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A Review of the Administration of the Death Penalty and the Need for a Nationwide Response to the ABA's Moratorium Call

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CALL TO ACTION: A MORATORIUM ON EXECUTIONS

**Presented by the American Bar Association on
October 12, 2000 at the Carter Center**

MARTHA BARNETT:

Good morning. I am Martha Barnett. For the next nine months, I have the privilege of being the President of the American Bar Association. So, I bring to each of you greetings from more than 400,000 members of the ABA. I want to start by thanking you for responding to the invitation to attend this conference. I especially want to thank you for your interest in an issue that the American Bar Association believes is one of the defining issues for the association and for the profession. That is the question of a moratorium on executions.

Gathered in this room are some of the best and brightest minds and hearts on this subject. Frankly, I am humbled to be in the room with people I know and people who have spent much of their professional career trying to address, solve, and resolve the complex issues that are involved in the question of capital punishment, and more specifically now, the question of a moratorium.

I want to start out by thanking you for the work you do. You actually make a difference in the lives of people. Hopefully, this conference and the ultimate result of the call to action will make a difference in the lives of people and in the life and history of this country. I was talking to one of my good friends this morning and said that one of the things that got me interested in the question of capital punishment and a moratorium was thinking about how history would judge us 50 years from now. Looking back on this time period in our life, how will history judge us? How will it judge our country? How will it judge the legal profession? Unless we address this problem in a constructive and effective way, I fear it won't be a pretty picture for our ancestors to look back on. That is of great concern to me. I hope that today will be not the beginning, but part of a continuum — perhaps, the beginning of a new level of intensity on efforts to try to get our country to put a halt to executions until we can address some of the underlying systemic problems in the administration of capital punishment.

Personally, I have had a lifelong passion for civil rights. I believe that capital punishment is indeed one of the major civil rights issues of our time. I am a product of the rural south. I know what

happens when people don't have education, when they live in poverty and are the victims of racial discrimination. So much of that, those threads, actually come through and impact the whole question of the criminal justice system, and indeed, capital punishment.

I remember 1972. I was in law school when the *Furman*¹ case was decided and I remember the euphoria that captured many people in the country. Yet, it was only three years later when states, such as my home state of Florida and others, reenacted statutes imposing capital punishment. I've asked myself, what's happened in the last 25 years. What has happened since the *Furman* decision to where we are today, when a chief justice of the highest court comments that it's acceptable to perhaps have someone who's innocent be executed? What has happened and how have we gone from a time when we were concerned about procedural guarantees, to now where we talk about procedural niceties? Where we've gone from a time when we were concerned about fairness, to now when we have a concern about finality? What's happened when we've gone from a time when we were concerned about proving guilt, to now when we have to prove innocence? What's happened when we've gone from that sense of hope and euphoria of 25 years ago, to, in many places, almost a bunker mentality when questions of capital punishment come up? In actuality, we've really come full circle in the last 25 years.

I went back and looked at some of the language in Justice Stewart's opinion in *Furman*. He says: "The petitioners are among a capriciously selected, random handful upon whom the death sentence has been imposed."² I also looked at the 1997 resolution by the American Bar Association calling for a moratorium. I was struck by these words: "Today the administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency." Because of that, and because of the anecdotal and empirical data that we now have regarding the problems in the administration of the death penalty, American lawyers adopted a call for a moratorium. That is why I've made it one of the priorities of my tenure as president to try to have that moratorium implemented in those states that now have capital punishment.

This is a little unusual for the American Bar Association. We, of course, take our policies and advocate for those principles and issues in Congress. We regularly write to Governors protesting the

¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

² *Id.* at 309.

execution of someone who was a juvenile at the time a crime was committed or the execution of the mentally retarded. But, we have never taken a resolution to the level that I hope we will do today. It will be the beginning of an effort to truly try to implement, on a national basis in those states that have capital punishment, a moratorium.

We want to talk today about how to do it. We also want to talk about how to help those states that want to address the underlying problems do that. The cornerstones of the call for a moratorium are: the right to competent and adequately funded counsel, the elimination of racial and geographic discrimination, and to make sure that due process and fairness guarantees are available for people who are death charged. Those are the cornerstones. Those are resolvable issues, we believe. Several of them are just resource issues. They're just a matter of money. We want to be able to try and help people interested in solving those issues get the tools to do so.

I began by talking about the best and the brightest people in the room, and those who make a difference in the lives of other people. That brings me to something that is an enormous privilege for me to have an opportunity to do this morning, and that is to introduce to you the keynote speaker.

I first began my journey of concern about capital punishment when I read a speech that Professor Tony Amsterdam did on the need for a moratorium. It struck a chord in my mind and in my heart like nothing else had done.

So, it is a pleasure to introduce one of the most revered public-interest lawyers and, indeed, legal scholars of our time.

Professor Amsterdam's career began like all of us wish our career had begun — not only with a law degree, but with a Ph.D. in art history. But more importantly, he had the honor to be a law clerk to Justice Felix Frankfurter on the Supreme Court. During the '60s and '70s he represented civil rights demonstrators. He was part of the legal team that represented the Chicago Seven, and he handled school desegregation cases for organizations like the NAACP Legal Defense Fund and the Southern Christian Leadership Conference.

Professor Amsterdam has been a lifelong advocate for challenging the legal system's inability to impose the death penalty in a manner consistent with fairness, justice and due process. He's a master at the jurisprudence of cruel and unusual punishment, due process, habeas corpus relief, and many other fields.

Since 1981, Professor Amsterdam has been teaching at NYU School of Law, where he handles the clinical and advocacy programs. I am told he is absolutely adored by his students and that he has probably inspired more public interest lawyers than any other professor of our generation.

His passion is infectious. His insatiable mind is admirable.

There is a legend that once during oral argument, Professor Amsterdam cited a case, giving the name, the official citation, the date and some other information. The Justice hearing the case actually had a clerk go check the citation carefully. He then told Professor Amsterdam that all this was very good but that, in fact, he had cited the wrong page number. To which, I'm told, Tony Amsterdam responded, "Your book must have been bound incorrectly." As it turned out, it had been.

So, it is my honor to introduce to you an icon of the legal profession, Tony Amsterdam.

PROFESSOR ANTHONY G. AMSTERDAM³

The work that brings us to this program and must follow it is, quite simply, the supreme challenge of the legal profession *as* a profession.

Like it or not, the power and responsibility to administer a system of life and death has been put into the hands of lawyers. The decisions that lawyers make and mediate in capital prosecutions come as close to exercising God's own powers as humanity can come. Not only is the judgment to take life irreversible; it is literally incomprehensible. Whatever else we humans know, life and death are mysteries beyond our understanding; and when we decree that a person's life is forfeited, however solemnly, however righteously, we commit an act whose nature and whose consequences we cannot pretend to grasp.

A democratic society has imposed this task on the legal profession because we are supposed to be qualified to do it. Whether or not we can ever claim those qualifications with sufficient confidence to answer for our actions in the courts of history and eternity are questions each of us must answer in the depths of his or her own soul. But collectively, if we announce ready, if we say that as a profession we are prepared to undertake this responsibility, it must

³ Professor Amsterdam's talk is based on material that he provided to Ronald J. Tabak and that Mr. Tabak, with Professor Amsterdam's permission, used as the starting point for the final section of Ronald J. Tabak's, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONNECTICUT L. REV. 733 (2001).

be because we are willing to carry it out as professionals, in the honored tradition that makes the law a profession and not just a trade. That tradition requires us to be ceaselessly self-critical, to examine how we are performing our assigned work, to ask if we are doing it competently and justly, and to face the answers with unflinching honesty.

As the members of a responsible profession, we can never simply do a task and put it down and leave the results unexamined, not caring whether they were effective or ineffective, just or unjust. We cannot repeat injustices with the excuse that we were not given the resources or did not possess the competence to do our work well the last time, and we still don't have the resources or the competence. Of course, it is a sufficient excuse for *past* mistakes to say that something unpredicted and unpredictable went wrong; we're still not sure what, or why; and we're working on finding out. But for a professional or a profession, it is impermissible to go right along repeating procedures after we are on notice that they have been going wrong and resulting in injustices. We have got to stop the process, at least to the extent that it can practicably be stopped or postponed to avert irreparable injury, until we study what went wrong and try our best to prevent its recurrence.

Which brings me to the subject of this program. Whatever one's views about capital punishment in the abstract, there are compelling reasons to believe that the way it is practiced in the United States today is fatally unjust and prone to error.

First, there is overwhelming evidence of racial discrimination in the way the death penalty is applied. This has been an open and notorious abomination for as far back as records have been kept, and it persists today despite repeated criticisms by the American Bar Association and other concerned groups. The unfunny parody of the Law of Homicide proverbial among criminal trial lawyers says that, "If a black man kill a white man, that be first-degree murder; if a white man kill a white man, that be second degree murder; if a black man kill a black man, that be mere manslaughter; whereas if a white man kill a black man that be excusable homicide (unless a woman be involved, in which cases the black man died of natural causes)." In State after State, study after study has found precisely that pattern in the decisions of prosecuting authorities and juries in potentially capital homicide cases. The identical pattern was found in a study of 2500 homicide cases prosecuted in the State of Georgia where we now meet, in the very case in which the Supreme Court of the United States held, 5-to-4, that nothing

could be done to rectify the situation, *McCleskey v. Kemp*.⁴ Bias on the basis of the victim's race was the most persistent single factor operating to produce death sentences; it had as much effect on the sentencing outcome as the most influential factors spelled out in the Georgia statute to be considered in aggravation of punishment, such as whether the defendant had a prior murder conviction. Bias on the basis of defendants' race was also found, although that finding was attenuated by the overriding facts that most black-defendant cases involved black victims; very few white defendants were convicted of killing black victims; and virtually no defendant gets the death penalty for killing a black victim. Yet a bare majority of the United States Supreme Court held that these facts failed to establish a remediable violation of the federal Constitution, because the only way to prove a constitutional claim of racial discrimination in capital sentencing is to present evidence of subjective, conscious racial *animus* operating inside the mind of some identified decisionmaker in the particular defendant's case, the prosecutor or the judge or the jurors. Statistical evidence of racially biased outcomes which would be sufficient to prove a claim of discrimination in employment or jury selection, five Justices held, was not enough to prove discrimination in the meting out of sentences of death. Since *McCleskey* was decided, 13 years ago, researchers in jurisdiction after jurisdiction have found the same racially biased pattern of capital sentencing everywhere; but *McCleskey* has insulated it from constitutional correction and left to the legal profession, if we care about racial justice in the matter of life and death, to identify the reasons for this practice and to root them out.

A *second* problem crying for correction is that the quality of legal representation and investigative assistance provided by the courts to capitally-charged defendants, almost all of whom are indigent, is appalling. The norm in cases where defendants' lives are at risk is to appoint under-trained, under-compensated, overworked, and often inexperienced or inept lawyers to defend them. Many of these lawyers fail to ask the court for the support services necessary to conduct an adequate investigation and pretrial preparation, because they believe that the judge will not grant the motion and will stop appointing them to represent capital defendants if they act like they want to make waves or run up a big cost bill. And when motions for defense resources are filed, they are frequently denied or fobbed off on the cheap, by, for example, ordering that the defendant be given an hour-long psychological examination at a state

⁴ 481 U.S. 279 (1987).

or county facility instead of a thorough work-up by a qualified, independent psychiatrist. This ubiquitous practice is particularly likely to result in an inadequate development of the mental-state issues that are at the heart of many capital trials and punishment decisions because the prosecutor's office almost everywhere, instead of employing independent, well-qualified mental-health professionals, tends to rely on a stable of professional testifiers who have not treated a patient for years but make their living solely by conducting cursory examinations of defendants at the prosecution's behest and writing standard-issue reports saying that the defendant is either A-OK or a psychopath.

I'll return shortly to one of the reasons prosecutors do this, which is a major systemic problem in its own right. My point now is simply that, when poor-quality defense lawyers and poorer-quality defense experts are pitted against a prosecution machine organized to take the worst possible view of the defendant in a potentially capital case and to seek the death penalty accordingly, the adversary system that is supposed to be the guarantor of accuracy and fairness in American criminal justice breaks down. And the breakdowns are too seldom corrected. You may have read or heard news reports about the *Calvin Burdine* case on June 5th of this year, in which a Deputy Solicitor General for the State of Texas argued to the U.S. Court of Appeals for the Fifth Circuit that a condemned inmate had received the effective assistance of counsel even though his defense lawyer concededly slept through substantial segments of his trial.⁵ The national media treated the story as a joke but it is no joke when you consider what an argument of this sort says about the standards for criminal justice in capital cases in the United States today, whichever way the Fifth Circuit ends up deciding the *Burdine* case. For a government lawyer to make such an argument is a reproach to the legal profession in this country that is only slightly less embarrassing than the fact that the law of the Constitution of the United States, as declared by its Supreme Court, makes it possible for such an argument to be advanced and debated by American appellate lawyers and judges with a straight face.

But the sad state of the constitutional right to counsel is not the worst of it. For, and this is a *third* distinct problem with our present system, the courts today are forbidden, in the cases of many condemned inmates, even to consider the question whether the inmate's constitutional right to counsel, or other basic constitu-

⁵ *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

tional rights, were violated in the process that produced his death sentence.

As one example, take the case of Tony Mackall, who was executed by Virginia on February 10, 1998. Before his execution, Mr. Mackall filed a petition in federal court asserting that his federal constitutional right to an attorney had been violated because he had been convicted of murder and sentenced to death without *ever* having had a competent lawyer.⁶ His trial lawyer was incompetent, but the claim of incompetence on the part of his trial lawyer could not be raised on appeal because Virginia does not allow claims of ineffective assistance of counsel to be raised on appeal. In state post-conviction proceedings the Virginia courts appointed *another* incompetent lawyer to represent Mr. Mackall. This lawyer, by *his* incompetence, managed to forfeit Mr. Mackall's claim that his trial lawyer had botched his case. So, Mr. Mackall tried to go to federal court.

The federal district court threw Mr. Mackall out without a hearing. It held that Mr. Mackall's second state-appointed lawyer had waived Mr. Mackall's right to complain about the incompetence of his first, and that a federal court could not consider the incompetence of Mr. Mackall's *second* lawyer because there is no federal constitutional right to have a lawyer at all in state post-conviction proceedings. In a rare moment of enlightenment, a three-judge panel of the federal court of appeals reversed, holding that a defendant with his life at stake is entitled to one competent lawyer *somewhere* in the proceedings leading to his execution, and that if *all* of the lawyers who had represented Mackall were incompetent, Mackall could obtain relief in federal court. However, the entire Court of Appeals then reheard this decision and decided by a vote of 10-to-2 that the district court was right; Because of the technical doctrine that state post-conviction proceedings are not a part of the criminal case, a death-sentenced inmate has no right to competent counsel in such proceedings; so Mackall's claim that the only lawyers Virginia ever gave him were a succession of incompetents had been forfeited by the final, terminal incompetent. The Supreme Court of the United States denied Mr. Mackall's petition for review, and he was duly put to death. So much for the right to counsel, due process, equal protection of the laws and rationality alike.

Incredibly, since the *Mackall* case was decided, judicial remedies for the correction of constitutional errors in capital cases have

⁶ Mackall v. Angalone, 131 F.3d 442 (1997).

been restricted even further. Mackall was denied relief under court-made rules of post-conviction procedure that predated Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996.⁷ This statute, the product of the understandable passions aroused by the Oklahoma City bombing, was designed to put executions on a fast track by requiring the federal courts to speed up and truncate federal habeas corpus proceedings, which had served for the preceding half-century as the principal safety net for catching violations of constitutional rights left unremedied by the state courts. Among other court-closing provisions, the 1996 act imposed a 1-year statute of limitations upon federal habeas corpus petitions; and Congress at the same time defunded the federal program that had provided capable, cost-efficient lawyers for death-sentenced inmates in federal habeas; so that it is now happening that the time for bringing claims of constitutional violations to the federal courts runs out, and such claims are forever barred, while and because death-sentenced inmates are unrepresented by counsel.

Moreover, if and after a federal petition is filed, the federal courts are no longer permitted to make an independent determination of the question whether the petitioner's constitutional rights were violated in the state-court proceedings that produced his death sentence. They are now restricted to determining whether the state courts were unreasonable in failing to find any violation of federal constitutional rules clearly established by the Supreme Court of the United States prior to the state courts' ruling. This may not sound so egregious in the abstract as it is proving to be in the concrete; but let me ask you whether you would want to depend for your life upon a system of dispensing life-preserving medication in which you were denied access to medicine not because your physician thought, in the exercise of his or her best professional judgment, that you did not need it to save your life, but because some other doctor could reasonably believe that failing to prescribe the medicine would not violate clearly established, though not quite up-to-date, minimum medical standards. I suggest that, even in our era of HMO's and financially managed medical plans, you would rebel at a system of this sort, and for the reason, among others, that it would offend your most basic notions of how the medical profession should behave. For the same reason, even though the Supreme Court may not be prepared to declare that this system for dispensing justice in capital cases is

⁷ AEDPA, Pub. L. No. 104-132.

federally unconstitutional, we who are obliged to run the system are also obliged to ask ourselves whether it measures up to the way we believe that a legal system charged with making life-or-death decisions professionally should operate. And, if we have our doubts, we are also obliged to say, "hold it; stop the breakneck process for a little time; let us take stock of what we are doing and whether it is at all right."

I am not using the word "stop" metaphorically. As you know, on February 3, 1997 the House of Delegates of the American Bar Association adopted a resolution calling on all American jurisdictions that use the death penalty to stop executions until they have implemented procedures which assure that capital cases are handled fairly and impartially, in accordance with due process, and which minimize the risk of executing innocent persons. I believe that such a moratorium is the indispensable condition of proceeding with appropriate deliberation to review and repair a death-penalty machine that has run amok in this country and unleashed a train of injustices that will cause our children's children to look back in horror at the record of what we have done.

Why do we need a moratorium? Why not simply work steadily to try to improve the system while the executions continue? For two basic reasons:

First and most obviously, so long as the executions continue, we are depriving ourselves forever of the opportunity to make amends if, after the present system is dispassionately examined, we conclude that it was too fallible to trust in making judgments to extinguish human life. An examination of the system is almost sure to uncover some people we are killing now whom we should not be killing. After all, the United States is still executing juveniles; we are one of four countries in the entire world, Iran, Nigeria, Pakistan, and the United States, with the United States way out front numerically, which persist in killing children whose execution is banned by international humanitarian conventions signed by the rest of the world. We still execute mentally retarded people, another practice widely banned by international human rights documents. And we persist in executing persons who never had a decent trial with a competent lawyer or adequate resources to defend them, and persons whom there is overwhelming evidence to believe are innocent, and persons whom there is overwhelming evidence to believe were sentenced to death as a result of race prejudice. Perhaps we are also executing some people whom, after reviewing the operation of the system, we might ma-

turely conclude should be put to death; but how do we know which ones? The present system has conspicuously failed to sort the dubious cases from the less dubious ones; and if we want to reexamine that system to identify and rectify its failings, we cannot *a priori* say which of its fatal judgments is good enough to carry out in the meantime.

But there is a second reason why a moratorium is indispensable. Reasoned reconsideration of the death-penalty systems of the American States cannot plausibly be carried out while those States are caught up in the present rush to kill. We must be realistic about the role that the death penalty plays in the culture of the United States if we want to reexamine it. The death penalty is accepted, even popular, in precisely the way that big-league baseball and football are accepted and popular: as a spectator sport to the fans and a competitive *agon* to the players and a logo of the American way to everybody. Almost everywhere in this country, the death penalty has become symbolically entrenched not simply as a legal institution but as a competition sport that pits prosecutors and police investigators against defense lawyers, and pits aspiring politicians against weepy, wimpy ivory-tower academics. Capital prosecutions and the countdown dramas that precede executions are a perennial Olympiad in which State's lawyers and defense counsel strive to win their laurels and to take their places beside John Wayne and the Marlboro Man on the billboards of the American soul. It's a mile-a-minute, thrills-galore game; and after playing it myself for more than a third of a century with no let-up, let me tell you it is a game that feeds on itself and feeds on itself and ceases to have any rationality or any meaning except to win and prove that you can win and win big by killing somebody or stopping somebody from being killed. It is a game that trivializes life by turning the awesomeness of death into a prime-time advertisement that the game is being played for the highest possible stakes, in order to increase the spectators' thrills and the competitors' motivation.

The moratorium that the American Bar Association has recommended would serve to take the death penalty, for at least a time, out of the realm of competitive athletics. It would suspend the agonistic ethos that, at present, fires the fighting instincts of every ambitious prosecutor and politician and makes them blood-mad to trounce defense lawyers and bleeding-heart liberals and to vie with one another to win the grand sweepstakes of death. I have fought against prosecutors for upwards of 35 years, ever since I was

a prosecutor myself in the 1960's, but I tell you I have more faith in the capacity of even the most zealous prosecutors to attain dispassion and humanity than they can have in themselves, under the blindingly savage competitive conditions in which they now function. Stop the executions, stop the steeplechase, give them space and time for reflection, and I think that we will find many supporters for reform among them.

But we must work hard and work together to achieve a moratorium so that the death penalty in this country can be reconsidered with the sobriety that the legal profession should bring to issues of life and death. This is a project that should unite people who would support a reformed, fair and reliable administration of capital punishment, people who would oppose the death penalty under any circumstances, and people who are just not sure. Because today we do not have a fair and reliable administration of capital punishment. Today we have a death penalty that is everywhere meted out in an arbitrary, uneven, and racially discriminatory manner under conditions that render it extraordinarily susceptible to the risk of killing innocent people through a variety of mistakes, often without the safeguards that could prevent or correct the grossest of those mistakes and assure some minimal fairness in the process. In that roll-call of our failings there is more than enough reason to stop, try our best to correct the situation if it is correctable, and reevaluate the costs of capital punishment if it is not.

MORNING PANELS: REVIEW OF THE ADMINISTRATION OF THE DEATH PENALTY AND THE NEED FOR A NATIONWIDE RESPONSE TO THE ABA'S MORATORIUM CALL

LARRY FOX:

I am Larry Fox. I have the privilege of chairing the ABA Death Penalty Representation Project. I also have the privilege of being the emcee. It will be my privilege to introduce the chair of each panel and the chair of each panel will introduce each panelist.

My first privilege is to introduce Jim Liebman. Jim is a professor at Columbia Law School. When I asked people about him I got a lot of rather heavenly descriptions. One, he has written the bible for habeas corpus. Two, as many of you know, and if you don't know now you will after Jim's presentation, Jim went to scholarly heaven when he recently published an article that reviewed the administration of the death penalty. He demonstrated, through this study, not only the practical, but the scholarly, placing his article

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