality of those verdicts that are imposed? Our goal there was to count the result of every single death verdict that got fully reviewed between 1973 and 1995. It was thousands and thousands of verdicts. It was by design a very conservative judgment. When we looked at these cases, we did not count the hundreds of reversals by state and federal courts in the wake of the *Furman* decision in '72, and the *Woodson* decision in '76. We wanted to look only at decisions pronounced under valid capital statutes at the state post-conviction level. It's very hard to get data. So, we made all sorts of conservative judgments assuming any case we couldn't find was an affirmance. We didn't count successive habeas cases, though there have been reversals there.

With all of those conservative judgments, we simply counted all of those cases, up or down. We determined, conservatively counted, that the inspectors in this system found that 68% of all of the capital judgments pronounced in those 23 years in 28 states, and fully reviewed in that period, were so seriously flawed that they could not be carried out and had to be sent back for some kind of retrial. In all but one of those years, the reversal rate found nationally, across the board, was 50% or higher. The error rate ranged from 18% in Virginia, which is down at the bottom all by itself two standard deviations below everybody else, up to 79% in Arizona. It was 80% here in Georgia, and 91% in Mississippi.

ELISABETH SEMEL:

Steve spoke about the fact that courts do not interfere with good lawyers' business when it comes to defending clients in capital trials. The same is true on direct appeal and state post-convictions as well. States that are most vigorous about enforcing the

death penalty from prosecution to execution are not willing to pay enough good lawyers enough good money to ensure qualified representation at any stage, including post-conviction review. Now we still use the word "crisis" when we talk about the shortage of competent, qualified, and adequately funded lawyers in state post-conviction. That word implies an acute condition that can be cured or significantly ameliorated by prompt, aggressive and decisive action. Well, we can call it a plague. We can call it a disaster. We can call it a disgrace, a disease. We can say it is critical, we can say it is chronic, but we can no longer get away with calling it a crisis.

In 1990, the American Bar Association concluded a year-long study, a nationwide study of the capital punishment system. It said, "Among the principal failings of the capital punishment process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings." It was a crisis in 1990, almost 15 years after the decision in *Gregg v. Georgia*.¹⁴ It was a crisis in 1990, at the conclusion of this ABA study, when there were 13 of what were ultimately 20 federally funded resource centers that were monitoring cases throughout the country, recruiting pro bono lawyers, assisting appointed and volunteer counsel, and also doing direct representation in hundreds of capital post-conviction cases. The ABA report said, a decade ago, "there are now and there will be insufficient volunteer lawyers to provide adequate representation in death penalty cases."

The size of death row in 1990 was about 2,300. Let's fast forward to 1995, 1996, when these two cataclysmic events that both Jim and Steve have talked about, the "de-funding", the elimination, of all 20 resource centers and the enactment of the Anti-Terrorism and Effective Death Penalty Act. The size of death row in 1990 was 2,300. The size of death row in 1995-96 was 3,200. Today it is pushing 3,700. The response of most states in the south and the southwest, that have historically executed in the greatest numbers, was to do nothing to fill the chasm that was left open when the resource centers were eliminated. The sound heard by men and women on death rows in this country in 1995-96 was that of the doors of the 20 resource centers slamming shut. The clock began to tick, as we have heard, on their access to state and federal review of their claims. They did not hear the wallets of state legislatures open up to ensure the appointment of lawyers from a list of qualified and adequately funded individuals. In states like Texas, Ari-

¹⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

zona, Alabama, Pennsylvania, Virginia, and Georgia, small non-profit capital representation offices of under-paid and over-burdened, heroic lawyers carried on with a skeleton of the staff and the resources that they had had.

In 1995-96, Congress vacated the capital post-conviction playing field in so far as defense funding was concerned, but it did not abandon the police or the prosecutors. Today over three quarters of a billion dollars is spent through federal funding, such as the "Byrne Grants," each year to support law enforcement and prosecutors, many of whom are trying state capital cases and defending against petitions for relief in state post-conviction in death penalty cases. While states like Texas and Pennsylvania refuse to fill the resource center gap, they did not fail to appropriate money for prosecutors to defend against these cases. And Texas has the largest death row in the United States; Pennsylvania has the fourth largest.

You have heard the two cornerstones of the moratorium resolution are the failure to provide adequate and adequately compensated counsel, and the failure to provide meaningful and independent state and federal review. Beginning at the end of 1997, I left private practice to start knocking on the doors of major law firms — some of the people on whose door I knocked are here today — to persuade them to devote what will be thousands of hours of time and maybe tens of thousands of dollars to provide a measure of justice that is denied consistently and repeatedly to men and women on death row. After three years of this itinerant existence I can tell you now, as we fund six lawyers to help those pro bono firms and to help appointed counsel, that the shortage of competent counsel is worse than it was in 1990. It is worse than it was in 1997.

Part of the reason the American public may be able to move itself from this focus on individual cases, and this focus on innocence, is the shift to looking at process. I think in part this is attributable to the work of some of the folks who are here today from the press. Not just the Los Angeles Times, the New York Times, the Chicago Tribune, the national press that has put its microscope and shone the spotlight on capital punishment; but also, in the last number of months, the fascinating development has been to watch the regional press, particularly in the death-belt, the Charlotte Observer, the Dallas Morning News, taking a look at what is going on with death penalty cases. The Dallas Morning News story looked at 461 cases in the State of Texas and concluded that nearly a quarter

of those individuals had been represented by lawyers who had been reprimanded, suspended, or otherwise disciplined by the state bar. And, as Steve will tell you, that is quite an

The two questions I am asked most often are: how many states have adopted the ABA's guidelines for the appointment and performance of counsel and how many people on death row across the country really don't have lawyers. The fact that I'm unable to answer both questions with any precision bespeaks of the problem. Capital punishment was described as a haphazard maze of unfair practices. It is a crazy quilt. Even in post-conviction, it's not the states to which we look. In states such as Alabama, Mississippi, and Virginia, it isn't whether the states have adopted standards. We look at the circuit courts, the local courts, and ask, "Have those courts adopted standards?" They are appointing the lawyers in state post-conviction, but we don't know the answer to the question. But I can tell you if they've adopted standards, they most certainly are not the minimum standards that the ABA put into place over 11 years ago. Indeed, because of the refusal to adequately fund counsel, the standards are honored, if at all, in breach. Certainly, the lawyer who is willing to take the case in the State of Alabama for a thousand dollars to represent someone in post-conviction, with no assurance of any money to investigate or hire experts, is not qualified or will be unable to do that job.

Let me mention another word about Alabama by way of illustration so we don't simply single out the State of Texas. There are 185 men and women on Alabama's death row. There are a handful of lawyers at the Equal Justice Initiative of Alabama, an office that was created in the wake of the resource center de-funding that has not got a penny of state or federal money. A handful of lawyers there are trying to tackle over 100 of those 185 cases, are assisting lawyers, are recruiting lawyers, are doing direct representation. There are no courts in Alabama that routinely appoint counsel for someone in state post-conviction, that is, someone who has completed his or her direct appeal. If a lawyer is appointed, as I said, you can rest assured that that lawyer does not meet the minimum qualifications that the ABA set out and does not have the funds and will not have the funds to do the case - - to do what would be considered, as Steve might say, a first-year law school or even a high school job of investigating the case, of presenting and litigating the claims in state court so they may be preserved for whatever federal review may be available. Alabama has been at the top of the project's list for recruitment of counsel for the last three years. We

have managed, of the 60 or so firms that we have recruited, to enlist firms to take about 11 of those cases. And, as Steve said, there are over two dozen people whose statute of limitations has expired and they received no review of their cases, or are perilously close to the expiration of those statutes. So, at best, what we have been able to do is to help less than a dozen people. To keep the numbers even is not progress, and it is certainly not justice.

The project is deluged with requests. Now we have the Internet, so we don't just get letters from the row; we also get e-mails from folks' parents and relatives. The way in which we determine how to take a case, what cases should we solicit lawyers to take, is not by some sort of merits review, because we receive these cases after incompetent lawyering at trial and incompetent representation on direct appeal. You can rest assured that the direct appeal record is the least best indication of the truth of the case — of what meritorious claims indeed may be. We operate very much the way hospitals operate when they are trying to decide who will receive the next liver transplant, or the next heart transplant. It is triage. We look at who is next in line to lose any opportunity for state or federal post-conviction review, and that is how we identify the lawyers who will be taking these cases.

I'll say just a brief word about Joe Guy and the State of Texas. Frankly, we found out about Joe Guy's case in the State of Texas because a man who is now a former assistant attorney general had the temerity, the decency and integrity to put in a call about the fact that Joe Guy had been abandoned -- not just by his trial lawyer, not just by his appellate lawyer, but by his post-conviction counsel. Joe Guy found out that he had an execution date when he received a visit from a representative of the Texas Board of Pardons and Paroles, not from his lawyer, whom he had never met. Suffice to say, the petition that had been filed on his behalf in state post-conviction was a handful of pages long. It raised no claims that a court could review. Indeed, when the petition was finally filed in federal court, it was filed months past the statutory deadline. This is where Joe Guy's case deviates from the norm. We were able to find a firm to represent Joe Guy, and as a result of the work of that firm Joe Guy may indeed have a review of the merits of his case.

Much is made, and appropriately so, of the work that volunteer counsel do in these cases. But, systemically these contributions have always been and always will be modest. They are potentially life saving for the individuals for whom we find lawyers. But, any suggestion that the private bar can or should shoulder the

legal responsibility for thousands of individuals on death row who are literally un-represented or represented by what I call a “virtual lawyer,” that is the mere image of a lawyer, is a cynical rejection of the responsibility of government to ensure qualified representation when human life is at stake - - from the beginning to the end, whether that be clemency or execution.

The next step for those of you who are here and have had the privilege to represent someone on death row, for those of you at these prominent law firms, now that you understand personally and professionally how this system works, is to lend your voice, your knowledge and your leadership to what will happen in state legislatures and in city councils, and in broader arenas, in order to make the kind of changes that we are here to talk about today. Thank you.

JAMES LIEBMAN:

Chief Justice Kogan.

GERALD KOGAN:

You have to understand where I come from. I was a chief capital crimes prosecutor in the Miami State Attorney’s Office, where I asked juries to return the death penalty, and where I instructed the people in my division to do the same thing. When I left the state attorney’s office, I then defended capital cases. I ascended to the trial bench. I tried capital cases. When I got to the Supreme Court of Florida I heard the reviews on every one of the capital cases that came to the court during the 12 years that I was there. I estimate that over a 40-year period of time I have probably participated in the disposition of over 1,200 capital cases. So, to say that I know what goes on in this type of a case really is an understatement.

Let me say this to you. The capital system that we currently have just doesn’t work. It’s broken. And why is it broken? Because we are trying to take an imperfect system, our judicial system that is as good as you’ll find but still imperfect, run by human beings — by our nature imperfect — attempting to come out with a perfect solution. And that just doesn’t work.

I’m going to talk to you about two things: number one, the independence of the judiciary, and number two, what we’ve tried to do in Florida, to do something about making sure that our system works better.

As to the independence of the judiciary, it is absolutely essential in this country that every judge who sits on a capital case, or for that matter any criminal case, understands that they will not be

subject to retaliation by either voters or by the state legislature. In Florida in the last 10 years, I think we've done a pretty good job as to how we handle capital cases. I think, Jim, we rank number one in actual reversals. I think we have a 71% reversal record in our particular state.

This doesn't sit very well with our current legislature. We now have, for the first time in Florida since reconstruction, both the legislature and the Governor of the Republican Party. And they don't basically agree with this idea that we are screening these cases very, very closely. So, essentially what's happened is instead of attempting to do something about making sure that innocent persons are not convicted, sentenced to death and actually executed, they've decided that they're going to take hold of the Supreme Court and try to control it.

This year for the first time in a serious manner they attempted to stack judicial nominating commissions by making sure that the state legislature, as well as the Governor, put people on those commissions. These commissions nominate people for the various courts in Florida. They also want to increase the size of the Florida Supreme Court, although nobody has even asked them to increase it, from our current seven up to thirteen. That could give our current Governor the opportunity to appoint six more people.

Our current Governor, when told about the situation in Illinois, and you'll hear more from Governor Ryan during the lunch hour, said "Well, we don't have to worry about that in Florida. That's a particular situation that is unique to the State of Illinois." That shows he does not have an understanding as to what is going on in the capital system.

The legislature went ahead and passed this particular bill to do all these particular things, in the form of a "constitutional amendment," after first doing it by statute. Let me tell you how they did the statute. Everybody was at the Florida State/Virginia Tech football game in New Orleans, and the Governor called a special session to deal with this issue. Now, I want to point out that this was not to deal with education, with health or with other problems in the state. They set the special session on January 4, so all the members of the legislature could get back to Tallahassee from New Orleans. Most of the members of the State House and the State Senate got the first copy of this bill when they arrived back in Tallahassee on the 4th. Within two days, this was passed as legislation. This, the Governor of the State of Florida thought, is the most important piece of legislation that we can possibly get out:

to stop the Supreme Court of Florida from sending so many of these cases back because of error.

The Florida Supreme Court declared that act of the legislature unconstitutional, because it violated the separation of powers. It, in fact, more or less indicated that the legislature had never heard of the checks and balances system. We expect this coming Spring, when the legislature meets again, that the court system in Florida is going to be under attack from the legislature and from the Governor's office.

The Governor has personally challenged me on the capital punishment system, to name for him those people that I think may have been innocent when the State of Florida executed them. I'm not going to get into that brawl with him. I explained that, obviously, a majority of the court didn't agree with me and, consequently, it doesn't make any difference what those people's names are because nothing would be accomplished by naming them except perhaps to enable someone to try to challenge my credibility.

As you know, the Governor of the State of Florida has a brother who is running for the presidency of the United States. In Texas, they've executed 145 people in the last five years, while George W. Bush has been Governor. I'm not saying this politically. I'm just saying a matter of fact.

To go ahead and to put pressure on the judiciary to cause judges to do things that they know they should not do is not the way to do things. You need an independent judiciary that's going to go out there and do what's right, without worrying about what the Governor or the state legislature is going to do to them.

What has Florida done to try to help out the system? First of all, we have in Florida open discovery. That simply means whatever is in the state's file essentially goes over to the defense. I know prosecutors complain about that, but there's no reason to do so. After all, a trial is an attempt by the system to discover what the truth may be. Why should a prosecutor, in all good conscience sworn to uphold the law and to treat everybody that comes through the criminal court system in a fair manner, have any reason to object to that? This has helped us materially, first at trial, and secondly in post-conviction.

There's no question that up front you have to spend money and make sure you've got competent counsel, who are in fact given sufficient funds to properly investigate the case. Fortunately in Florida, we do have a highly structured public defender system. Certainly in our large urban areas, the public defenders in the

homicide and capital crimes divisions are as competent as any private lawyer that you can hire anywhere. We still have problems in the rural areas of the state, because there, when they get a capital case, it's probably the first capital case they've had in ten years, so nobody's had any experience: the prosecutor, the judge, or the public defender. The Florida Supreme Court, when I was on it, started a process of certifying who is competent to try a capital case. The experience factor was very, very important. And, we were going to require people to sit as a second chair, assisting an experienced attorney, until they themselves got experience and could in fact represent people. That is ongoing now. We're still working on that to try to make sure that all the defendants in the system are represented by competent lawyers.

Also, we realized that even though we put the money up front, and even if you have qualified lawyers working up front, you still have to have something on the back-end. Florida set up, a number of years ago, what we call the "Capital Collateral Representative (CCR)." These are a group of attorneys who are paid and financed by the state. They are also given money to investigate cases and to represent defendants once the Governor has signed a death warrant. Inevitably now, CCR works on these cases before the death warrants are signed. We have three offices, one in the north, one in the central, and one in the southern part of the state. These people are outstanding Collateral Representatives, able to represent these defendants. What they have to do now is basically go ahead and reinvestigate these particular cases, which go back years ago. So, there's a tremendous delay in what happens.

These are things that can be done by the states now, just following the Florida model. We're not perfect and as a result, we're going to make mistakes. We're human beings. We're working with that imperfect system. But, I think that if other states take to heart setting up public defender systems, getting up a Capital Collateral Representative office, they're going to find in the long run that justice in their particular states will be more even and more just than it is now.

JAMES LIEBMAN:

Senator Ellis.

I commend the ABA for taking on this very important, substantive issue.

I think that state legislatures are probably the most difficult of any legislative branches of government to impact, and I'll tell you why. I began my elective career as a member of the Houston City

Council. I had an urban, inner-city district, predominantly African American. It was very difficult for me to go out and shop for groceries, because when I would go to the grocery store people would stop me and say, "Councilman, you need to pick my trash up", or "Councilman, you're the reason we have problems in my home." On a local level at City Hall, people think you are responsible for everything.

Now I'm in the State Senate. There are 31 of us in the big districts, about 600,000 people per district, which is roughly the size a congressional district in Texas. I can go to grocery stores in my district or anywhere and intelligent people who ought to know that I am a State Senator will say, "Senator, what are you doing in town, I thought you'd be in Washington?" Then I generally say, "I'm leaving in the morning, don't call."

My point is that people don't know where we are. They don't really know what we do. We're somewhere in between local government and the federal government.

Passing a bill in the state legislature is generally a game for the swift. Most of us are part-time. Only in a couple of states could you consider state legislators full-time, and I wouldn't say that's really full-time. Maybe they are in California, because they make a decent salary, and there are so many restrictions on what they can do for outside earned income; and maybe in Pennsylvania. That means that most people who do what I do, as a state legislator, also have some other life as well. That means to a great extent we rely on our staffs to help us.

Most state houses and state senates are very leadership dominated. The best way to get something passed is if the leadership is pushing it. By leadership I mean President of the Senate or the Speaker of the House.

We tend to be lobby dominated on these criminal justice issues. I think in most states, prosecutors probably have a disproportionate impact on what we do. A good number of state legislators are lawyers, but most who are lawyers have their private practices as well. In my state I think that sort of inbreeding sometimes creates problems.

I sort of stumbled onto these criminal justice issues. I'm a lawyer, but I'm a corporate lawyer. And I really make my living as an investment banker. I probably know more about financing prisons than I know about helping people get in or out of them. I've taken on this issue, in part, because years ago you expected your state legislator to do a letter if someone at your church was coming up

for parole or probation. Years ago I stopped doing that. It's not politically acceptable anymore and we didn't know them anymore. My mother came to me some years ago, after I went to the Senate. Her choir director's child was up for parole and my mother asked me if I would do a letter. I said, "Well mother, I'm sorry. I don't do those anymore." And she said, "Well you do them for the crowd that you run with. I see you helping people get jobs and doing all sorts of things." I said, "Mother, the problem is I don't know the choir director's child." And she said, "Well I know him." I said, "Well, mother, if they lock you up, I'll do a letter for you. And I'll say that up until this point you've been a good mother, and I have no reason not to believe that if the court would decide to let you out you would revert to being a good mother again." I decided since I couldn't deal with these issues on the micro level, I would deal with them on a broader level.

I put in an indigent defense bill maybe my second term in the Texas Senate. I think someone on my staff may have gotten involved with someone who worked as a public defender out in Los Angeles. We put in the bill, which is a pretty stringent bill. Instead of being embarrassed to be from Texas and be on a panel like this one, I would have been proud if that bill had passed. Obviously it didn't get a hearing. I don't think it even got a date set on the calendar so someone could send it off to a cubbyhole and kill it.

Over the years, different groups would come to me, would gravitate towards me, and ask me to take some time to focus on these issues. Last session, we decided we'd get serious and pass an indigent defense bill in Texas. In many ways, I am not very proud of what the bill had in it because we compromised it down to the lowest denominator. To anybody who raised an issue, we said, "Okay, what can we do to adjust your fears?" I think the prosecutors were concerned because I said in the bill you should get a defense lawyer in three days. You ought to get one in 24 hours, but we put in three days. The prosecutors objected, they asked for 20-21 days. We took that, considering hopefully that that would be the ceiling and not the floor. Virtually everything that we could do to adjust to someone's concern we did it in that bill, which is probably why the bill passed the Texas Senate. It's controlled by the opposite party, the Republicans. The House is controlled by Democrats. The bill came out of the House with very little controversy. The judges then, as Stephen Bright said, complained to the Governor and got the bill vetoed.

I was not convinced that the system was as bad as a number of

the advocates who were working with me on the bill said it was, until the bill was vetoed. But the venom, the anger, that those judges raised in that debate makes me convinced that the system is rotten to the core.

It sort of reminds me of being in law school the first year, in constitutional law at the University of Texas Law School. When we got to the great civil rights cases, it's interesting, that they'd call them civil rights cases because they were all anti-civil rights cases: *Plessy v. Ferguson*,¹⁵ the "Slaughterhouse cases."¹⁶ For me as an inner-city kid coming out of a low-income neighborhood, to read those cases, it really impressed me that the logic was so cogent. The phraseology was so beautiful. If you read through the opinions and forgot about the conclusion, you couldn't help but think these were very rational people, until you got to the conclusion and you realized that they were justifying outright bigotry. I think that is the beauty of the legal profession and why I chose it as something that I wanted to do. We train to justify almost anything. And when you're trying to impact state legislators, it is a very difficult task to do.

It's important to call for a moratorium. I think it energizes the debate. It won't happen in my State. First of all, one would rationalize not having a moratorium by saying the Governor can only do a 30-day reprieve. The reality is the Governor appoints the people to the Board of Pardons and Parole, so he could put pressure on his appointees. But, if someone puts in a bill to call for a moratorium in Texas, someone will say you don't understand the process because the Governor, under the rules in Texas, does not have the ability to do that.

It's important for me as a legislator to have someone to the left of me. I have gotten so far away from the norm in Texas, I'm as far to the left as you can get on these issues.

I'm President Pro Tem. in the Senate. That means when the Governor and the Lieutenant Governor are out of state, I'm Acting Governor. I've had a chance to act up a few times. Obviously the Governor is running for national office, and the Lieutenant Governor has had to travel from time to time.

The first day I really thought it was a big deal. The legislature adjourned at the end of May in 1999. About 45 days later, July 7th, was the first day that I was Acting Governor of Texas. It was a pretty nice day. I got up that morning, my wife ran on to work,

¹⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁶ *Slaughter-House cases*, 83 U.S. (16 Wall.) 36 (1872).

didn't prepare breakfast, the children talked back, little Leland had a problem in his diaper and I had to change it. So I didn't think it would be that meaningful of a day.

I knew that the execution of Tyrone Leroy Fuller was scheduled for that day. A number of my colleagues asked in the Senate, "Well now, Roger, we know you said you're for the death penalty but you're not really for it." As though one can not be really for or against making that ultimate decision. We reviewed the file. It was the first instance in which someone was scheduled for the death chamber in Texas with the use of DNA testing.

It was an eerie feeling when I had to make that phone call on a secure line from the Governor's office or Lieutenant Governor's office. I chose the Lieutenant Governor's office. You get on the line maybe a quarter until the hour the execution is scheduled, and then you are told who's in the viewing room. You are told what the person ate. You are told their last words. And then as Acting Governor of the state, you have to make a decision and say whether or not the State of Texas will proceed or not.

My point is, in previous sessions, a number of these issues for me were things that I would deal with from an abstract position. Now it is a very real position.

I don't feel very good about the things that have happened in my State. I don't feel very good about the prospects about making substantive change. I'm afraid that once the glare of a Presidential campaign is over with, it will be difficult to sustain the scrutiny, particularly on my level of government, where we tend to be oriented towards just dealing with the problems that are up on a given day.

There have been three scheduled executions during the 40 or some odd days that I've been Acting Governor of Texas. Barry Scheck is here now I see. I think more than anything having the privilege of reading his book gave me comfort in making the decision when Mr. McGinn's execution was scheduled to order a reprieve. But also I had the beauty of a ruling by a conservative, rural trial court judge, in Texas of all places, named Ellis, maybe from the same plantation. He's white; I'm black obviously. Judge Ellis ruled in a very logical, methodical opinion that even someone like Mr. McGinn, who certainly was not the poster child for someone you'd want living next door, who had a background of being in and out of trouble with the criminal justice system.

There are about seven reforms in Texas that I'm going to push. I won't discuss all of them now. Obviously, they include

DNA testing and indigent criminal defense. We did get a bill out of the Senate to ban executing the mentally retarded.

It's so hard to get lay people and even lawyers in a state legislative body to focus on these issues. On the bill to ban executing the mentally retarded, it seemed like a no-brainer to me. But a number of my colleagues were asking questions, and sincerely, like, "Well you know, just like most people on death row get religion, if you give someone a test when they're on death row obviously they'll flunk the test to prove that they're mentally retarded." What most people don't realize in lay terms are the distinctions between a bad day and mental health problems, mental retardation, and then mentally insane. A number of my colleagues really didn't understand it. And I would suspect that in most state legislatures that may be a problem.

The challenge for you is simple. The activists have to get active. The demonstrators have to start demonstrating. The lawyers have to do their business lawyering. But, you have to be involved in a process so legislators can legislate. It's not enough to just impact the media and get these issues on the front page. You've got to get into the nitty, gritty mechanics of working state legislatures.

LARRY FOX:

One of the hallmarks of the concern about capital representation and the death penalty in America has been the outstanding scholars from the academy who have gotten involved so heavily in this effort. We've heard from Tony Amsterdam and Jim Liebman. The chair of our next panel is another one of those committed academics — Jim Coleman, a professor at Duke Law School who really does typify, in the best way possible, the mixing of the academic and the practical. Jim has represented capital defendants. Jim has chaired the Individual Rights and Responsibilities Section and has been a leader in the moratorium movement at the ABA and is now a leader in the moratorium movement in North Carolina. It is my great pleasure to introduce him. He will moderate this second panel.

MORNING PANEL B: Practices of law enforcement and prosecutors; racial discrimination; juvenile/mentally retarded.

JAMES COLEMAN:

Thank you. Our panel had a couple of telephone conference calls about this program today, and we agreed that we would just introduce the subjects that we're going to talk about and not try to exhaust them, so we'll see if that works.