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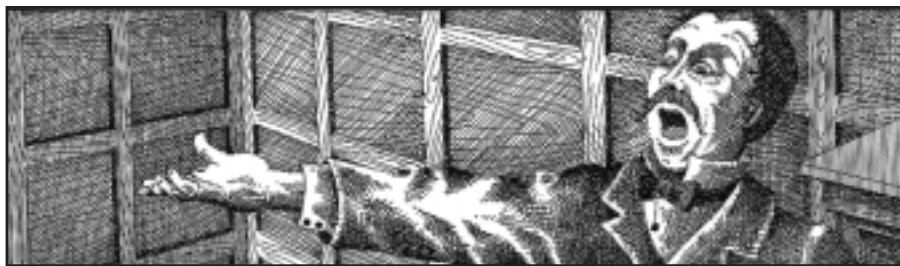
Opening Statement: How Can We Be Sure?

by Scott Atlas

**Chair
Section of Litigation**

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Opening Statement



How Can We Be Sure?

by **Scott Atlas**
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I want to discuss the death penalty. At the outset, let me be clear that, like 50 percent to 80 percent of Americans nationally (*see* www.pollingreport.com/crime.htm for polls taken by Harris, Gallup, and others periodically since 1973), I have no philosophical problems with capital punishment. For example, based on what I have read about the case, I have no problem with the death sentence given to Timothy McVeigh in the Oklahoma City bombing case. And I find troubling Illinois Governor George Ryan's recent decision, no matter how well-intentioned, to commute to life without parole every death sentence in the state, including the ones for horrific crimes with no doubt about the perpetrators' guilt.

My views might surprise some, because I led a 20-lawyer team that in 1997 freed a man who spent 15 years on Texas Death Row until we convinced federal and state court judges that he was innocent and was the victim of extensive police and prosecutorial misconduct. I described this case in some detail in Spring 2002's issue of this magazine (Vol. 28:3). I also currently lead a group of attorneys who represent Argentina and several other Central and South American countries as *amicus curiae* in another capital case. We support resentencing of an Argentine national convicted of a brutal murder who received the death penalty after the local prosecutor elicited a psychologist's testimony that the defendant posed a threat of future danger (and thus qualified for the death penalty under Texas law) in part because he is Hispanic. I believe one can object to the execution of innocent people and oppose executing people based on their race or ethnicity without opposing capital punishment *per se*. Similarly, I believe that one can support constitutional principles

of a fair trial and due process irrespective of one's views on the merits of the death penalty.

My principal concern about the administration of the death penalty is what seems to me to be a systemic failure in most jurisdictions to appoint adequate counsel for poor defendants charged with capital crimes. Without competent, effective counsel, there can be no fair trial or due process. Without a fair trial, the results will be suspect.

It is undisputed that almost everyone on death row is indigent. This means that they were represented by appointed counsel in the trial at which they were convicted and received a death sentence. Unfortunately, the compensation received by appointed counsel in even noncapital cases in most jurisdictions is woefully inadequate. But the amount provided to counsel in death penalty cases is materially worse because capital cases generally require much more effort, for at least three reasons. First, having a client facing possible execution calls for extra effort. Prosecutors invariably concentrate resources and personnel on capital cases, which are usually the most high-profile cases they have. They have access to all the necessary investigators and experts. To counter this effort and mount a credible defense, defense counsel will need to question more witnesses and dig deeper into their statements and the events generally. They will almost always need investigators and will often need experts in forensics and other disciplines. This is a time-consuming and expensive process.

Second, for defendants who are found guilty, the sentencing phase of the trial follows almost immediately after conviction. Trial counsel must prepare in advance for both segments, without

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waiting to determine if the client will be acquitted. Preparing for sentencing is invariably much more time-intensive in a capital trial than in other cases. The sentencing hearing is the opportunity for the defendant to present mitigation evidence, i.e., the important information about a defendant that will help the jury decide between life and death. Mitigation includes, inter alia, evidence of mental retardation or mental illness, history of physical and/or sexual abuse, and “good” character evidence. All of this takes serious, time-consuming investigation and the assistance of an expert to find the information and help the lawyer present it. At this critical phase, many appointed counsel fail completely, presenting no mitigation evidence at all and leaving the jury no reason to impose a sentence other than death. (The Supreme Court recently agreed to hear a case in which this occurred. *Wiggins v. Corcoran*, 123 S. Ct. 556 (2002).) The defense lawyer’s task at sentencing is to rebut the prosecution’s aggravating factors and present compelling mitigation evidence. Counsel must determine the client’s history by interviewing not only the client but also many of the accused’s friends, acquaintances, and relatives. The attorney likely will also need to prepare to defend against accusations that the client has a criminal background. Testimony that normally would be inadmissible in a noncapital case unless the defendant testifies is almost always admissible during the sentencing phase of a capital case to show that the defendant poses a future danger.

Finally, jury selection in capital cases often (and properly conducted, should) last much longer than in noncapital cases. In capital cases in many states, lawyers question jury panel members separately to prevent answers given by one jury panelist about personal views on capital punishment from tainting the views of other panelists. Separate questioning occurs rarely in noncapital cases. Moreover, the questioning of each jury panelist typically lasts longer in a capital case. Overall, it is not

unusual for jury selection in a death penalty case to last for several weeks, while lawyers usually select most non-capital juries in a day or two.

Overall, including jury selection, properly conducted capital trials can easily last for weeks, as compared to a week or less for most non-death criminal cases. Yet the amount available for compensation for appointed lawyers to prepare for and try capital cases is usually not much more than the amount paid in noncapital cases and, in any event, is almost never adequate. The prescribed hourly rates and caps vary greatly among jurisdictions but run as low, for example, as a cap of \$1,000 plus expenses for pretrial and trial work in one state, a cap of \$1,700 for pretrial and a fixed rate of \$400 per trial day in another, a cap of \$20,000 for lead counsel fees and \$5,000 for co-counsel in a third, and \$40 per hour for out-of-court preparation and \$60 per hour for in-court time in a fourth. Moreover, courts often delay for months—sometimes years—before paying appointed counsel, and they frequently reduce fees without explanation and refuse to fully reimburse necessary expenses. See Stephen B. Bright, “Crisis in the Legal Profession: Rationing Legal Services for the Poor, Panel Two: Whatever Happened to Gideon—Representing Indigent Clients in Criminal Courts,” 1997 *Ann. Surv. Am. L.* 783, 820 (1999). Only a few jurisdictions have created and adequately fund public defender offices. *Id.* at 784, 787-88. The prospect of receiving limited compensation that often is delayed and reduced even further by the courts seems unlikely to attract the best and brightest volunteers. A report prepared by another ABA entity found “long-term neglect and underfunding of indigent defense ... in many states through the country.” Richard Klein and Robert Spangenberg, *The Indigent Defense Crisis* 25 (1993) (prepared for the ABA Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis).

In jurisdictions with inadequate funding of indigent defense, the results are

predictable. Appointed counsel often lack the experience, knowledge, competence, and even enthusiasm to provide an adequate defense. See Bright, 1997 *Ann. Surv. Am. L.* at 785 n.17; Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts*, 13-14 (Dec. 2, 2002), www.texasdefender.org/publications.htm (study of all available—251 of 263—initial state habeas corpus applications filed by appointed counsel in Texas between 1995 and 2001; concludes that death row inmates “face a one-in-three chance of being executed without having the case properly investigated by a competent attorney and without having any claims of innocence or unfairness presented or heard”). Several U.S. Supreme Court Justices have expressed concern about the quality of representation provided indigent defendants facing the death penalty. See, e.g., Tony Mauro, “Court Steps into Familiar Territory,” *Legal Times*, Nov. 25, 2002, at 8 (several justices); Anne Gearan, Supreme Court Justice Backs Proposed Death Penalty Freeze,” *The Record* (Bergen County, NJ), Apr. 10, 2001, at A18 (Justice Ginsburg); “O’Connor Questions Death Penalty,” *New York Times*, July 4, 2001, at 9.

The ABA recognized this problem years ago. In 1989, the ABA’s policy-making House of Delegates adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. Guideline 10.1 called for compensation at a reasonable hourly rate “commensurate with the provision of effective assistance of counsel” and urged full reimbursement of reasonable incidental expenses and periodic billing and payment. The accompanying commentary complained that low fees, flat payment rates, and arbitrary compensation ceilings discourage experienced criminal defense lawyers from accepting appointment in capital cases or devoting the necessary time to mount a vigorous defense. The commentary also listed several states where capital representation was drastically underfunded and described a survey confirming examples of lawyers admit-

ting that they omitted some appropriate defense activity due to low compensation. New, revised guidelines, which were adopted by the House of Delegates in February 2003, add an explicit declaration, in Guideline 9.1(B)(1), that flat fees, statutory caps on compensation, and lump-sum contracts in death penalty cases are improper. The new commentary cites several recent studies demonstrating that funding for attorneys in capital cases “remains notoriously inadequate” and that this and other arbitrary limits on attorney compensation severely affect the quality of representation.

Unfortunately for impoverished defendants, the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), adopted a standard for proving constitutionally ineffective assistance of counsel that is almost impossible to meet. Some argue that the decision guarantees only the presence of a lawyer at counsel table and “foster[s] tolerance of abysmal lawyering.” E.g., William S. Geimer, “A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel,” 4 *Wm. & Mary Bill Rts. J.* 91, 93-94 (1995). The Court may be ready to revisit this issue, because it agreed this term to review a Fourth Circuit decision finding minimally adequate counsel in a capital murder case. *Wiggins v. Corcoran*, 123 S. Ct. 556 (2002).

Irreparable Harm

The impact on a defendant’s rights of being represented at trial by inadequate counsel is often irreparably harmful. Any issue that trial counsel fails to raise timely is waived and, except as part of an ineffective-assistance-of-counsel claim, cannot be raised post-conviction. Appointed counsel who conducts little investigation and is largely ignorant of the law easily may fail to raise important issues. This can even create a perverse conflict of interest in the many jurisdictions where trial judges have sole responsibility for selecting counsel for indigent defendants. Appointment of less experienced, talented, and thorough defense counsel can shorten the trial, increase the likelihood of conviction, and reduce the prospect that the trial judge will be

reversed on appeal or post-conviction.

Once a defendant’s conviction has become “final” on direct review (i.e., the U.S. Supreme Court has declined to review the case, or the time for seeking that review expires), defendants seeking to vindicate serious constitutional flaws in their convictions face strictly enforced state and federal filing deadlines, a veritable minefield of procedural traps, and standards of review that are extraordinarily deferential to the state—particularly in federal court. Frequently, courts deny relief based not on the merits of their cases but on barriers to review that have been created by state and federal legislation as well as by Supreme Court decisions.

For example, Congress and most states have adopted strict limitations on the time for seeking post-conviction review. While these limitations are not jurisdictional, failure to comply, absent extraordinary circumstances, will waive all post-conviction review. Several prisoners have been executed without any federal review of their cases due to a failure to file timely for habeas review.

In theory, legislation and common law doctrine mandate one opportunity for a full and fair review of a defendant’s case, subsequent to which that defendant is barred from returning to court except in the rarest of instances. In my state of Texas, defendants may not file a subsequent petition unless they can show that the new claims for relief could not have been presented previously because the factual basis was unavailable through the exercise of due diligence or that, but for a violation of the U.S. Constitution, no rational juror would have convicted or sentenced that defendant to death. Texas applies these same criteria to any effort to amend or supplement the initial petition beyond the initial filing deadline.

The federal ban on successive applications is even less forgiving. A petitioner may not file a successive application in federal court unless (1) he is relying on a new rule of law that, by express declaration of the U.S. Supreme Court, applies retroactively to cases on collateral review; or (2) he is innocent and he can show that the factual predi-

cate of his claims could not have been previously discovered through the exercise of due diligence. Thus, in federal court, it is not sufficient merely to demonstrate innocence. Death-sentenced petitioners seeking to return to court must also prove a constitutional violation that could not have been discovered earlier through the exercise of due diligence.

Thus, the initial habeas proceeding, in all but the rarest of cases, will be the last. So, there is a premium on thoroughly investigating and developing all potential claims for relief in the initial state habeas proceeding.

If a petitioner loses in state habeas court on the merits or for procedural reasons, an uphill battle awaits in federal habeas court. First, federal law prohibits courts from granting relief on claims that were not first presented to the state courts, though federal courts may deny relief on the merits of these claims. Second, federal law prohibits the consideration of evidence in support of claims properly before the federal court unless the evidence was presented in state court. Third, petitioners are generally barred from seeking post-conviction relief pursuant to a new rule of constitutional law.

Many prisoners have been denied relief based on one or more of these procedural limitations, without any consideration of the merits of their claims. For example, Gary Graham, whose case traveled a lengthy path through state and federal courts, never received plenary consideration of his innocence claim because the federal courts ultimately held that the testimony of the eyewitnesses, who insisted that Graham was not the person who had committed the murder for which he had been convicted, was proffered too late in the process.

Despite facing these many complex substantive and procedural hurdles, indigent defendants have no federal constitutional right to—and a number of states provide no funds for—counsel in state post-conviction proceedings. Most states that provide funding almost invariably set unrealistically low hourly rates and caps on the total fees available.

Not surprisingly, the quality of counsel attracted by little or no compensation is often not the best. Many lack experience

and expertise in post-conviction litigation. The cases are legion where appointed state habeas counsel missed filing deadlines and thus forfeited any post-conviction review, filed perfunctory briefs that failed to raise obvious issues, and demonstrated a shocking ignorance of the applicable constitutional and statutory law. A substantial and increasing number of death row inmates who have completed direct review lack legal representation in their state habeas proceedings.

Finally, assuming that a claim and all of the supporting evidence were properly presented in state court, the federal standard of review heavily favors the state. All state court factual findings are presumed correct unless rebutted by clear and convincing evidence. To prevail on the merits of a constitutional claim, such as the suppression of evidence favorable to the accused, it is not enough to demonstrate that the state courts incorrectly applied the U.S. Constitution. Instead, the petitioner must prove that the state court's legal conclusion was "unreasonable"—a term that the Supreme Court has defined as more than simply incorrect.

With many capital defendants receiving poorly compensated counsel and generally inadequate representation, the prospect of convicting and even executing an innocent party is real. Polls show that many Americans believe this has already occurred: 68 percent, 82 percent, and 94 percent of adults questioned in June 2000, April 2001, and July 2001, respectively, held this view. See www.pollingreport.com/crime.htm; *Support for Death Penalty Still Strong Despite Widespread Belief That Some Innocent People Are Convicted of Murder*, PR Newswire, Aug. 17, 2001. Several Supreme Court Justices appear to share this concern. See John Paul Stevens, Opening Assembly Address at the ABA Annual Meeting 13 (Aug. 3, 1996); Charles Lane, "O'Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed," *Wash. Post*, July 4, 2001, at A1. See also U.S. Supreme Court Justice Sandra Day O'Connor, Speech to Nebraska State Bar Association (Oct. 18, 2001), in John Fulwider, *O'Connor Lectures Lawyers, Rec-*

ollects for Students in Lincoln, Neb. State Paper, www.nebraska.statepaper.com, search Archives, Oct. 18, 2001. In addition, with better lawyers at trial, many poor defendants would have been convicted of lesser crimes or received a sentence other than death.

A recent extensive study of thousands of death sentences from 1973 to 1995 found serious, reversible errors in 68 percent of the cases and determined (1) states with below-average spending on their court systems have higher rates of error on direct appeal of capital cases than states providing above-average funding, and (2) prisoners represented by well-paid, well-staffed, big-city law firms obtained federal relief almost 70 percent more often than other prisoners. James S. Liebman, "Rates of Reversible Error and the Risk of Wrongful Execution," *Judicature*, Sept.-Oct. 2002, at 78, 80-82. See generally James S. Liebman *et al.*, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (Feb. 11, 2002), www.law.columbia.edu/broken-system2.

It is difficult to confirm post-execution that someone was innocent. Prosecutors typically strenuously oppose such efforts, and the media and public tend to focus more on the cases of those still living on death row. But in just the last 25 years, more than 100 people already on death row have been exonerated and released due to strong evidence of actual innocence. See Death Penalty Information Center, *Innocence and the Death Penalty*, www.deathpenaltyinfo.org/innoc.html. Uncontestable DNA evidence accounted for at least a dozen of these cases. See *id.* In more than 100 other non-death cases in the last 13 years, DNA evidence has demonstrated post-conviction that someone innocent had been convicted. See www.innocenceproject.org/case/index.php (chronological listing of exonerations); Barry C. Scheck and Peter J. Neufeld, "Toward the Formation of Innocence Commissions in America," *Judicature*, Sept.-Oct. 2002, at 98. Only 27 states currently have post-conviction DNA laws, *id.* at 101, so the number of DNA exonerations will likely increase. Of the first 18,000 criminal cases selected for pretrial DNA testing by

the FBI and other criminal laboratories, the results excluded more than 25 percent of prime suspects. Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence*, at xv (2000). It is difficult to extrapolate from non-death error rates to death cases. Several commentators argue persuasively, if somewhat counterintuitively, that capital cases are more, not less, susceptible to error than other felonies, mostly due to the added pressure to solve capital murder cases. *E.g.*, Michael L. Radelet, "Wrongful Convictions of the Innocent," *Judicature*, Sept.-Oct. 2002, at 67, 68.

Some people argue that these exonerations prove that the system works well at saving innocent defendants before they are executed. But DNA evidence and highly paid, well-staffed, big-firm lawyers are available in relatively few cases. Furthermore, a recent examination of the 13 Illinois death row inmates exonerated since 1977 demonstrated that 10 of the 13 exonerations resulted from extrinsic fortuities such as the discovery of new evidence rather than in the normal course of appellate review. *See* Lawrence C. Marshall, *Do Exonerations Prove that "the System Works?"* at 83, 84-89. Other studies confirm that these fortuities include confession by the real killer, appearance of a new witness, and discov-

ery of error by a journalist or a private citizen. Hugo Adam Bedau, *Causes and Consequences of Wrongful Convictions: An Essay-Review*, at 115, 117.

The frequent lack of competent counsel for capital defendants and the concomitant risk of executing innocents have long concerned the ABA. Since 1986 the ABA's Death Penalty Representation Project, with substantial funding and leadership from the Section of Litigation, has recruited volunteer lawyers for death row inmates and provided training and assistance. As noted earlier, in 1989 the ABA House of Delegates adopted guidelines for selection and performance of appointed counsel in capital trials. In February 1997, the ABA House of Delegates called for a moratorium on executions until states implement policies to ensure due process in capital cases, including appointment of competent counsel, and to minimize the risk of executing innocent people.

In 2001, one-third of the members of the U.S. Senate and well more than half of the House agreed to co-sponsor the Innocence Protection Act, which would provide grants to states to improve capital indigent defense systems at every stage of a capital case, including reasonable compensation. *See* www.cjreform.org/ipa for the bill's text, history,

and list of supporters. Last July, the Senate Judiciary Committee passed the bill, but the House Judiciary Committee did not reach it. The bill will be reintroduced this year.

I have little reason to doubt that most death row inmates in fact committed the crimes for which they were convicted. The situation no doubt will improve if Congress passes the Innocence Protection Act. But until all relevant state political subdivisions—either voluntarily or under federal statutory mandate—begin providing skilled, adequately compensated lawyers in capital cases, we will continue to run the risk of convicting and executing innocents.

Sadly, without this change we will almost never identify those few on death row who are actually innocent or those who, with a proper defense, would have been found guilty of a lesser crime than capital murder. A capital punishment system that pays little more than lip service to the Sixth Amendment's right to adequate legal representation runs two significant risks: that innocent people will be executed for no more a crime than being poor, and that a larger group will be executed when the proper sentence would have been for manslaughter or non-capital murder. We can—and should—do better. □