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IT TAKES A VILLAGE TO SAVE A LIFE: A STATEWIDE MODEL FOR INDIGENT CAPITAL DEFENSE

Alexa Woodward*

“Many human rights issues take a long time to win; we are prepared to keep up the pressure and hard work for as long as necessary.”¹

—The Center for Death Penalty Litigation

I. INTRODUCTION

In downtown Durham, North Carolina, six capital defense organizations operate on one block of Main Street and function as the central hub of responsibility and resources for the state’s capital defense services. The Indigent Defense Services,² Capital Defenders,³ Appellate Defenders,⁴ Center for Death Penalty Litigation,⁵ Fair Trial Initiative,⁶ and the ACLU Capital Punishment Project⁷ each play a unique role in North Carolina’s evolving capital defense structure. When viewed as a whole, this cooperative network presents a model of a just and effective statewide system of capital defense.

Supporters and opponents may disagree about the morality of the death penalty, but on this one fact everyone must agree: the death penalty is expensive. States spend significant amounts of

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¹ E-mail from Thomas K. Maher, Executive Director, Center for Death Penalty Litigation, to author (Oct. 23, 2007, 16:33:46 EST) (on file with author) [hereinafter Maher Email].

² See *infra* Part V.A. (describing services provided by the Indigent Defense Services); see also Indigent Defense Services, <http://www.aoc.state.nc.us/www/ids> (last visited Jan. 30, 2008).

³ See *infra* Part V.B. (describing services provided by the Office of the Capital Defender).

⁴ See Office of the Appellate Defender Mission Statement, http://www.appellatedefender.org/mission_statement.html (last visited Jan. 30, 2008).

⁵ See *infra* Part V.C. (describing services provided by the Center for Death Penalty Litigation); see also The Center for Death Penalty Litigation, <http://www.cdpl.org> (last visited Jan. 30, 2008).

⁶ See *infra* Part V.D. (describing services provided by the Fair Trial Initiative); see also Fair Trial Initiative, <http://www.fairtrial.org> (last visited Jan. 30, 2008).

⁷ See *infra* Part V.E. (describing services provided by the ACLU Capital Punishment Project); see also ACLU Capital Punishment Project, <http://www.aclu.org/deathpenalty> (last visited Jan. 30, 2008).

money on capital litigation. It is estimated that New York spends approximately \$23 million on capital litigation each year.⁸ In 2005, the *Los Angeles Times* reported that California was spending over \$250 million per execution.⁹ From 1979 to 2000, Florida spent \$24 million for each of its forty-four executions by electrocution.¹⁰ New Jersey's taxpayers have spent \$253 million on the death penalty in their state since 1982.¹¹ The purpose of this Comment is to provide a model for reforming capital defense structures by examining one state's effort to manage the costs of capital defense and improve the quality of its representation.

This Comment considers North Carolina's decision to completely restructure its indigent defense system in 2001 and demonstrates the improvements this restructuring has brought to the state and its capital defendants. Part II begins by describing conditions prior to 2001 and then discusses improvements resulting from the Indigent Defense Services Act.¹² Part III then describes some of the specific statewide changes North Carolina has made, providing a model for potential change in other states. Of particular interest to legislative reformers is Part IV, discussing the demonstrated economic benefit of this structure.¹³ Finally, Part V addresses the unique roles that different organizations play throughout the state, and concludes with an argument in favor of comprehensive, statewide capital defense structures.

II. WELCOME TO THE JUNGLE

Prior to 2001, the picture was bleak for capital defendants in North Carolina. During the 1990s, North Carolina sentenced an average of fourteen people to death annually.¹⁴ It was only in 1994

⁸ Richard C. Dieter, Executive Director, Death Penalty Information Ctr., Testimony before the Judiciary Committee of the Colorado House of Representatives on House Bill 1094 8 (Feb. 7, 2007) (transcript available at <http://www.deathpenaltyinfo.org/COcosttestimony.pdf>) (citing Daniel Wise, *Capital Punishment Proves to be Expensive*, N.Y. L.J., Apr. 30, 2002, at 1).

⁹ *Id.* (citing Rone Tempest, *Death Row Often Means a Long Life*, L.A. TIMES, Mar. 6, 2005, at 1).

¹⁰ S. V. Date, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at 1A.

¹¹ MARY E. FORSBERG, NEW JERSEY POLICY PERSPECTIVE, MONEY FOR NOTHING? THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 16 (2005), available at http://www.njpp.org/rpt_moneyfornothing.html.

¹² Indigent Defense Services Act of 2000, N.C. GEN. STAT. ANN. § 7A-498 (2001).

¹³ See generally N.C. OFFICE OF INDIGENT DEFENSE SERVS., FY06 NORTH CAROLINA PUBLIC DEFENDER AND PRIVATE ASSIGNED COUNSEL COST ANALYSIS 10 (2007), available at <http://www.aoc.state.nc.us/www/ids/> (follow "Reports and Data" hyperlink; then follow "FY06 Public Defender and Private Assigned Counsel Cost Analysis" hyperlink).

¹⁴ Averages were calculated from Department of Justice statistics. See U.S. DEP'T OF

that the state included life without parole as a sentencing option in capital cases.¹⁵ Prior to the introduction of life without parole, any first-degree murder charge required a prosecutor to seek the death penalty.¹⁶ Before 2001, there were only eleven public defender offices, which covered thirteen counties in the state.¹⁷ This meant that eighty-seven of North Carolina's 100 counties had no public defender office.¹⁸ The inaugural address at a 1995 fundraiser for the North Carolina Academy of Trial Lawyers ended with the following statement:

In 1972, when the Supreme Court of the United States ruled the death penalty unconstitutional, one of the justices likened the application of capital punishment to the random and tragic fate of being struck by lightning. While the application of Capital Punishment in North Carolina remains arbitrary and capricious, the question of who faces execution is hardly as unpredictable as a dangerous storm. Those selected for execution are chosen by all too predictable criteria, criteria that give little confidence in the fairness of our system of justice.¹⁹

A few of these "criteria" included race,²⁰ mental illness,²¹ geograph-

JUSTICE, CAPITAL PUNISHMENT 2005, 15 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf>. An average of fourteen per year were sentenced in the decade prior to the passage of the IDS act (1991–2000) and an average of six per year were sentenced from 2001–2005. *Id.*

¹⁵ See Cindy George, *Life Trumps Death Penalty*, THE NEWS & OBSERVER, Dec. 11, 2005, at A1. Before 1994, a life sentence included parole as an option. In amending the death penalty statute in 2001, the North Carolina General Assembly passed a statute giving prosecutors discretion in first-degree murder cases. This gave prosecutors the discretion not to seek the death penalty even in first-degree murder cases where aggravating circumstances are clearly present. Prior to the passage of this amendment in 2001, the only other alternative would be to seek a conviction less than first-degree murder under which the defendant could be released on parole or to dismiss the homicide charges against the defendant altogether. *Id.*

¹⁶ *Id.*

¹⁷ INDIGENT DEFENSE STUDY COMM'N, REPORT AND RECOMMENDATIONS 4 (2000), *available at* <http://www.aoc.state.nc.us/www/ids/Home/ids%20study%20commission%20report.pdf> [hereinafter INDIGENT DEFENSE STUDY COMM'N].

¹⁸ *Id.*

¹⁹ Attorney David Bruck, Remarks at the Inaugural Fundraising Reception for the Center for Death Penalty Litigation at the North Carolina Academy of Trial Lawyers (Nov. 16, 1995) (on file with author).

²⁰ See Jack Boger & Dr. Isaac Unah, *Race and the Death Penalty in North Carolina: An Empirical Analysis: 1993–1997*, (Common Sense Foundation & North Carolina Council of Churches 2001), *available at* <http://www.deathpenaltyinfo.org> (follow "Issues" pull-down menu; select "Race"; then select "Race and the Death Penalty in North Carolina An Empirical Analysis: 1993–1997" from the "Additional Issues" section) This comprehensive study based on data collected from court records of 502 murder cases from 1993 to 1997 in North Carolina, finds that race plays a significant role in who is sentenced to death. *Id.* In North Carolina, defendants whose victims are white are 3.5 times more likely to be sentenced to death than those with non-white victims. *Id.* See

ical location,²² and poverty,²³ to name only a handful of the arbitrary factors that contributed to the likelihood of a death sentence.²⁴

Prior to 2001, over 300 judges throughout the state appointed defense attorneys to capital cases without any uniform standards for attorney qualifications.²⁵ Individual judges had the right to grant or deny funding for expert testimony and were responsible for deciding how much to pay capital attorneys.²⁶ There was no uniform method of payment and no uniform qualifications standards for attorneys.²⁷ Data were maintained on separate, largely

also Joan W. Howarth, *Excluding White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002) (arguing that the current structure of capital punishment and its application to black men should be understood as a "performance of white masculinities"); DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

²¹ See Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 351 (2006) (arguing that "the general public remains ambivalent and uninformed about many aspects of mental illness and the mentally ill," and that this is particularly evident in capital sentencing of mentally ill defendants); see also Andrea Weigl, *Clemency Sought for Delusional Murderer: North Carolina Inmate is Part of a National Debate on the Executions of Those with Severe Mental Illness*, THE NEWS & OBSERVER, Nov. 12, 2006, available at <http://www.newsobserver.com/689/story/509665.html> (discussing Guy LeGrande, a death row inmate who was diagnosed as suffering from psychosis, but was permitted by the trial court to fire his attorneys and represent himself at trial). His stand-by counsel were not permitted to present evidence of his mental incompetence. LeGrande wore a Superman t-shirt at his trial and told the jury in his closing statement to "[p]ull the switch"). *Id.*

²² Press Release, ACLU, *Scattered Justice: Geographic Disparities of the Death Penalty* (Mar. 5, 2004), available at <http://www.aclu.org/capital/unequal/10532pub20040305.html>.

In North Carolina, the unfairness of the capital punishment system was illustrated by a 1988 study that found the chances of defendants in cases with the same quality of evidence being brought to trial on a first degree murder charge depended on which judicial district processed the case. While most districts brought only 5-15 percent of the cases to capital trial, in two districts the rates were 42 and 40. In the latter districts, an accused was 2.8 times more likely to be tried on a capital charge than in the county with the lowest rate.

Id.

²³ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1837 (1994) (arguing that arbitrary results in capital cases frequently stem from inadequacy of counsel, and that poor defendants are most vulnerable to inadequate counsel).

²⁴ While this Comment argues that improvements have been made in North Carolina's capital defense system, the author acknowledges that arbitrary factors continue to dictate who is sentenced to death in North Carolina, as is indicated by the articles referenced in the foregoing four footnotes.

²⁵ INDIGENT DEFENSE STUDY COMM'N, *supra* note 17, at 5.

²⁶ *Id.*

²⁷ *Id.* at 1.

incompatible computer systems,²⁸ making it difficult for attorneys to access important information. There was no administrative body monitoring the \$60 million a year being spent on indigent defense.²⁹ The tremendous expense of this system combined with concerns for the fairness and accuracy of the conviction process led the General Assembly to change the structure of capital defense in North Carolina.³⁰

In 1998, the General Assembly of North Carolina established an Indigent Defense Study Commission ("IDS Commission") because of its concerns about unmonitored increased spending and the quality of indigent defense services throughout the state. Costs for private counsel in capital defense cases had increased by 338% from 1988 to 1998,³¹ with no administrative structure to monitor and document payment.³² Between 1998 and 1999, paying private counsel to represent indigent clients in the absence of public defenders cost the state of North Carolina \$9.2 million.³³

In addition to this fiscal crisis, the quality of legal representation and the indigent defense programs suffered from lack of management and accountability.³⁴ Some judges used their discretionary power to award inadequate compensation to defense attorneys, and lack of appointment standards led to poor legal representation.³⁵ Furthermore, the Commission found that judicial control over an indigent defense budget on a case-by-case basis discouraged aggressive representation and compromised the quality of legal services throughout the state.³⁶

The most egregious examples of this lack of structural accountability were instances in which unqualified attorneys were appointed to represent capital cases. Individual judges appointed defense attorneys without any uniform standards for their appointment.³⁷ A number of defendants were represented by attorneys who were later singled out for disciplinary action by the state bar.³⁸

²⁸ *Id.* at 5.

²⁹ *Id.* at 1.

³⁰ See Stan Swofford, *Reasonable Doubt: Are There Innocent People on North Carolina's Death Row?*, GREENSBORO NEWS & REC., Aug. 6, 2000, at A1 (discussing the extent of North Carolina's expenses, the lack of DNA evidence used to determine guilt or innocence, and flaws throughout the capital defense structure in North Carolina).

³¹ INDIGENT DEFENSE STUDY COMM'N, *supra* note 17, at 6.

³² *Id.* at 1.

³³ *Id.* at 6.

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Frances Ferris, *Common Sense Says that People on Death Row Often Had the States*

In the mid-1990s in Guilford County, and in other areas, judges resorted to “appointing civil attorneys to capital cases because so few criminal lawyers are willing to take the low-paying, time-consuming cases.”³⁹ In another instance, an attorney was intoxicated during the sentencing phase of the trial. Despite his attorney’s later admission that he struggled with alcohol abuse throughout the trial, Frye’s *habeas corpus* petition was denied.⁴⁰ During a mitigation investigation for Frye’s post-conviction appeals, one juror said:

It would have made a great difference [in the way I voted at sentencing] to know that Ronnie was criminally abused as a child and that his family had multiple problems. This was not presented to the jury. I did not understand that there was more evidence about the defendant’s past that was not presented.⁴¹

In both of these examples of inadequate representation, the defendants were sentenced to death and have since been executed.⁴²

The Commission found that North Carolina’s indigent defense system suffered from a lack of planning and poor management, and recommended that a statewide office be established to oversee North Carolina’s indigent defense services.⁴³ In August 2000, the General Assembly implemented the Commission’s recommendations and passed the Indigent Defense Services Act (“IDS Act”).⁴⁴

III. NEW RULES FOR AN OLD GAME

In August 2000, when the General Assembly passed the IDS Act, it created the Office of Indigent Defense Services (“IDS”) and charged it with the responsibility of overseeing the legal representation of indigent defendants throughout the state, including in all

Worst Lawyers at Trial, vol. 5, issue 5, Oct. 2002, available at <http://www.common-sense.org/pdfs/DPSpecialReport.pdf> (stating that one in every six people on death row in North Carolina was represented by a trial lawyer who has been singled out for disciplinary action by the State Bar for various infractions including felonies, embezzlement, intentionally prejudicing clients, or failing to properly represent clients).

³⁹ Swofford, *supra* note 30, at A7.

⁴⁰ Amnesty International, *Urgent Action, USA (North Carolina): Death Penalty/Legal Concern, Ronald Wayne Frye*, (2001), <http://web.amnesty.org/library/index/ENGAMR511152001?open&of=ENG-392> [hereinafter Amnesty International, *Urgent Action*]; *Frye v. Lee*, 235 F.3d 897, 902 (4th Cir. 2000).

⁴¹ Amnesty International, *Urgent Action, supra* note 40.

⁴² North Carolina Department of Correction, Executions Carried Out Under Current Death Penalty Statute, <http://www.doc.state.nc.us/DOP/deathpenalty/executed.htm> (last visited Feb. 26, 2008).

⁴³ INDIGENT DEFENSE STUDY COMM’N, *supra* note 17, at 2–5.

⁴⁴ Indigent Defense Services Act of 2000, N.C. GEN. STAT. § 7A-498 (2000).

capital cases. The General Assembly was concerned about the amount of money being spent on indigent defense throughout the state and the lack of fiscal accountability in its administration.⁴⁵ The General Assembly founded IDS as a result of these fiscal concerns.⁴⁶ Their goals were to coordinate defense services throughout the state, keep fiscal accounts of indigent defense costs, and implement standards for defense attorneys.⁴⁷ IDS and the IDS Commission have implemented several initiatives since July 2001. Since 2001, the annual number of death sentences dropped from an average of twelve death sentences a year to an average of only five.⁴⁸ The Assembly has also created a cooperative structure of organizations and practitioners who share information and training.⁴⁹

During its first year in action, IDS developed rules to govern the continued delivery of services, including standards for appointing capital attorneys, provisional appointment of counsel, requirements to consult with the Center for Death Penalty Litigation on all capital cases, procedures for a defendant who waives his right to counsel, and procedural requirements for appeals.⁵⁰ The following requirements demonstrate the concrete impact of the IDS reforms.

Unlike the former smorgasbord of discretionary judicial appointments, all capital attorneys are required to be appointed according to specific standards.⁵¹ Two attorneys are appointed to

⁴⁵ See CAROL J. DE FRANCES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999 3 (2001), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf> (according to the 1999 National Survey of Indigent Defense Systems, North Carolina spent \$39,731,705 on private assigned counsel, \$11,708,864 on Public Defenders, and \$329,469 on contract attorneys).

⁴⁶ N.C. GEN. STAT. § 7A-498 (2000).

⁴⁷ *Id.*

⁴⁸ North Carolina Department of Correction, *supra* note 42; See also U.S. Department of Justice, Bureau of Justice Statistics, Prisoners On Death Row, <http://ojp.usdoj.gov/bjs/glance/tables/drtab.htm> (last visited Nov. 19, 2007) (The author calculated the average from 2001–2006 and the average from the decade prior to the passage of the IDS Act, 1990–2001. The annual number of death sentences is listed on the Department of Corrections website.).

⁴⁹ See generally INDIGENT DEFENSE STUDY COMM'N, *supra* note 17, at 7.

⁵⁰ OFFICE OF INDIGENT DEFENSE SERVICES, RULES OF THE COMMISSION ON INDIGENT DEFENSE SERVICES, pt. 2 app. (2006), <http://www.aoc.state.nc.us/www/ids> (follow “IDS Rules & Procedures” hyperlink; then follow “Part 2, Appendix—Standards for Capital Cases” hyperlink) [hereinafter OFFICE OF INDIGENT DEFENSE SERVICES].

⁵¹ *Id.* at 1.

every capital case at both the trial and post-conviction stages.⁵² These attorneys must fulfill a series of requirements before being eligible to handle capital cases, and must demonstrate these qualifications through the application and recommendation process.⁵³

Lead attorneys, as well as associate counsel, must demonstrate legal knowledge and skill. They must fulfill ethics requirements in North Carolina and be familiar with the relevant capital jurisprudence.⁵⁴ Lead attorneys must have at least six years of litigation experience or four years of concentrated criminal litigation.⁵⁵ Further, lead counsel must have participated as trial counsel in at least ten jury trials. In addition, they must have either tried a capital case as lead defense counsel, tried two capital cases as associate counsel, or presented at least four homicide cases.⁵⁶ Associate counsel must have at least three years of criminal or civil litigation experience.⁵⁷ Finally, all attorneys must have familiarity with the use of expert witnesses and scientific or medical evidence.⁵⁸ While IDS has discretion to accept an attorney who does not fulfill all of these requirements,⁵⁹ implementing these standards provides a framework by which attorneys can be judged. Such standards provide a structure designed to ensure competent and committed counsel for defendants.

IDS is authorized to appoint provisional counsel to determine whether or not a defendant is indigent.⁶⁰ Previously, persons were only found indigent based on the discretion of individual judges.⁶¹ While judicial officials still make an initial determination of indigency, IDS has discretion to appoint provisional counsel to investigate potential indigency.⁶² IDS is also responsible for appointing standby counsel to assist a defendant who has chosen to waive his or her right to counsel.⁶³ In a state in which a capital defendant

⁵² See generally OFFICE OF INDIGENT DEFENSE SERVICES, *supra* note 50 (discussing lead and associate trial counsel appointments in capital cases).

⁵³ Indigent Defense Services Act of 2000, N.C. GEN. STAT. ANN. § 7A-498.5 (West 2001).

⁵⁴ OFFICE OF INDIGENT DEFENSE SERVICES, *supra* note 50, at 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ Indigent Defense Services Act, N.C. GEN. STAT. § 7A-498.5 (c)(8) (2001).

⁶¹ See N.C. GEN. STAT. § 7A-459 (1991) (repealed 2001) (former rule providing that judges have sole discretion to determine indigency).

⁶² N.C. GEN. STAT. § 7A-498.5 (c)(8).

⁶³ OFFICE OF INDIGENT DEFENSE SERVICES, *supra* note 50, at 4.

may represent himself, this is a particularly significant safeguard for the defendant's rights.

Perhaps one of the best illustrations of the need for such procedures is the case of Guy LeGrande.⁶⁴ LeGrande, now on death row in North Carolina, was permitted by the trial court to fire his attorneys and represent himself at trial. His stand-by counsel were not permitted to present evidence of his incompetency, including evidence of his delusional belief that he was receiving signals from Oprah Winfrey and Dan Rather over the television.⁶⁵ LeGrande wore a Superman t-shirt at his capital trial and in his closing statement told the jury to, among other things, "[p]ull the switch."⁶⁶ His execution was stayed in December 2006 after concerns increased about his potentially severe mental illness, with some North Carolina news media going so far as to demand a hearing for his competency.⁶⁷ It was only in the summer of 2007 that Guy LeGrande's competency hearing finally took place.⁶⁸

⁶⁴ See *State v. LeGrande*, 346 N.C. 718, 729 (1997) (denying appeal despite recognition that during his pro se representation LeGrande manifested mixed personality disorder with hypomanic traits and signed letters to opposing counsel as "Lucifer").

⁶⁵ ACLU, *MENTAL ILLNESS AND THE DEATH PENALTY IN NORTH CAROLINA: A DIAGNOSTIC APPROACH* 33 (2007), available at http://www.aclu.org/pdfs/capital/nc_mental_illness_report2007.pdf.

⁶⁶ See Andrea Weigl, *Clemency Sought for Delusional Murderer: The North Carolina Inmate Is Part of a National Debate on the Executions of Those with Severe Mental Illness*, THE NEWS & OBSERVER, Nov. 12, 2006, at A1, available at <http://www.newsobserver.com/689/story/509665.html> (noting that he also told the jury in his closing statement to "kiss my black [expletive] in the showroom window of Heilig-Meyers").

⁶⁷ *Take Another Look: Too Many Questions Unanswered as LeGrande Faces Execution*, CHARLOTTE OBSERVER, Nov. 26, 2006, at 24A, available at 2006 WLNR 20508307.

At least three issues should be resolved satisfactorily if the state is to execute Guy LeGrande: Is he too mentally ill to be executed? Did race play a role in the decision to put him on trial for his life and let his white co-defendant plead guilty to a lesser charge? Did prosecutors improperly withhold information concerning payments and other benefits to witnesses—information that might have made jurors skeptical about their testimony? At this point the LeGrande case has more unanswered questions than a TV quiz show. The courts, and the governor, should get satisfactory answers before this case goes forward.

Id.

See also Attila Nemezc, *Hope for Raleigh's Soul*, THE INDEPENDENT WEEKLY, Dec. 6, 2006, available at 2006 WLNR 22893009 ("The recent stay in the execution of Guy LeGrande gave us anti-death-culture activists a sliver of hope, but the cruel injustice of the case should make all of Raleigh take a moment to think about how LeGrande's case reflects our people's treatment of the mentally ill."); see also *Our View: Even if this Murderer Is Sane, He Didn't Have a Competent Lawyer*, THE FAYETTEVILLE OBSERVER, Nov. 28, 2006, available at <http://www.fayobserver.com/article?id=248003> (discussing LeGrande's conduct at his capital trial wherein he represented himself).

⁶⁸ Emily Achenbaum, *Will Mental Illness Save Mom's Killer: Psychiatrists Review Competence Question*, CHARLOTTE OBSERVER, June 27, 2007, available at 2007 WLNR 12080737.

Guy LeGrande's case is only one example of the importance of implementing statewide standards for capital cases. Through the reforms of the IDS Act, North Carolina has made it clear that the burden of capital punishment should be met with a solemn commitment to qualified representation.

IV. SAVING MONEY: SAVING LIVES?

From 2002 to 2006, by hiring new public defenders instead of private attorneys, the Indigent Defense Services estimates that the State of North Carolina saved approximately \$12.6 million in capital and non-capital cases.⁶⁹ In 2002 alone, North Carolina saved \$3.3 million under the Indigent Services Act as compared to using private assigned counsel.⁷⁰ By providing organized, effective, and just structures for indigent defense, North Carolina has lowered costs while improving the integrity of its criminal justice system.

From 2002 to 2006, IDS worked to improve its existing public defender offices and opened three new offices throughout the state.⁷¹ It also implemented new rules for reporting spending, and saved the state significant amounts of money by paying a uniform hourly rate for capital and non-capital public defenders.⁷² Furthermore, in 2004-2005 IDS saved an additional \$285,000 by contracting with attorneys throughout the state instead of hiring only private attorneys pursuant to individual appointments.⁷³ While IDS still hires private attorneys for some cases, the capital caseload is now distributed between public defenders, private attorneys, and contract organizations.⁷⁴

⁶⁹ See FY06 NORTH CAROLINA PUBLIC DEFENDER AND PRIVATE ASSIGNED COUNSEL COST ANALYSIS 10, (2006), available at <http://www.aoc.state.nc.us/www/ids> (follow "Reports and Data" hyperlink; then follow "FY06 Public Defender and Private Assigned Counsel Cost Analysis—March 2007" hyperlink. Author calculated the total amount saved by adding annual "PD Savings/Loss" from the chart on page ten; the number reflects a comparison to the cost the state would have spent on private attorneys).

⁷⁰ See REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 11 (2003), available at <http://www.aoc.state.nc.us/www/ids> (follow "Reports and Data" hyperlink; then follow "IDS Report to General Assembly- March 2003" hyperlink).

⁷¹ REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 9, 10 (2006), available at <http://www.aoc.state.nc.us/www/ids> (follow "Reports and Data" hyperlink; then follow "IDS Report to General Assembly—March 2006" hyperlink) [hereinafter "IDS 2006 ANNUAL REPORT"] (this report is submitted annually to the North Carolina General Assembly pursuant to S.L.2005-276, § 14.12).

⁷² See IDS 2006 ANNUAL REPORT, *supra* note 71, at 9–10 (stating that IDS pays eighty-five dollars an hour for capital defenders and has requested an increase from sixty-five dollars to seventy-five dollars an hour for non-capital defenders).

⁷³ *Id.* at 24.

⁷⁴ *Id.* at 28.

Because there was no uniform method of reporting payment or expenditures prior to 2001, the state legislature could not assess how funds were being used.⁷⁵ With the creation of the IDS office, the General Assembly receives annual reports detailing all expenditures for indigent defense, including capital defense.⁷⁶ These reports allow them to make informed funding decisions, knowing exactly how and why funds are expended. Such information creates a cooperative relationship between the legislature and indigent defense services, so that legislators can make meaningful choices about funding.

North Carolina has demonstrated that even with an expanding caseload, funding public defense is ultimately a fiscal advantage. The IDS Act has not only created a more reliable system, but it also presents a financially realistic model for other states to follow.⁷⁷

V. IT TAKES A VILLAGE TO SAVE A LIFE

In addition to the rules and fiscal reforms made since 2001, the face of capital defense in North Carolina has changed because of the cooperative relationships between capital defense organizations. This section addresses the importance of accountability and communication in capital defense systems. Each organization plays a role in maintaining a network of services. The organizations in North Carolina that work together on capital cases are 1) Indigent Defense Services, 2) The Office of the Capital Defender, 3) The Center for Death Penalty Litigation, 4) Fair Trial Initiative, and 5) The ACLU Capital Punishment Project. This section explores the unique role that each organization plays in a cooperative network of capital defense.

A. *Indigent Defense Services*

IDS is the centralized organization through which capital defense attorneys and organizations connect to resources and information. While IDS does not directly represent any clients, they provide communication, referrals, and resources to capital defense attorneys throughout the state.⁷⁸ IDS created a resource website to provide an accessible source for attorney information and network-

⁷⁵ INDIGENT DEFENSE STUDY COMM'N, *supra* note 17, at 5.

⁷⁶ Indigent Defense Services Act, N.C. GEN. STAT. § 7A.498.2 (d) (2001).

⁷⁷ For more detailed information about North Carolina's indigent expenditures, see <http://www.aoc.state.nc.us/www/ids/> (last visited Nov. 7, 2007).

⁷⁸ IDS 2006 ANNUAL REPORT, *supra* note 71, at 28.

ing, including forms and applications, and procedures.⁷⁹ To encourage capital defenders to work together and share information, IDS also formed a capital defense listserv that relays updates on cases, trainings, and conferences.⁸⁰

In addition to providing these services IDS maintains a roster of all attorneys⁸¹ and mitigation specialists⁸² who have been approved for capital defense assignments.⁸³ It assigns defense attorneys to capital cases and refers them to other organizations for specialized training and resources.

In March 2005, “IDS hosted a conference for organizations that focused on criminal justice issues, innovative indigent defense programs around the country, and indigent defense service organizations from other states.”⁸⁴ The conference created “a national forum where practitioners and criminal justice social scientists gathered” to examine “the role indigent defense should play” in their states and considered strategies for improved services.⁸⁵

B. The Offices of the Capital Defender and Appellate Defender

The Office of the Capital Defender was established in early 1999 as a pilot program within the Office of the Appellate Defender.⁸⁶ In 2001, the Interim Capital Defender began working with IDS to appoint attorneys and review expert requests in potential capital trials.⁸⁷ The General Assembly of North Carolina approved IDS’s proposal to establish a permanent Capital Defender position in the existing Capital Defender Office. The Office of the Capital Defender is a resource for training and education for appointed attorneys, and is charged with the responsibility of identifying exceptional capital cases and referring attorneys to specific training.⁸⁸

⁷⁹ *Id.* at 5–6.

⁸⁰ *Id.* at 6.

⁸¹ *Id.* at 5.

⁸² *Id.* at 1.

⁸³ *Id.* at 5, 1, 29.

⁸⁴ *Id.* at 29.

⁸⁵ *Id.*

⁸⁶ See OFFICE OF INDIGENT DEF. SERVS., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 4 n.2 (2003), available at <http://www.aoc.state.nc.us/www/ids/> (follow “Reports and Data” hyperlink; then follow “IDS Report to the General Assembly — March 2003” hyperlink).

⁸⁷ *Id.*

⁸⁸ *Id.* For more information on the procedures of the Office of the Capital Defender, see <http://www.aoc.state.nc.us/www/ids/> (follow “Rules and Procedures” hyperlink, then follow “Capital Cases at the Trial Level” link) (last visited Feb. 26, 2008). The links for both “Mandatory consultations in Capital Cases” and “Excep-

C. *The Center for Death Penalty Litigation*

The Center for Death Penalty Litigation (“CDPL”) is a non-profit organization founded in 1995 with a mission to advocate for justice and improve the quality of representation for capital defendants in North Carolina.⁸⁹ CDPL “provides legal representation to indigent defendants accused and/or convicted of capital crimes” and works primarily on post-conviction cases.⁹⁰

In addition to representing one-third of the capital inmates on death row in North Carolina,⁹¹ CDPL consults with all attorneys in North Carolina who are currently working on capital trials.⁹² It provides mandatory training and consulting for every capital case in North Carolina.⁹³ In 2003, IDS established a mandatory consulting policy for trial and post-conviction cases requiring that within sixty days of appointment, capital attorneys must contact CDPL for a consultation.⁹⁴

The CDPL has played a role in North Carolina’s moratorium on lethal injection.⁹⁵ Members of the CDPL staff have had success litigating the use of lethal injection, arguing that it violates the Constitution’s prohibition on cruel and unusual punishment.⁹⁶

tional Capital Cases” outline some of the obligations and duties of the Office of the Capital Defender. *Id.*

⁸⁹ Maher E-mail, *supra* note 1; *see also* The Center for Death Penalty Litigation, <http://cdpl.org/About.html> (last visited Feb. 26, 2008).

⁹⁰ Maher Email, *supra* note 1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ OFFICE OF INDIGENT DEFENSE SERVICES, RULES OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 7 (2006), <http://www.aoc.state.nc.us/www/ids> (follow “IDS Rules & Procedures” hyperlink; then follow “Part 2 – Rules for Capital Cases” hyperlink) [hereinafter IDS RULES FOR CAPITAL CASES].

⁹⁴ Maher E-mail, *supra* note 1.

⁹⁵ *State’s Death Penalty Lingers In Legal Limbo*, GREENSBORO NEWS AND RECORD, May 31, 2007, at B3 (stating that the North Carolina Medical Board released a statement in January 2007 prohibiting doctors from participating in executions, which is in direct conflict with North Carolina’s lethal injection protocols requiring that a doctor must be present for executions. Until the legislature can formulate a means of execution in which doctors can ethically participate, all executions are temporarily stayed).

⁹⁶ *See* *State v. Hunt*, 591 S.E.2d 502 (2003) (vacating a stay of execution based on the use of certain chemicals in lethal injection administration); Titan Barksdale, *Doctors Lose in Execution Ruling*, NEWS AND OBSERVER, Sept. 22, 2007, at A1, *available at* 2007 WLNR 18608604.

Still pending are the cases of five death row inmates who successfully sued to have their executions postponed while the medical board, top state officials, the courts and legislators wrangle with the issue. . . . Ken Rose, an attorney with the Center for Death Penalty Litigation, says he doesn’t see the ruling as ending the controversy over doctors’ roles in the death penalty either. Rose represents Jerry Conner, one of a handful of inmates whose executions have been stayed amid the debate.

The CDPL is also raising awareness about the need for retroactive application of the new attorney qualification standards.⁹⁷ In post-conviction cases, these concerns are particularly relevant: clients who have ineffective assistance of counsel claims can often trace their claims to inadequate attorney standards.⁹⁸ There are over twenty executions to be scheduled when the moratorium is lifted, a much higher annual number than any single year since the reforms have taken place. Many people facing execution might not have been sentenced to death if attorney standards had been higher at the time of their trials.⁹⁹

D. *The Fair Trial Initiative*

In 2001, four law students founded the Fair Trial Initiative ("FTI").¹⁰⁰ They were convinced that defendants facing capital murder charges were not receiving adequate representation and that every capital defendant should receive a fair trial.¹⁰¹ FTI was founded with a mission to train effective capital defense lawyers and provides a two-year fellowship designed to assist young lawyers who are committed to a career in capital defense. Since 2001, FTI has recruited and trained twenty young capital defenders.¹⁰² FTI fellows assist capital defense attorneys across the state in pre-trial pleadings and trials. FTI has assisted in over 275 cases since 2001.¹⁰³ In many instances, its work has been vital in determining the ultimate outcome: life sentences instead of the death penalty have been obtained for 97% of FTI's clients.¹⁰⁴

FTI is an example of the important role that inter-organizational cooperation has played in improving North Carolina's capital defense structure, as its primary function is one of supporting capital defense teams at the trial level throughout the state. FTI

Id.

⁹⁷ Maher E-mail, *supra* note 1.

⁹⁸ See COMMON SENSE FOUNDATION, THE PLAIN TRUTH: DEATH ROW INJUSTICES 1 (Oct. 2006), <http://www.common-sense.org/pdfs/DP%20IDS%20Study.pdf> (stating that there are at least thirty-seven people currently on death row in North Carolina who did not have lawyers at trial who would meet today's minimum standards of qualification).

⁹⁹ *Id.*

¹⁰⁰ E-mail from Mark Kleinschmidt, Executive Director, Fair Trial Initiative, to author (Oct. 23, 2007, 23:13:35 EST) (on file with author) [hereinafter Kleinschmidt E-mail].

¹⁰¹ *Id.*

¹⁰² Fair Trial Initiative, <http://www.fairtrial.org/fellows.html> (last visited Feb. 26, 2008).

¹⁰³ Kleinschmidt E-mail, *supra* note 100.

¹⁰⁴ *Id.*

receives referrals from the Capital Defenders office. Such cases are referred to FTI because the Defenders Office recognizes that the risk of a death sentence may be high, and deems trial assistance necessary. FTI's executive director, Mark Kleinschmidt, says of the process:

Adding a lawyer to the team increases the quality of work: tasks are divided in different ways and investigation can be done by more people. Because our fellows are not burdened by large existing caseloads, they have time to attend some of the best trainings in the country and bring cutting edge practice to these cases.¹⁰⁵

FTI also began the first Defense Initiated Victim Outreach program in the Carolinas and has been working with victims' families to build relationships between survivors and the defense teams.¹⁰⁶ This program is operating in North and South Carolina and seeks to educate defense attorneys about the value of reaching out to victims' families, even minimally, so that their needs are respected and acknowledged by the defense team.¹⁰⁷

Founded on the principles of restorative justice,¹⁰⁸ the process of defense initiated victim outreach takes the view that the existing legal structures in criminal trials do not adequately address the complex emotions felt by all parties involved.¹⁰⁹ The process is a means of creating a bridge between the defense team and the survivors, providing them with information and acknowledging their loss, while simultaneously breaking down the notion that survivors

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Pamela Blume Leonard, *Defense-Initiated Victim Outreach: "All but Death, Can Be Adjusted": Recognizing Victims' Needs in Death Penalty Litigation*, CHAMPION, Dec. 2006, at 41.

¹⁰⁹ See Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 517 (2003).

Victim impact testimony is lethal for capital defendants and often illusory for the witnesses who provide it. Although such testimony invariably serves the prosecution's goal of procuring a death sentence, the opportunity to testify does not address most of the needs of the survivors of murder that could be met by the criminal justice process. At best, victim impact testimony provides a momentary opportunity for survivors to give voice to their loss, be heard, and feel less isolated. At worst, victim impact testimony exploits the immense pain suffered by survivors—using the emotional reaction to their circumstances as a lever to produce a death sentence, while leaving them as onlookers in a criminal justice process whose focus is punishing the offender, not meeting the needs of survivors.

Id.

are tied to the goals of the prosecution.¹¹⁰ FTI has planned a residential conference and retreat in 2007 to train individuals interested in participating in this program, from which a roster of persons who have been trained in victim outreach will be created.¹¹¹

E. ACLU Capital Punishment Project

The ACLU Capital Punishment Project ("CPP") is a national project of the American Civil Liberties Union.¹¹² While CPP does not work primarily within the statewide network, the project contributes to the spirit of the region's work by supplementing local efforts with national policy concerns. CPP focuses on strategic litigation, public education, and systemic reforms.¹¹³ Its work focuses on the ultimate repeal of the death penalty, and CPP is currently engaged in repeal and moratoria efforts throughout the country.¹¹⁴

CPP is particularly focused on litigation for innocent persons, mentally ill persons, and persons facing execution because of poor representation.¹¹⁵ It is also committed to representing persons who face execution because of systemic racial discrimination.¹¹⁶ Both the CPP and the CDPL have worked to raise awareness about the need for protections for mentally challenged persons in North Carolina.¹¹⁷ Its work compliments North Carolina's capital defense system by using impact litigation to obtain fair and just trials, ulti-

¹¹⁰ See *id.* at 527–28.

¹¹¹ Kleinschmidt E-mail, *supra* note 100.

¹¹² American Civil Liberties Union Capital Punishment Project, <http://www.aclu.org/capital/general/10521res20040409.html> (last visited Oct. 17, 2007).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ The ACLU and CDPL recently contributed to a Charlotte School of Law Symposium on Mental Illness and the Death Penalty. See ACLU, MENTAL ILLNESS AND THE DEATH PENALTY IN NORTH CAROLINA: A DIAGNOSTIC APPROACH (2007), available at http://www.aclu.org/pdfs/capital/nc_mental_illness_report2007.pdf. Two CDPL attorneys, Ken Rose and Gretchen Engel, spoke on mental illness at the symposium at Charlotte School of Law in October of 2006, and the ACLU published a report of the Symposium. *Id.* at 69–74. In the Symposium report, CDPL Attorney Ken Rose stated:

We're not talking about letting people go. We're not even talking about finding them guilty and putting them in the hospital for life. And we're only talking about those people with serious, serious mental illness, which is very narrowly defined. We're talking about life without parole as the alternative to executing someone with severe mental illness.

Id. at 34.

mately working toward an end the death penalty in the United States.

V. CONCLUSION

In North Carolina, the number of prisoners who were sentenced to the death penalty reflects a dramatic shift since 2001. From an average of fourteen death sentences per year in the 1990's, the average has dropped to less than six death sentences a year—more than a fifty-percent decrease.¹¹⁸ When asked about the developments in capital defense since 2001, FTI executive director Mark Kleinschmidt said:

The reforms created by the IDS Act give capital defense teams confidence that they have support to prepare for capital trials. Prior to 2001, capital defenders had to persuade judges to finance the needs of a defense team. While many judges appreciated those needs, for some judges, it took time for certain Supreme Court cases to trickle down. It was difficult for trial attorneys to adequately fund their services. IDS removed that obstacle, staying on top of the changing needs of capital defense teams and providing the financial support they need to do their jobs well.¹¹⁹

However, defense attorneys and organizations continue to strive for improvement. Despite the improvements IDS has made in the capital defense structure, the ideals set forth in the IDS Act have not been fully realized. In a recent audit, IDS was criticized for not having implemented the goals of the IDS Act in their entirety.¹²⁰ There is still an unacceptable amount of judicial involvement in the appointment of capital attorneys in certain regions.¹²¹ IDS will need to find the resources and administrative vision to live up to its legislative commission. North Carolina's model may be helpful to other states in its structure, but in order to fulfill the aims of IDS Act, it will need to correct the continuing deficiencies of its current

¹¹⁸ See *supra* note 14 and accompanying text.

¹¹⁹ Kleinschmidt E-mail, *supra* note 100.

¹²⁰ See LESLIE W. MERRIT, OFFICE OF THE STATE AUDITOR, PERFORMANCE AUDIT: OFFICE OF INDIGENT DEFENSE SERVICES, 6–9 (2007), available at <http://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2007-7223.pdf> (criticizing the ongoing appointment of defense counsel by judges despite the direct mandate of the IDS Act, urging judicial independence in appointment of counsel and public defenders; further criticizing IDS for not having fully implemented state-wide, uniform methods of hiring; and suggesting that IDS should propose legislation to gain appointment authority over public defenders).

¹²¹ *Id.*

system.¹²²

With clients facing capital punishment, practitioners and activists must remain vigilant. Among the bills filed in the General Assembly in 2007, several address further reforms. They include a two-year moratorium on the death penalty,¹²³ reducing the effect of racial discrimination on the death penalty,¹²⁴ and limiting the circumstances under which a person may be sentenced to death.¹²⁵ At the time of this writing, three bills have recently passed and have been signed into law: one improves the preservation of DNA evidence,¹²⁶ another improves procedures for eyewitness identifications,¹²⁷ and another requires interrogations of suspects to be recorded.¹²⁸ Continued legislative efforts, combined with the work of each organization, bring North Carolina closer to the goal of a truly just indigent capital defense system.

Most importantly, the zealous advocacy of the capital defense network keeps North Carolina accountable for continued reforms. Each organization has been encouraged to play a specific role in the state's capital defense structure.¹²⁹ The cooperation of these organizations has created a communal system that is both financially beneficial to the state and encourages the development of expertise among practitioners. North Carolina can serve as a fiscally attractive model for reform. Just as these capital defenders

¹²² *Id.*

¹²³ Suspend Executions for Two Years, H.R. 1691, Gen. Assem., Reg. Sess. (N.C. 2007) (requiring a two year moratorium on the death penalty), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1691v1.html>.

¹²⁴ N.C. Racial Justice Act, H.R. 1691, Gen. Assem., Reg. Sess. (N.C. 2007) (prohibiting executions where race was a significant factor in the decision to seek the death penalty), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1291v1.html>.

¹²⁵ Streamlined & Cost Effective Capital Case Act, H.R. 1526, Gen. Assem., Reg. Sess. (N.C. 2007) (limiting the circumstances under which the death penalty can be imposed), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1526v1.html>.

¹²⁶ N.C. GEN. STAT. § 15A-268 (2007).

¹²⁷ Eyewitness Identification Reform Act, 2007 N.C. Sess. Laws 421, art. 14A, § 15A (requiring improved procedures for eyewitness identification), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1625v5.html> (to be codified at N.C. GEN. STAT. § 15A-284.52).

¹²⁸ Electronic Recording of Interrogations, 2007 N.C. Sess. Laws 434, art. 8, § 15A (requiring that all interrogations be recorded), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1626v5.html> (to be codified at N.C. GEN. STAT. § 15A-211).

¹²⁹ The author notes the important role of grassroots organizations in creating momentum for change. Non-legal organizations work tirelessly for social and political reform that contributes to public awareness, including the North Carolina Coalition for a Moratorium and People of Faith Against the Death Penalty.

have pooled resources and ideas, defenders throughout the country can change structures and policies in their own states. Such creativity can produce reforms that truly honor justice and present a hopeful blueprint for change.