

I am anxious to hear today the testimony of these two distinguished panels of witnesses. I thank them for being here today to help us better understand the impact this bill may have on the criminal justice system.

Senator METZENBAUM. Thank you very much, Senator Pressler. You may get a medal for that. [Laughter.]

Senator Simon?

**OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator SIMON. I am glad I yielded to you, Senator Pressler. [Laughter.]

Mr. Chairman, I think this really gets not only to the question of capital punishment, but the whole crime area. We have to be tough on crime, but we also have to be smart on crime. We tend to be the former, not the latter, and if I can move away from capital punishment just for a moment, we have more people in prisons than any other country on the face of the Earth. We have more per 1,000 population than any other country that records; we have 455 per 100,000 population. South Africa is a distant second with 311; Canada has 109.

I think I heard Senator Hatch, and I may be misquoting him, say that he is rethinking the mandatory sentences that we impose. I frankly am moving in that direction. I think we have made some mistakes and not discouraged crime as we should be.

I think Senator Feinstein hit the nail on the head when she talked about the speed of the trial. I think the evidence is overwhelming that it is the swiftness and the sureness of the punishment that deters crime, not the severity of it.

Then you get to the area of capital punishment; two factors, I think, have to be weighed. One is looking at what other countries do. Mexico doesn't have capital punishment, Canada doesn't have capital punishment, Western Europe doesn't have capital punishment. In fact, up until recently, except for some of the Third World nations, the only major nations to have capital punishment are China, the Soviet Union, South Africa, and the United States. South Africa has suspended capital punishment. I don't know what is happening in what was the Soviet Union and Russia today, but if you exclude Russia, it is China and the United States. We are the only nations that retain the death penalty other than Third World nations, and that ought to cause us to reflect a little bit.

Then there is a final and, to me, a clinching argument—that capital punishment is reserved for those of limited means. If you have enough money to hire the best attorneys, you don't get capital punishment, period. That is a reality in our society today. While that is also sometimes true of bank robbery or other things, the ultimate penalty of death should not be an economic penalty.

So, Mr. Chairman, I thank you for holding this hearing. I think this is an area where I know public opinion is strongly on the side of capital punishment. But I think this in area where we have to part with public opinion.

Senator METZENBAUM. Thank you very much, Senator Simon.

The Chair notes that normally opening statements don't take nearly this long. Normally, not this many members show up at committee hearings of this kind, but this is a very deeply felt issue.

I felt that to limit members of the committee to 2 minutes or 3 minutes or 5 minutes for their opening statements would have been inappropriate, so I apologize to those of you who are present, but I felt that in view of the nature of the hearing that I would not limit anyone in their statements.

I now call to the witness stand Mr. Walter McMillian; Mr. Bryan Stevenson, executive director of the Alabama Capital Representation Resource Center; Mr. Randall Dale Adams; Mr. Talbot "Sandy" D'Alemberte; and Elaine Jones. Mr. D'Alemberte is the past president of the American Bar Association, and Elaine Jones is of the NAACP Legal Defense Fund.

I am going to ask each of you to stand, please, because I am going to swear in the witnesses this morning. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. MCMILLIAN. I do.

Mr. STEVENSON. I do.

Mr. ADAMS. I do.

Mr. D'ALEMBERTE. I do.

Ms. JONES. I do.

Senator METZENBAUM. Thank you very much. The committee has asked the witnesses to hold their remarks to 5 minutes. In the case of Mr. McMillian and Mr. Adams, both of whom were the individuals who were on death row, we will make a little leeway on that, not too much.

Mr. McMillian, would you please proceed?

**PANEL CONSISTING OF WALTER MCMILLIAN, MONROEVILLE, AL; BRYAN A. STEVENSON, EXECUTIVE DIRECTOR, ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, MONTGOMERY, AL; RANDALL DALE ADAMS, GROVE CITY, OH; TALBOT D'ALEMBERTE, STEEL, HECTOR & DAVIS, MIAMI, FL; AND ELAINE R. JONES, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATION FUND, NEW YORK, NY**

#### STATEMENT OF WALTER MCMILLIAN

Mr. MCMILLIAN. Good morning.

Senator METZENBAUM. Would you bring the mike closer to you, please?

Mr. MCMILLIAN. Good morning, everyone. My name is Walter McMillian, born and raised in the small town of Monroeville, AL. I always was a hard-working man. I started off at an early age, about 11 years old, working on the farm with my mother. Later on, at the age of about 17, I started to work different jobs. At about the age of 20, I got married. Me and my wife had three beautiful children.

A little later on, I started working for myself, self-employed, pulp wood, and I continued to work pulp wood off and on for different ones and myself. Then I started working in Louisiana on a job, coming home on a season job like, and then I would come home like that.

Then I decided I would improve my pulp wood business and make it a little bigger and continue on pulp wood, so that was in 1982, I believe it was—1982, 1982. Then I started working, doing

85 Federal habeas hearing in district court before Judge "Toll." Prosecutors had given movie researchers file and information that they had reused to give Adams, so Federal habeas hearing provided forum for defense to learn of file and important exculpatory testimony, issues that had not been raised in the State habeas. Toll ruled against Adams, but then it was discovered that he had represented prosecutors in Adams' civil rights action against them and therefore had a conflict of interest. Adams' motion to strike Toll's ruling was granted, and his attorney dismissed the Federal habeas without prejudice.

Nov 88 2d State habeas (hearing), raising new issues based on evidence finally uncovered through Federal hearing and movie research (main issue: State knowingly used perjured testimony in obtaining conviction).

Mar 89 State trial court hearing habeas "recommends" new trial (only Ct.App. can "order" new trial; usually a formality).

Mar 89 State drops charges.

Mar 89 Released.

Senator METZENBAUM. Thank you.

Mr. D'Alemberte, you are past president of the American Bar from Miami, FL. We are happy to hear from you, sir. Thank you for being with us.

#### STATEMENT OF TALBOT D'ALEMBERTE

Mr. D'ALEMBERTE. Thank you, Mr. Chairman, Senator Hatch, members of the committee. It is customary to say you are happy to—

Senator METZENBAUM. Do you want to bring the mike a little closer?

Mr. D'ALEMBERTE. It is customary to say you are happy to be before the committee, but I must tell you that it is a rather cruel thing to bring a lawyer in to discuss a case he has lost, so I am not entirely happy to be here to discuss the *Herrera* opinion. It is a case that I argued in the Supreme Court last term.

Let me say quickly I was quite moved by the statements made earlier, as I think anybody has to be on hearing of a innocent person who has been convicted, served time in prison, and been under the very substantial threat of execution. These stories, I don't think, are numerous if we looked around our prisons, but we certainly know they happen.

In my own State of Florida, I can think of two cases, each one handled by close friends of mine, that are very similar stories—the *Pitts* and *Lee* story in Florida that ultimately led to Governor Askew taking some action to free *Pitts* and *Lee* who were under a death sentence, and I think most members of this committee know from reviewing the files of the recently appointed Attorney General that she had investigated a case called "James Richardson," a man who was in prison for allegedly killing his children, and she concluded that indeed he was innocent and, as the stories are told, that indeed there was evidence that was not made available to the defense in that case, as so often happens.

If I may, I would really like to talk about three quick matters relating to the *Herrera* opinion. The first, Senator Hatch, goes to a comment that you made about *Herrera* being guilty, and I concede that that is not only said, but it is said several times within the *Herrera* opinion. But the point that I would like to make is that a Federal district judge, the person we normally look to when we start talking about who handles these problems, looked at the *Herrera* case. Judge Hinojosa was a 1983 appointee. He lived his life and served for 10 years in south Texas, served on the bench there.

Senator METZENBAUM. A Reagan appointee?

Mr. D'ALEMBERTE. Yes, sir.

Senator HATCH. I know him well. He is a fine judge.

Mr. D'ALEMBERTE. I think a very well-regarded judge from all I understand. He had entertained a habeas petition from Herrera at an earlier time and rejected it. He said that these other earlier claims were not meritorious and rejected them. He is not a person who is particularly soft on crime or anything. He is a person who looked at the fact of innocence, however, and said that he was uncomfortable and that he thought that these facts ought to be presented to a court.

Now, that has never happened. Judge Hinojosa was not allowed to go forward. The fifth circuit came in and issued an opinion without hearing oral argument or having any real briefing and said that you may not have a hearing on a mere claim of innocence. If it is just innocence, you don't get heard, the fifth circuit said. And, of course, it was that opinion of the fifth circuit that was reviewed by the United States Supreme Court and affirmed. It is always shocking when you talk to any lay person to say mere innocence is not going to get you into court, but that is where we are.

If you look at the *Herrera* opinion, you see these statements about Herrera being guilty. Coupled with that is the idea that somehow we don't have to look at even the threshold showing very seriously because, after all, these are just affidavits. There was no testimony taken. But, you see, that is exactly our point. The appellate courts have not allowed the district judge to take testimony, and now for the appellate court to say, well, these are just affidavits, they have not been cross-examined, is exactly our point. We wanted to put forward the evidence before a court and we wanted to have an opportunity to present that evidence and to have it cross-examined.

The second point I would like to make relates to the flood gates question. I know whenever you get into these areas—and I have heard some in the statements made by the Senators as this hearing commenced—that there is a great worry that whenever you start tampering with the law you are suddenly going to open up the flood gates of litigation. We have heard that repeatedly.

Indeed, the argument came up, in a way, during the *Herrera* oral argument because Justice Stevens pointed out that he had dissented in an earlier opinion, *Jackson v. Virginia*, and the basis of his dissent was that if you had the kind of review proposed in *Jackson* you would actually open up the flood gates. But Justice Stevens said he was simply wrong; there had been no flood gates.

We had a case not too long ago arising out of Florida, the *Alvin Ford* case, and that case related to the question of whether you would execute a person who was mentally ill and the United States Supreme Court said we should not. And at that time it was charged that we would have this vast flood gate of litigation, and it simply hasn't happened. And I would say to you simply on that question that it is much easier to fake mental illness than it is to fake innocence, that the courts are fully competent to examine the question of innocence.

Finally, if I may conclude by making some reference to that portion of the Court's opinion which points to clemency as a relief, I

hope that you have a chance to read the *Herrera* opinion carefully, and even the Court itself puts forward the Texas standard on clemency. Essentially, to get anywhere, and no one has—at oral argument, Texas conceded that they have not given clemency now for 18 years, or so, to anybody on death row. It did not give it to Randall Dale Adams. He was actually seeking to be released from prison after the trial court had found that he was innocent. Before the appellate review, he sought to go to that Texas board. They didn't even give it to Randall Dale Adams in that context.

Clemency is not an effective remedy. It is a political remedy. It is the most passionate forum that you could put us into. You know that the people who are dealing with clemency questions are out there in this very environment that all of you have described, an environment in which the death penalty is politically popular. And particularly where you have got a police officer, as in Randall Dale Adams and as in *Herrera*, who was killed, then you will find that it is not going to be very popular thing for a Texas governor to grant clemency and it will not happen. It has not happened, and therefore I think all of this points to the necessity of looking at some measure to look at innocence.

You don't have to favor abolition of capital punishment to look at this innocence question and say we ought to have some way to make sure that the integrity of the system is preserved.

Senator METZENBAUM. I will have some questions for you later, but how does the president of the American Bar Association happen to be representing Mr. Herrera?

Mr. D'ALEMBERTE. I was asked to do so. Senator, I made the mistake that some of us make in public life sometimes of talking about what lawyers ought to be doing in terms of giving pro bono service and somebody came to me and offered me the opportunity to live up to my own rhetoric, so I—

Senator METZENBAUM. This was a pro bono case?

Mr. D'ALEMBERTE. Yes, sir.

[The prepared statement of Mr. D'Alemberte follows:]

#### PREPARED STATEMENT OF TALBOT D'ALEMBERTE

I am delighted to join this panel and I appreciate the Committee's interest in the subject of innocence. I am Talbot D'Alemberte from Florida. I have served on an American Bar Association Task Force looking into post conviction relief, I have handled, on a *pro bono* basis, several post Conviction Cases for Florida death row inmates and a Florida clemency matter. I argued the case styled *Herrera v. Collins* in the United States Supreme Court last term.

The testimony you have heard relating to Walter McMillian and his lawyers is truly amazing and, though I doubt that there are great numbers of innocent people on death row, I do know that the conviction of innocent people is not at all beyond our experience. In my home State, Florida, we have known a number of such cases and I have had good friends tell me about the investigation. During the term of Gov. Reubin Askew, his office conducted an investigation into the case we know as *Pitts and Lee* and determined that they had been wrongfully convicted. One of my law partners, who was then the Governor's General Counsel, participated in the investigation of that case and found that there was a miscarriage of justice. I have another former law partner who investigated a case where the prisoner, James Richardson, was convicted of having killed his own children. When evidence pointing to his innocence surfaced, the governor asked her to investigate and she determined that James Richardson was innocent. I learned from both these friends something about how the justice system can fail to protect the innocent.

My personal direct contact with the innocence issue came last year when I was asked to participate in the presentation of Lionel Herrera's case to the United States Supreme Court. Leonel Herrera had been convicted of murder, had completed

several post conviction proceedings (including Federal court proceedings) and had been on the very eve of execution when a Federal district judge, a 1983 appointee sitting in south Texas, held that the evidence offered to the court in support of an innocence claim was sufficient to entitle Leonel Herrera to a hearing.

The Federal Appellate Court, the fifth circuit, reversed and held that a mere claim of innocence not connected to any other claim of constitutional dimension was not sufficient to support jurisdiction of a Federal court.

When the case was reviewed by the United States Supreme Court, only three of the Justices (Blackmun, Stevens and Souter) supported Herrera's right to have this evidence heard and tested by the rules of evidence. The six Justices who made up the majority placed their judgment over that of the district judge and decided that the evidence, including testimony from a person who claimed to be an eye witness, need not be received. This decision prevented a Federal district judge who wanted to hold a hearing on new evidence of innocence brought forward by Herrera from holding that hearing. This new evidence created enough uncertainty in the mind of that judge to prompt him to order a hearing prior to Herrera's execution. But the rule laid down by the Supreme Court is that a death row inmate who has new evidence of his innocence is not entitled to judicial review of that new evidence. That means that executions may go forward even though there might be credible reason to have doubts about the defendant's guilt.

A significant portion of the majority opinion was devoted to outlining the reasons why clemency, rather than a court hearing, was the appropriate remedy for a capital defendant who has a claim of innocence based on newly discovered evidence. The court's elaborate discussion of the clemency remedy sent a strong signal to lower courts that it is not within their province to entertain claims of innocence based on new evidence.

Let me elaborate on a number of troublesome aspects of the opinion which merit further comment.

#### AFFIDAVITS V. COURT TESTIMONY

A number of apologists for the *Herrera* opinion have pointed to the language in the court's opinion, particularly that of the concurring opinion of Justice O'Connor and Kennedy which concludes that Leonel Herrera is guilty. It is strange to me that people find so much confidence in that particular language which after all, is based in large part on the fact that Leonel Herrera's evidence was not Presented in open court nor subject to cross-examination.

In our system, we frequently look to trial judges as the people who are closest to the situation and best able to make judgments about the sufficiency of the pleadings and the bona fides of the evidence. But look at the *Herrera* decision, where we have appellate judges displacing the district judge in these areas. These appellate judges, who have never heard the evidence, decide whether to believe a person who has put forward an affidavit saying that he was an eye witness to the events. The person's testimony is never heard. It may give these judges distant from the facts some comfort to say that, after all, the eye witness was and relative of the defendant and that the person who is implicated in the murder is now himself deceased, but surely there are circumstances when relatives are indeed eye witnesses and it should be entirely understandable that a witness who might not want to come forward and implicate their own parent would be relieved from any reluctance to testify following the parent's death.

My simple point is that these credibility questions are normally made by the district judge who hears the evidence, not appellate judges who do not. Moreover, these decisions are best made by judges familiar with the local circumstances.

It is particularly grating to read passages where appellate judges refer to the "absence of cross-examination" when it is those very judges who are blocking the evidentiary process including cross-examination.

#### CLEMENCY

The *Herrera* opinion discusses executive clemency and suggests that this is the "fail safe" for the criminal justice system. The opinion recites the Texas rules. If these rules on pardon are read closely, you will see that they are designed by the same person who wrote the immortal rule "Catch 22." In Texas, pardons for innocence depend on the support of "trial officials of the court of conviction" and since these are the very officials who will not hear the evidence of innocence, it is clear that there is going to be no process for determination of innocence, no possibility to present evidence and no pardon.

The court lingered on pardon as the real "fail safe" even after the Assistant Attorney General at oral argument conceded that clemency has not been exercised in a death case in Texas for the last 15 to 13 years.

The reliance on clemency is also curious because it is a political process subject to the passions of that process. In States like Texas where political Campaigns may be waged in part by candidates who argue that they are more likely to execute the most people, clemency is not an attractive step for a politician.

If we are to have a safety valve to protect the innocent, we need to engineer that safety valve so that it actually works. In our design, we should want the mechanism to operate in the least politically volatile environment, not the most passionate, and we should want a process which has established procedures for dispassionate review. We have traditionally thought that the judiciary, not the executive branch, was best suited to protect our civil liberties and we have learned that Federal judges with life tenure can be better trusted with certain tasks than State elected judges.

The *Herrera* opinion rejects this view and suggests that the "fail safe" device be trusted to the most political, most passionate branch, the branch which has the least settled process and no history of performance. The design of a safety valve by the *Herrera* majority is a poor design and it will not work.

#### FLOODGATES

There are some people who have suggested that creating a remedy for those with a bona fide claim of innocence will create a flood of litigation. I note that this floodgates argument is made repeatedly in context of death penalty post conviction and it is almost never correct. Justice Stevens made an observation to that effect during the course of oral argument in the *Herrera* case.

One of the more recent references to the possibility of a floodgate occurred after the decision of the Supreme Court in the *Alvin Ford* case which held that a person who is mentally ill may not be executed. The opponents to the *Ford* decision argued strenuously that there would be large numbers of prisoners faking insanity and large volumes of litigation relating to this. In fact, no such problem has developed.

It is much easier to fake insanity than it is to fake innocence and a procedure which allows for innocence claims to be made should not create any large number of cases. It is amusing to see that the very people who argue that no process is necessary to protect innocent people on death row also advance the floodgate argument. My personal hunch is that there are not large numbers of people on death row but have practiced law long enough to have confidence that the judicial processes are sufficiently sound to allow the courts, without great effort, to sort between those cases which deserve hearing and those which do not.

The situation which is just plainly intolerable is one where there is no process at all and that appears to be the situation following *Herrera*.

#### CONCLUSION

It is curious to me that where our most serious legal questions are involved, often there is not sufficient time to develop a full study and a well considered result. *Herrera* is such a case. A district judge, Judge Hinojosa, a Reagan-era appointee sitting in South Texas who was very familiar with the case and the environment in which it arose, determined that Leonel Herrera's case deserved an evidentiary hearing. The fifth circuit, without providing an occasion for oral argument or full briefing, overruled him and held that there could be no hearing for innocence, thereafter, there were briefs to the United States Supreme Court and an argument lasting one hour. The *Herrera* opinion now controls the law of innocence, yet I have an unsettling feeling that justices simply did not understand the case or the perspective of the death row inmate with a bona fide claim of innocence.

It is important that someone give these questions adequate attentions and I am delighted that this Committee has decided that this inquiry is worth its time.

I do not think there is anything more important than designing the safety valve for the innocent person who is sentenced to die. What is needed is some reliable, nonpolitical avenue of relief where a prisoner can litigate a bona fide claim of innocence.

The courts are able to sort out the bona fide claims of innocence from the trumped up claims and there are abundant protections to assure that we are not dealing with phoney cases. False witnesses may be prosecuted for perjury; lawyers who put forward claims with no basis may be disciplined.

The former Attorney General of Texas has said that the execution of an innocent person is a prosecutor's worst nightmare. It ought to be the worst nightmare of all

people who care about the justice system. The problem is that the *Herrera* decision takes us closer to making this nightmare a reality.

Since the vast majority of Americans do not want to see innocent people executed, it is important to have legislation which allows a well-pled claim of actual innocence to be considered by the Federal courts. Sen. Metzenbaum has proposed a workable solution to the problems created by the *Herrera* decision in Senate Bill 221. The integrity of our justice system demands that there be some method available for innocent people to bring their evidence to court.

Senator METZENBAUM. Ms. Elaine Jones of the NAACP Legal Defense Fund, I know it was somewhat not comfortable for your schedule to be with us, but I am very glad that you are with us.

#### STATEMENT OF ELAINE R. JONES

Ms. JONES. Thank you, Senator Metzenbaum and members of the committee.

I listened to Sandy D'Alemberte talk about his role in *Herrera* and as president of the American Bar Association. I think, well, the American Bar Association has come a long way because Sandy D'Alemberte is president, he argued *Herrera* in the Supreme Court, and I have spent as head of the NAACP Legal Defense Fund—I am with an organization who, for 30 years, has dealt with this issue of capital punishment in a defense posture, and I have represented in Alabama and other States people who have been accused of capital crimes. I, too, have served with the American Bar Association. I was elected to its board of governors, and so we served there together.

Let me say that, first, as I have indicated, the NAACP Legal Defense Fund for 30 years has been involved in looking closely, since 1964, and litigating this issue of capital punishment. We realized and recognized early, early, quite a long time ago that race plays a very significant factor in terms of the imposition of this sentence. We wish that were not the case, but it is. The facts, the studies, the evidence shows that.

However, you know, I am pleading guilty to the committee this morning in terms of my position on the death penalty. You know, I am making it clear that I was one of the counsel of record in *Furman v. Georgia* which abolished the death sentence and the death penalty in 37 States back in 1972. So I am telling the committee that because I think it is important for us to understand, though, that I have known for many years now that the law—that *Furman* is no longer the law, and that what has happened is that this country has moved toward the death penalty, and as a lawyer I recognize that and that that is the system in which I am operating.

Now, if that is the case, then I say to all persons, whether you support or oppose the death penalty, it is very, very important that this legislation be supported. Especially those who support the death penalty need to understand that under no circumstances should we close the courthouse door to a death-sentence prisoner who has a strong claim, a strong claim of probable innocence because, as others have pointed out earlier, the integrity of the system depends on our extreme care when we as a society are exacting the ultimate penalty.

When I hear the stories of Randall Adams and Walter McMillian—and we all hear them and we sit and we think, well,

they are here so the system must be working. Not so, ladies and gentlemen of the Judiciary Committee. What this means is they are sitting here because an extraordinary combination of factors came together in a system that otherwise condemns.

They are here because of extraordinary work by counsel over an extended period of time. They are here because there were support systems in place that would not let their cases go. They are here because an extraordinary bit of luck occurred in their situations. For example, Mr. Adams told us about how the records were released to a movie producer that his counsel could not get, and only because the movie producer then shared them with the counsel and the counsel had sought the records—so we have got to understand that these men are the exception, not the rule, and we also must understand that our system is fallible. We do the best we can with it, but it is fallible, and we have an obligation as a society to make sure that when we are talking about death that we make sure that the courthouse door is open to those with strong claims of probable innocence.

Now, I listened to Senator Hatch this morning and I heard what he said when, Senator Hatch, you told us—you talked about justly imposed death penalties. Well, when you say justly imposed death penalties, we have to be careful about a mechanical application of our rules, of existing rules.

The issue is not justly imposed, but whether or not those procedures do, in fact, afford a full measure of justice, the procedures that we have in place, and when society is taking life we know there is a problem when we have death-sentence individuals who have strong showings of justice and the courthouse door is closed—strong showings of innocence that they can make and the courthouse door is closed.

Adams and McMillian are two cases. You know, I have represented and tried capital cases. I have also had the experience of seeing men I knew who were innocent, I knew were innocent, who were sentenced to death, and in three of those cases back in the early 1970's in Alabama, because of diligence, because of the kind of time and commitment—and there was an organization behind me and we were not part of a State indigent defense system. We made sure we had funds and pushed, and although they were stretched we used them, and we used them to free those three men from death row in Alabama.

But this is a very important issue. We cannot take lightly this issue of fairness in our system, and I echo the remarks of Sandy D'Alemberte on the question of limitations of clemency. We have to understand that we are in a political process when we are talking about State court judges and when we are talking about clemency, and it is very tough. I don't have to tell this committee about elective politics and problems and issues that can arise. But it is very important that we have a forum in which these claims can be raised even if it is at the 11th hour because we are talking about death.

Thank you very much.

[The prepared statement of Ms. Jones follows:]

## PREPARED STATEMENT OF ELAINE R. JONES

I am Elaine Jones. I am director-counsel of the NAACP Legal Defense and Educational Fund. I am grateful for the opportunity to speak to the committee on an issue that really has no peer—the wrongful conviction and condemnation of a fellow citizen.

My organization has long been concerned with the administration of capital punishment and with the potential for—indeed the inevitability of—its application to innocent persons. Our involvement began over 30 years ago with our recognition that the consideration of race—a factor that has long distorted the search for truth—is often *the* dispositive factor for a prosecutor to seek the death penalty, and for the sentencer to impose it. As a punishment for rape, death was reserved almost exclusively for African-American offenders. Since, we have participated in some of the landmark cases that have shaped modern capital jurisprudence.<sup>1</sup>

The topic for this morning—citizens wrongly convicted of capital offenses—is one that many might wish to believe is a relic of a bygone era, a rare phenomena that occurred only before our Constitution was read to guarantee indigents appointed counsel, before the post-*Furman* Eighth Amendment procedural protections, and before the development of existing post-conviction remedies.

But the mere presence of Walter McMillian and Randall Dale Adams, and their nightmarish accounts as condemned innocents, leave no doubt that citizens who have committed no crime can still today be hauled into court, convicted of a capital crime, sent to death row, and, in the absence of intervention by skilled counsel and luck, dispatched to the electric chair or death gurney. I am sure that their stories and heartaches distress you as much as they do me.

In my time this morning, I wish to make three points. First, as Mr. McMillian's and Mr. Adams' cases so eloquently demonstrate, it takes no great effort to wrongly convict an innocent person. The momentary decision to withhold a particularly exculpatory piece of evidence, the use of one crooked witness or misleading exhibit, or testimony from an earnest but mistaken eyewitness, can without more guarantee a conviction. All that is needed is a dishonest cop, a savvy informant, a mistaken eyewitness, or an ambitious prosecutor who will cut whatever corner is necessary. Indeed, an innocent citizen can be convicted in the absence of foul play.

Second, to later uncover this crucial *and* deadly flaw, and prove up innocence, can take years, hundreds of hours of labor, and the expenditure of considerable resources. And when, as in Mr. McMillian's case, innocence is so uncovered and demonstrated, it is not because "the system works." It is more often that the truth emerges in spite of the system. Innocence is shown only after the condemned, counsel, and others tirelessly navigate through the increasingly strong and tricky currents of finality. Moreover, fortuity and luck are often more responsible for an innocent prisoner being set free than is any systemic safeguard.

Third, our legal systems's capacity to hear claims of innocence—both at trial and later in the process—must be enhanced. It is time for the Congress to review the causes of wrongful conviction and take measures to reduce their occurrence.

#### 1. CONVICTING THE INNOCENT: ALL IT TAKES IS ONE BAD APPLE ON THE PROSECUTION TEAM OR A MISTAKEN WITNESS

As the experiences of Mr. McMillian and Mr. Adams show, citizens who are wrongly convicted today are often the victim of a dishonest police investigator, a con-artist informant, or a prosecutor who will go to whatever length necessary to secure the conviction and death sentence.

##### *a. The dishonest investigator*

Jerry Banks' life was forever altered by a crooked sheriff's investigator. Banks, then a happily married young African-American father of three, was twice convicted and death-sentenced in Georgia.<sup>2</sup> While out hunting one day, he came upon the bodies of a white high school band instructor and one of his former female students.

<sup>1</sup>See e.g., *Furman v. Georgia*, 408 U.S. 238 (1972)(Court struck down all existing capital statutes because of arbitrary, capricious and racist application); *Coker v. Georgia*, 433 U.S. 584 (1977)(death is an inappropriate and excessive sentence for rape and other crimes in which death does not result); *Lockett v. Ohio*, 438 U.S. 584 (1978)(Eighth Amendment requires that sentencer be free to consider wide range of mitigating evidence during sentencing phase of trial); *Estelle v. Smith*, 451 U.S. 454 (1981)(Fifth and Sixth Amendment rights to silence and counsel apply to capital sentencing proceedings). See also *Zant v. Stephens*, 462 U.S. 862 (1983); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>2</sup>*Banks v. State*, 268 S.E.2d 630 (Ga. 1980). Banks first conviction was overturned because the prosecution withheld exculpatory material. See *Banks v. State*, 218 S.E.2d 851 (1975).

As would any good citizen, Banks immediately notified the police. This act of civic duty led to him being charged with the murders.

No evidence or motive linked Banks to the crime until an investigator planted some shotgun shells that matched Banks' old shotgun near the scene of the crime. This evidence was strong enough to twice persuade juries to convict Banks for the murders and to sentence him to death.<sup>3</sup> As was the case with Walter McMillian, the State expended little time and few resources to send an innocent man to death row.

Clarence Lee Brandley, another African-American, was railroaded after the lead investigator insisted, from the beginning, that the entire investigation be directed toward building a case against Brandley.<sup>4</sup> The investigator repeatedly ignored leads that might inculpate someone other than Brandley, such as attempting to explain the presence of a caucasian pubic hair on the victim's body. This investigator also intimidated one witness, and threatened to kill another if the witness, testimony was not consistent with his theory of the case.

In part, this dogged determination to "get" Brandley was driven by racism. As one witness later testified, Brandley was charged with the crime after it was determined "that 'the nigger' \* \* \* was big enough to have committed the crime; therefore 'the nigger was elected.'"<sup>5</sup>

The disgraceful tactics witnessed in *Banks and Brandley* are not aberrations. With increased pressure upon police nationwide to solve crime swiftly or be subject to media ridicule, misconduct seems to be on the rise. *60 Minutes* aired a story last Sunday that profiled a former New York State Patrol officer, David Harding, who is now in prison for manufacturing fingerprint evidence and testifying falsely in a number of trials.<sup>6</sup> Harding has told investigators that he was encouraged by superiors to falsify evidence and that other police investigators did as he did. His claim was echoed by Gerald Arenberg, a retired police officer and Executive Director, National Chiefs of Police, who regularly hears of reports of faked evidence. He explained:

What you learn in police school is to obey the law, the constitutional rights of citizens. Then you go out and start riding with older officers who are more experienced. And they say, Well listen, what they taught you in police school, forget about it because this is the real world. Now in order for us to make cases, we're going to have to do—take some shortcuts.<sup>7</sup>

#### b. The con-man informant

It's hardly news that capital prosecutions, like a growing number of drug prosecutions, often rely heavily upon the testimony of a "snitch witness" or informant to make out a crucial portions of the case. Sometimes, it turns out this evidence is worthless as it is offered solely to gain favor in the inmate's own case. Mr. Adams certainly understands this point; the most critical evidence against him came from David Harris who later confirmed that his trial testimony inculpating Mr. Adams was untruthful, and had been given to secure a deal in his own case.<sup>8</sup> Mr. McMillian was similarly victimized.

The Federal courts have also confronted unreliable snitch testimony in numerous cases. For example, in *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986), the Federal Appeals Court threw out a capital murder conviction and death sentence when concluded that the State's key witness lied about the absence of a deal.<sup>9</sup> As posttrial proceedings showed, this witness acted primarily to save his own neck.

The dangers of over reliance upon snitch testimony have come to haunt authorities in Los Angeles, and have raised enormous doubts about the credibility of numerous convictions. In 1989, Leslie White, an inmate at the L.A. County Jail, showed authorities how easily he could gather enough information about a case to

<sup>3</sup> At both trials, Banks was represented by an attorney who was later disbarred. See *Banks v. State*, 268 S.E.2d at 631. Counsel's fee was a retainer of \$10, "a kettle of fish and some collard greens." Brenda Mooney, *Banks' Release Has Kids Jumpin Like Squirrels*, Atlanta Constitution, December 24, 1980 at p.1.

<sup>4</sup> *Ex parte Brandley*, 781 S.W.2d 886 (Tex.Cr.App. 1989).

<sup>5</sup> *Ex parte Brandley*, 781 S.W.2d at 890.

<sup>6</sup> *Officer Harding*, CBS 60 Minutes, March 28, 1993 at 12-16.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Ex parte Adams*, 768 S.W.2d 281 (Tex.Cr.App. 1989).

<sup>9</sup> At the time the deal was struck, this witness was facing murder and armed robbery charges. Some months after trial, this witness recanted his trial testimony that incriminated Brown and said that he had testified falsely to receive favorable treatment in his own cases. He later recanted a portion of the recantation. See 785 F.2d at 1461-62. The State made no effort to again try Joseph Brown for this crime because it had little evidence—apart from this witness—which inculpated Brown.

concoct a confession that could later be used against a suspect.<sup>10</sup> White learned his trade as he had been in and out of prison 30 times since he was nine years old. In many of his own cases, he was released early by making a deal with prosecutors for testimony.

As a result of White's disclosure, the L.A. County District Attorney's Office had to review more than 200 murder cases in Southern California in which informants were used. Sixteen people convicted using informant testimony are on Death Row. Prosecutors have since confessed error in at least two murder cases because of unreliable informant testimony.<sup>11</sup>

Such use of informants, who have everything to gain and little to lose by telling the police what they wish to hear, is growing and is lessening the integrity of the system. A recent report notes that "various governmental agencies paid crooks somewhere between \$40 million and infinity" to help solve crime.<sup>12</sup> Information and evidence plied by dollars and deals is often later shown to be false as many informants "are pathological liars."<sup>13</sup>

#### c. *The crooked prosecutor*

While many prosecutors throughout the country steadfastly comply with constitutional and ethical standards while enforcing the law, some do not. The pressures associated with capital cases often tempt the prosecutor to disobey the law. Failure to win a conviction or death sentence in a widely publicized case can harm a promising career. We have seen prosecutors withhold evidence or let witnesses testify falsely to insure convictions in our own cases.

Mr. Adams' case, the district attorney lied to the trial court about the status of a crucial State's witness, and failed to disclose to the defense evidence that would have shown this witness committed perjury.<sup>14</sup> In the *Brandley* case, the prosecutor presented evidence that he knew was not truthful. The prosecutor in *Brown* not only failed to correct the key State witness' testimony that no deal was made, but affirmatively argued to the jury that the false testimony was true.

James Joseph Richardson's prosecution was plagued by similar problems. Nearly 22 years after being convicted for the poisoning deaths of his seven children, Mr. Richardson was released from prison when Attorney General Janet Reno, then serving as a special prosecutor appointed by the Governor, found that the trial prosecutor withheld crucial evidence that could have resulted in acquittal, allowed witnesses to lie and made no attempt to correct their testimony.<sup>15</sup>

In *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), in a case where the surviving victim's identification was crucial, the prosecutor failed to disclose a report wherein the witness first told police her assailant was white. Mr. McDowell is Africa-American. In *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990), the prosecutor allowed several false statements by a key witness to go uncorrected.<sup>16</sup>

#### d. *The mistaken witness*

In the Jerry Banks case, the State's ballistics witness testified truthfully that the shell casings provided to him by investigators had been fired by Mr. Banks' gun. This testimony was crucial as it served to link Mr. Banks to the murders. As we now know, this evidence was misleading because the expert witness had been provided with planted evidence.

We know that innocent persons can be convicted where witnesses believe they are telling the truth. In several recent cases, men who have served years in prison for sexual assault have been cleared by new DNA evidence. For examples in 1982, Kerry Kolter was convicted of rape. The victim made a courtroom identification that he was her assailant. After serving 11 years in prison, DNA testing showed conclusively that Mr. Kolter was not the victim's assailant. The victim continues to believe that Mr. Kolter assaulted her.<sup>17</sup>

<sup>10</sup> Mark Curriden, *No Honor Among Thieves*, ABA Journal, June, 1989 52.

<sup>11</sup> Ted Rohrlich, *D.A. Admits Murder Trial Was Unfair*, Los Angeles Times, August 2, 1990, p. A1.

<sup>12</sup> *The Informers*, CBS 60 Minutes, March 28, 1993 at 1.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See *Ex parte Adams*, 768 S.W.2d at 285-87.

<sup>15</sup> See Curriden, *supra* at note 10, at 54.

<sup>16</sup> Full habeas relief was granted in this case on the ground that Mr. Ross' elderly attorney, who was a former Imperial Wizard of the KKK, failed to provide minimally adequate counsel. The Court found it unnecessary to reach the prosecutorial misconduct claim.

<sup>17</sup> Jonathan Rabinowitz, *Rape Conviction Overturned on DNA Tests: Reversal Comes After Man Served 11 Years in Prison*, New York Times, December 2, 1992 at B6. Upon his release, Kolter "tearfully embraced his parents," and remarked that "I'd like to tell the rape victim that

## 2. CLEARING THE INNOCENT: OVERCOMING EXTRAORDINARY ODDS AND THE INDISPENSABLE ROLE OF LUCK

In the wake of a case like Walter McMillian's or Randall Dale Adams,' it is often said that such vindication "proves the system worked." But as you hear their stories, what is clear is that their vindication came in spite of the system, and indeed was dependent upon their ability to overcome the very strong presumption that anyone who is convicted of capital murder is indeed guilty. And that effort requires enormous amounts of time, resources, and lucks.

### a. *The system literally obstructs challenges based upon innocence: the absence of defense, resources and law enforcement aversion to reopening the question of guilt*

After conviction, strong institutional forces take hold and make revisiting the issue of guilt a most difficult task. First, few indigent inmates possess the resources necessary to marshal a comprehensive reinvestigation of their cases, and many States still fail to provide adequate compensated counsel for post conviction proceedings. As you have heard, Mr. McMillian's innocence investigation consumed thousands of hours. Mr. Stevenson's office was barely able to conduct such an investigation, and attend to their numerous other responsibilities.

Indeed, the efforts of other counsel, many who have volunteered their services because of the failure of the system to provide any counsel, have also run into many hours of time and considerable out-of-pocket expenses. Counsel for Jerry Banks donated several thousand hours before they identified the witnesses who finally could show that the State convicted the wrong man. One of his attorneys commented after Banks was freed that "no single lawyer could have adequately handled Banks' case, which involved 4000 hours of legal work. He said there should be a board of approved attorneys to handle death penalty cases."<sup>18</sup> The records in *Adams* and *Brandley* show that similar amounts of time and out-of-pocket expenses were required to vindicate those claims of innocence.

Moreover, prosecutors and law enforcement officers stubbornly refuse to concede error even when there is no question that they convicted the wrong person. That was certainly the case for a long time in Mr. Adams' and Mr. McMillian's cases. In *Brandley*, even after it became clear that the State's case was fundamentally flawed and based upon perjured testimony and the suppression of much exculpatory material, the State fought hard to keep its judgment and for its right to Mr. Brandley's execution. To our knowledge, none of those officials have yet declared that they convicted the wrong man.

In a recent Pennsylvania case, prosecutors went so far as to wrongly accuse a fellow law enforcement officer with fabricating evidence to win a conviction and to preserve that "win" on appeal. *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992). The State's theory in this case was that Smith and a fellow teacher named Bradfield killed another, teacher. Smith's defense claimed that Smith had nothing to do with this killing, and that Bradfield alone killed the teacher at a New Jersey beach. The Court described the issue in the following terms:

One of the Commonwealth's witnesses was Corporal John Balshy, a former Pennsylvania State trooper who had investigated the Reinert murders and had been present during the victim's autopsy. He testified on cross-examination that he had used adhesive lifters to remove granular particles which looked like sand from between the victim's toes. The Commonwealth excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters. The Commonwealth then presented the testimony of other State police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false. The prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury. A few days later, while appellant's trial was still in progress, the Pennsylvania State police discovered the missing adhesive lifters in their evidence locker at the State police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth suppressed the discovery. Then for more than two years, while appellant's case was on direct appeal, the Commonwealth continued to suppress the fact that it had in its possession the disputed exculpatory evidence, vigorously arguing all the while that this court should affirm appellant's death sentence. Meanwhile, Corporal Balshy was made the scapegoat for the mis-

I have no bad feelings toward her. I do not doubt that she is an honest woman, and I'm convinced that she believes in her identification." *Id.*

<sup>18</sup> Mooney, *supra* note 3 at 3-A.

conduct on the theory that he had fabricated and "planted" the evidence after the autopsy. It was even argued by the Commonwealth at appellant's trial that the defense had paid Balshy to concoct his testimony about the sand and the lifters. Investigations conducted after trial by the State police and the attorney general's office concluded that there was no evidence of perjury or falsification of evidence by Balshy. Finally, on July 12, 1988, the attorney general's office informed defense counsel that the missing lifters had been discovered, though *even then*, there seemed to be some hesitancy concerning the prosecutor's duty to disclose the evidence.

615 A.2d at 323-24 (*emphasis in original*). The Court noted appropriately that the "deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness \* \* \* " *Id.*, at 324.

Moreover, where detection of innocence will reflect badly upon law enforcement, the inmate runs squarely into the "code of silence" long observed by law enforcement in this country. As the Executive Director of the National Association of Police Chief reminded us this past Sunday evening, "as police officers, we protect each other. We're a very thin blue line. It's you against us, and so we're not likely to turn in a brother officer."<sup>19</sup>

*b. Assistance from extralegal sources and luck are also critical ingredients to vindicating innocence*

While Randall Dale Adams and Walter McMillian owe their lives literally to their postconviction attorneys, lawyers who we are proud to know and who personify the very finest traditions of the Bar, neither might be present today had it not been for additional resources that came to their aid.

In Mr. Adams' case, it is now well known that despite counsel's best efforts, some of the crucial prosecution documents which pointed to perjury and suppression of exculpatory evidence was discovered by an independent movie producer, Errol Morris. While law enforcement officials felt no duty to provide this information to counsel, they gladly revealed this crucial information to Mr. Morris. And it was only with his pursuit of the story, in combination with counsel's independent efforts, that the truth of Mr. Adams' wrongful conviction was fully brought to light.<sup>20</sup>

Moreover, Mr. Banks' cause was greatly aided by sustained interest by the media in Georgia, as Mr. Brandley's defense team received considerable support from a large coalition of concerned individuals from throughout the United States as well as the media.<sup>21</sup>

Yet the vindication of innocence often falls short without the intervention of fortuity and luck. Take Mr. McMillian's case. In retrospect, Judge Robert E. Lee Key's decision to override the jury's recommendation of life to impose a death sentence saved Mr. McMillian as it meant that lawyers at the Alabama Capital Resource Center could handle his case. Because Alabama provides only meager funds for posttrial representation of indigents, it is a certainty that Mr. McMillian's court appointed counsel would have lacked the resources to conduct the type of investigation that was required to show his innocence. There is *no* doubt in my mind that but for the sentence of death, Mr. McMillian would not be with us today.

In the same sense, the decision of film maker Morris to interview residents of death row in Texas, as opposed to condemned inmates in more than 30 other States, brought he and Mr. Adams together. Had Mr. Morris chosen Florida or California instead, Mr. Adams might not be with us today.

Indeed, no one in the New York State Criminal Justice System discovered investigator Harding's shenanigans—the CIA did. The fact that Harding was fabricating evidence was learned only when Harding sought employment with the CIA, and told his interviewers that he would be willing to violate the law for the good of the country.<sup>22</sup>

Other noncapital cases make the point as well. Alberto Ramos was convicted in New York of raping a 5 year-old girl at a day care center where he was employed.

<sup>19</sup> CBS 60 Minutes, *supra*, note 11 at 16.

<sup>20</sup> This case shows why it is nonsense to assert that Mr. Adams' case demonstrates that the system works. Law enforcement officials successfully blocked the legal process from learning the truth; it took extralegal resources to overcome that blockade.

<sup>21</sup> See Nick Davies, *White Lies: Rape, Murder and Justice Texas Style*, Pantheon Books, New York 1991.

<sup>22</sup> CBS 60 Minutes, *supra* at note 6, at 13.

The conviction was based "essentially on the testimony of [the child]." <sup>23</sup> Ramos' defense was that he never raped the child; the child's doctor testified that the child described an explicit sex act that the doctor believed no child age 5 could know about without having experienced the act. Ramos was convicted, was given the maximum sentence, and his conviction was affirmed on appeal.

Through new counsel, Ramos sought postconviction relief. During the pendency of these proceedings, Ramos received a tip that would allow him to demonstrate that he had been wrongly convicted. Shortly after his conviction, the child's parents filed a suit against the day care center. Pursuant to their investigation, they learned that day care center records and other documents showed that the child often masturbated in class, simulated sexual intercourse to her peers, and had alleged falsely that a 5 year old boy had touched her just prior to her complaint against Ramos, and that these files had been in the possession of the prosecutor at the time of trial. The parents' investigator turned this information over to Ramos' counsel.

But for this unrelated law suit and the tip from the investigator, Ramos might well have never learned that at the time of his trial, the prosecutor possessed evidence that raised very grave doubt about the veracity of the young complainant. In dismissing the conviction, the trial court wrote that this sort of case "require[s] great care and balance on the part of the district attorney." Order at 8. The Court concluded:

The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system. Ramos—a first offender—was sentenced to the maximum at the same time that the sentencing judge called on the Legislature to prescribe a harsher term. It is no wonder that Ramos, in rage, is said to have cried out, "Kill me now, I want to die."

*Id.*, at 9. Shortly thereafter, Ramos was discharged from custody a free man.<sup>24</sup>

And in a recent Georgia drug case, Rusty Strickland spent six months in jail for possession of a white substance that turned out to be soap.<sup>25</sup> At his arrest and at his preliminary hearing, he insisted he was innocent, and even begged courtroom personnel to smell the evidence. None would. A chemist from the crime lab testified at the hearing that testing showed the substance to be cocaine.

On the eve of trial, the prosecutor learned that the chemist—an essential witness—was on vacation, and sought new testing and another expert. This new expert determined the substance was soap and the charges were dismissed. But for the first chemist's vacation schedule, Strickland might well today be under a long mandatory sentence for drug trafficking.

### 3. VINDICATING THE INNOCENT: OUR LEGAL SYSTEM MUST POSSESS THE CAPACITY TO BETTER HEAR CLAIMS OF INNOCENCE BOTH AT TRIAL AND IN LATER APPEALS

Unless we are prepared to allow innocent, wrongly convicted individuals to be executed, it is important that Congress act. To stand aside will surely guarantee one result—the next Walter McMillian who fails to draw stellar counsel, or is unable to marshal the facts to show his innocence, will be executed.

In the short run, the Congress will best serve the interests of justice by providing a Federal forum for the entertainment of innocence claims. Existing law, as articulated by the Supreme Court's recent decision in *Herrera v. Collins*, 122 L.Ed.2d 203 (1993), fails to provide an adequate approach to this problem.

The *Herrera* majority establishes a rule that seems to view innocence claims as arising in two respects only. First, there are those that will raise doubt, even considerable doubt about guilt, but will be unable to satisfy the "extraordinarily high" *Herrera* standard because the petitioner ultimately is guilty. Second, there might be truly exceptional ones—like the person who finds an authentic videotape of the crime which shows proves his innocence shortly before his scheduled executions<sup>26</sup>—and presents it to the court. Under such extraordinary circumstances, the *Herrera*

<sup>23</sup> *People v. Ramos*, Supreme Court of New York, Bronx County, Part 21 No. 3280/84 (Order vacating conviction) at p. 1.

<sup>24</sup> Marie Newman, *Man Freed After Serving 7 Years for Rape*, New York Times, June 3, 1992 at B1.

<sup>25</sup> Trisha Renaud, *Open and Shut, and Wrong*. Fulton Daily Law Reporter, September 28, 1992 at p. 1.

<sup>26</sup> Justice Kennedy posed this situation to counsel for the State during oral argument and asked whether that showing would entitle a Federal court to grant a stay and entertain the claim. The State responded it would not and maintained that the only remedy is executive clemency. No condemned inmate in Texas has been awarded clemency during the past 20 years.

majority in *dicta* seems to hedge and say a Federal court might be able to entertain the claim.

This approach to wrongful conviction is inadequate. It presumes a set of circumstances that do not exist—that condemned habeas petitioners, regardless of whether they have counsel, or suffer from a mental illness, or are illiterate, etc., nevertheless possess the ability to demonstrate innocence if they are in fact innocent.

We now know that Walter McMillian did not commit the crime that he was death-sentenced for. We know that not because Mr. McMillian uncovered by himself all of this proof and one day presented it at the courthouse. Much of the evidence which demonstrated that the key State witness had committed perjury, as well as other corroborative evidence, was secured through discovery.

Had Mr. McMillian faced proving his innocence under the *Herrera* test, he would have failed, and would have been executed. Fairly applying that standard to Mr. McMillian, even a sympathetic judge would have had to deny a stay *and* deny requests for discovery because Mr. McMillian—without discovery—could not demonstrate his innocence.

*Herrera's* assumption that the innocent condemned can, if they are diligent, uncover *and*, prove their innocence without access to State files and records, is inconsistent with the Court's more realistic assessment that the State's superior ability to collect and gather evidence creates a duty to disclose exculpatory evidence in certain circumstances.<sup>27</sup>

Senate Bill 221 is a reasonable approach to this problem. It requires a substantial showing of innocence before a stay can be imposed, but correctly leaves considerable discretion to the district court.

Senator METZENBAUM. Thank you very much, Ms. Jones.

The committee will have 10-minute rounds for each member.

Mr. McMillian, you spent nearly 5 years on death row for a crime which you did not commit.

Mr. MCMILLIAN. Yes, sir.

Senator METZENBAUM. Did you ever think that anything as horrifying as this could happen to you or to anybody else?

Mr. MCMILLIAN. No, sir, I never did believe—I never believed that nothing like that could happen to no one until it happened.

Senator METZENBAUM. Do you believe that your race played a role in your conviction?

Mr. MCMILLIAN. Yes, sir, I know it.

Senator METZENBAUM. Why do you say you know it?

Mr. MCMILLIAN. Just because the way the sheriff talked to me after he arrested me and stuff. It was the things he said, and I had a relationship with a white lady and then my son married a white lady and had three children by her, and I pretty well know it, you know.

Senator METZENBAUM. Mr. Stevenson, let me first congratulate you on the job you did for your client. I think it was a superb piece of legal work. I don't think there is any greater accomplishment for a lawyer than to free an innocent man from death row.

In reviewing the *McMillian* case, it seems apparent that it was relatively easy to convict Mr. McMillian, but extraordinarily hard to win his release. Why was it so easy to frame your client and so difficult to free him?

Mr. STEVENSON. Well, again, I think it points to some of the things that this committee recognized in its opening statements. There is such tremendous support for the death penalty in the society. The law enforcement officers in this community could not solve this crime. Seven months had gone by. I think they were quite ready to believe anything that anyone told them about someone

<sup>27</sup> See generally *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny.

who might have committed this crime. I think they didn't want to hear that this man was innocent. They didn't want to pay attention to the witnesses who came into court and verified that Mr. McMillian could not have committed this crime.

But more than that, I think that there were not systematic safeguards that would protect people like Mr. McMillian from being wrongfully convicted. There were no assurances that he would get the kind of investigative assistance that he needed, that he would get the kind of representation that he needed, and that created an environment where it was just very easy to achieve this conviction. Certainly, the death sentence in a State where you can override a live verdict from a jury makes it incredibly easy to impose a death sentence.

The difficulty really, I think, was measured, in fact, because we have all become very cynical about claims of innocence. You hear that and you see that in the *Herrera* opinion. You hear it when you talk to people about other innocent folks on death row, most people are just not willing to believe that innocent people are wrongly convicted which without a great deal of proof which requires a great deal of effort. And even when you make that effort and you present that proof, we still don't want to believe it.

Senator METZENBAUM. In your testimony you stated that the Supreme Court's decision earlier this year in the *Herrera* case was a tremendous blow to us as we attempted to secure Mr. McMillian's freedom. How is that so?

Mr. STEVENSON. Well, I think the Court is sending messages to all the lower courts, not just the legal holdings that they issue, but the messages that they send, and I think the message in *Herrera* to most judges in the lower courts is that you need not be concerned with evidence of innocence like you ought to be or like you might have been previously. And, obviously, when innocent people come into court and all that exists is evidence of innocence, that makes us discouraged.

Senator METZENBAUM. One of the shocking things about the *McMillian* case that I noted was that the judge who presided over Mr. McMillian's trial overruled the jury's recommendation that Mr. McMillian be given a life sentence. Instead, he imposed the death penalty.

It is my understanding that State judges in Alabama are elected officials, and that is also the case of a number of other States which have the death penalty. Does the fact that State judges are elected affect the way in which death penalty cases get handled in a State court?

Mr. STEVENSON. No question. I think there are many decisions and issues that we will not get from many State court judges who believe that their political careers turn on those decisions, even if those decisions are not the right ones. That certainly is an influencing factor, and I think it relates to this whole question of clemency. We will not see clemency granted to death row prisoners in Alabama, I don't believe, in the present political environment. We can't even get hearings of clemency appeals and executions in capital cases in that State, and I think it is one of the reasons why we need life-tenured judges who can review these cases and decide.

Senator METZENBAUM. Mr. Adams, let me ask you the same question I asked Mr. McMillian. You actually came within a week of being executed, which is unbelievable. You spent 12 years in jail for a crime you did not commit. Before this horrible nightmare happened to you, did you ever in your whole life believe that such a major mistake could happen in our criminal justice system?

Mr. ADAMS. Senator Metzenbaum, as I stated earlier, all the way up until they actually—the jury came back and convicted me, we believed that there was no way the American system could convict me, you know, but that was our belief, that was our faith and trust in the system and we were shattered when we realized it wasn't so.

Senator METZENBAUM. Later witnesses will claim that your case shows that the criminal justice works. You were a man who was wrongfully convicted of a crime and you were eventually exonerated. How would you respond to that?

Mr. ADAMS. Well, I think it shows just the opposite in many ways. First of all, it took over 12 years. Second, it took a film and film producer to be given evidence that my attorney, by law, could not get, had no right to according to the district attorney, but yet he would turn it over to a film crew, a film producer—evidence that exonerated me, evidence that was hidden at my trial. So I think it shows just the opposite, actually. It took the mass public outrage after watching the film and millions of signature sent to the governor of Texas to finally ultimately release me.

Senator METZENBAUM. While you were awaiting execution in the penitentiary, what was going through your head?

Mr. ADAMS. You know, when you are given a sentence of death it is usually placed 30 days away, and the only way I can describe that is you begin a very short path of 30 steps and each day you take one more step and you come closer to a very dark wall that you cannot see into, you cannot see out of. It is just there and it is getting closer.

Again, I came 72 hours before my execution date was stopped. I was a nervous wreck. I was—the only way I can describe it is you have to make peace with yourself. Had my execution taken place, I think I could have been man enough to—I am happy with myself, I am happy with who I am. I knew the truth about my case, my family knew the truth about this case, so we could have lived with it. I am just happy to be alive one more day.

Senator METZENBAUM. Maybe that is an appropriate statement that you could have lived with it.

Mr. ADAMS. Up until I would not have lived anymore.

Senator METZENBAUM. Very, very difficult for both you and Mr. McMillian.

Mr. D'Alemberte, what is the practical effect of the *Herrera* decision on death row inmates who have new evidence of their innocence?

Mr. ADAMS. I am sorry. Was that for me or—

Senator METZENBAUM. It was for Mr. D'Alemberte.

Mr. D'ALEMBERTE. Senator, I think it just simply says that if innocence is all you have got, if you are merely innocent, you are not going to get into Federal court, and so I agree very much with Mr. Stevenson. I think it has been devastating, and I must say I am

a little bit surprised because I actually had gone into this case somewhat optimistic that the promise of the safety valve that was to be there for the person who was innocent—a lot of the cutbacks on habeas have occurred with courts stating that they would limit habeas, but there would always be this safety valve to give us some protection.

But all I see in the safety valve now is clemency, and I know enough about the political process myself from a little bit of elective office to know that that is not—certainly, in States that I know something about is not an effective safety valve.

Senator METZENBAUM. But clemency says you are still guilty, but we are going to make the penalty a little less.

Mr. D'ALEMBERTE. Clemency, pardon, any of those are simply not effective because of the political environment in which they are raised, and again I think one of the best examples of that is that it didn't even work where the facts had already been proven to a trial court in Randall Dale Adams' case. We haven't had clemency in Florida for 10 years. Alabama counsel arguing the *Herrera* case indicated that it had not been available for, I think, 18 years.

Senator METZENBAUM. Let me see if I can get two more questions, one for you and one for Ms. Jones. Before the *Herrera* case got to the Supreme Court, you went before a Federal district judge in Texas, Ricardo Hinojosa. Judge Hinojosa is a Reagan appointee. He wanted to hold a hearing on the new evidence presented by Herrera. Why did he want to hold that hearing and why was he prevented from holding it?

Mr. D'ALEMBERTE. As I understand the record, Senator, he wanted to hold a hearing because he thought there was a real question of Leonel Herrera's guilt. He understood the circumstances in south Texas and he wanted to see that evidence was taken. He, first of all, wanted to give the Texas courts an opportunity to have that hearing. They did not.

He set a hearing 3 days away. There was not any substantial delay; there was not any of this great time. He had an evidentiary hearing set for 3 days later, and instead of going to that evidentiary hearing which could have been handled very expeditiously, the State of Texas instead took the case up to the fifth circuit and the fifth circuit again, without briefs, without oral argument, said that you may not consider—the Federal courts may not consider innocence, and that is why your bill is so important.

Senator METZENBAUM. Thank you. I am just going to have one question for Ms. Jones even though I know my time has run out. The two men with us today who were freed from death row both benefited from considerable media attention. Mr. Adams' story became the subject of a movie, while Mr. McMillian's story was looked at by "60 Minutes."

Have we reached the point at which you cannot free an innocent person from death row unless you have both an airtight legal case and attention from the media?

Ms. JONES. Regretfully, Senator, that seems to be the case, and the recent instances where innocence has been established show that the media attention is required and the airtight case, and all of that and more is required. It takes assistance from extra-legal sources. In addition to media, it takes luck, it takes years of labor,

it takes hundreds of hours of work, and it takes expenditure of considerable resources. It takes all of that.

Senator METZENBAUM. Thank you very much.

Senator Hatch?

Senator HATCH. Well, thank you. I want to say to you, Mr. McMillian, and you, Mr. Adams, that I am glad you are both here and I am happy that in the end it turned out all right for you. It was a terrible, terrible experience in both cases. Neither of you should have had to go through what you have been through, and we respect you and we respect what you are saying here today.

Although the system did not work for you during the trial phase, and so forth, I want to thank both of your attorneys, who are excellent attorneys, for ultimately seeing that your innocence was found to be so. In the end, we are just happy to have you here and you have, certainly, our sympathy, and I personally believe that in both cases the States ought to acknowledge the injustices that they have done to you and they ought to somehow compensate you.

Ms. Jones, I just want to say this to you. I have tremendous respect for you and what your organization does, and I want to talk about Mr. Stevenson, too. I have been sitting here thinking I know that in some of these States it is very difficult for African-American people and others who are low-income people to be treated fairly.

As I understand it, Mr. Stevenson, your organization can—it is funded partially by the State?

Mr. STEVENSON. No, sir.

Senator HATCH. Who funds you, the Federal Government?

Mr. STEVENSON. We get grants from the Federal Government for the work we do in Federal court.

Senator HATCH. Yes. You are funded partially by the Federal Government, but only in the appellate process?

Mr. STEVENSON. Only in postconviction for the work we do in Federal habeas, yes, sir.

Senator HATCH. Yes, the postconviction process. I am wondering if we shouldn't in these kinds of matters—and as I understand it, your organizations are in basically every capital crime State?

Mr. STEVENSON. That is correct. We are trying to recruit counsel or provide assistance.

Senator HATCH. The Federal Government then funds you to a degree—

Mr. STEVENSON. That is correct.

Senator HATCH [continuing]. With regard to postconviction proceedings?

Mr. STEVENSON. That is correct.

Senator HATCH. Well, I am wondering if this committee shouldn't really look into funding you for preconviction proceedings up through the trials and see that these people have adequate counsel in these capital crime States. I have also noted through the years the tremendous amount of difficult work that the NAACP has done on behalf of African-Americans and others throughout this country, and I want to compliment them for it.

Now, all of that said, I am still going to come to Mr. D'Alemberte, who is a friend, and ask a couple of questions about the *Herrera* case because the issue being framed here is that the conclusion in the *Herrera* case was one of injustice and one that lit-

erally did not give Mr. Herrera a chance to fairly present evidence of his innocence.

Now, Mr. D'Alemberte, Justice O'Connor in her concurring opinion in *Herrera* describes the evidence of Herrera's guilt as, "overwhelming," in her words. In her words she says,

The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981. Petitioner's new evidence is bereft of credibility. Not even the dissent expresses a belief that petitioner might possibly be actually innocent, nor could it. The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," but instead is himself the established perpetrator of two brutal and tragic ones.

Now, Justice O'Connor also observed that, "Of all the judges to whom Herrera presented his claim of actual innocence—more than 20 judges by my count—not one has expressed doubt about Herrera's guilt." That is Justice O'Connor.

I want to just make sure that there is no dispute that that is what is in the record.

Mr. D'ALEMBERTE. That is what is in the opinion.

Senator HATCH. In the opinion.

Mr. D'ALEMBERTE. Yes, and, of course, that—Senator, my quarrel with that, although I must confess I am a great fan of Justice O'Connor and Justice Kennedy, who joined that opinion—

Senator HATCH. Sure.

Mr. D'ALEMBERTE [continuing]. My quarrel with that is that they put themselves in the place of Judge Hinojosa. In our system we normally look to the trial judges to make some judgment about credibility. What is so startling to me about the *Herrera* opinion, Senator Hatch, is that what seems to be happening is that not only is the decision about credibility being made at the appellate level rather than the trial, but that the appellate court is making that without ever hearing the testimony.

Senator HATCH. I understand, but according to the Supreme Court's account of the proceedings below, the district court in *Herrera* granted a stay in order to permit him to present his claim—Federal District Court Judge Hinojosa.

Mr. D'ALEMBERTE. Yes, sir, and set that hearing three days away.

Senator HATCH. Yes, to permit him to present his claim of actual innocence in State court. As Justice O'Connor points out, the judge did not himself express any doubt about Herrera's guilt—Judge Hinojosa didn't. In addition, the State courts had already addressed and rejected Herrera's claim of actual innocence.

Now, if, as Ms. Jones indicated and Mr. Stevenson, who we have had testify here before, for whom I have great respect, both of them—if it is because of prejudice or something else, we have got to provide some better means so that people have better representation in these matters.

But the key question addressed by the Supreme Court is what evidentiary threshold must be met in order to entitle a claimant to a hearing. I mean, that is the way I view it, and the Court is as well positioned as the district court to decide that Herrera did not meet that threshold. In other words, the Supreme Court is just as well positioned as Hinojosa was to decide that he didn't meet that threshold.

But let me just ask you a couple of things about the case. As I understand it, Mr. Herrera was convicted in the 1981 murder of Texas Police Officer Enrique Carrisalez. That is correct, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. He also pled guilty to the murder of police officer David Rucker, is that right?

Mr. D'ALEMBERTE. After he had been beaten fairly severely, yes, sir.

Senator HATCH. So you are saying that that was a guilty plea under duress?

Mr. D'ALEMBERTE. Yes, sir, and hospitalized.

Senator HATCH. OK. Now, evidence at Herrera's trial for the Carrisalez murder showed that on the evening of September 29, 1981, Carrisalez spotted a car speeding away from the area where Rucker's body, shot to death, had just been found. Is that correct? That is the record.

Mr. D'ALEMBERTE. That was at trial. Certainly, that was the evidence, yes, sir.

Senator HATCH. OK. That is all I am asking is if these things are true. The evidence also——

Mr. D'ALEMBERTE. They are not true, Senator, but that is——

Senator HATCH. No, but I mean whether the record shows it.

Mr. D'ALEMBERTE. That is right.

Senator HATCH. The evidence—and we are talking about evidence here—the evidence also showed that Officer Carrisalez pulled the car over and was shot to death by the driver, right?

Mr. D'ALEMBERTE. Your Honor, that is correct.

Senator HATCH. And that Officer Carrisalez died 9 days after that, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. Now, when Herrera was arrested it is true, isn't it, that a lengthy letter in his own handwriting was found on him, right?

Mr. D'ALEMBERTE. Yes.

Senator HATCH. And in the letter Herrera stated that he was, "terribly sorry," for having, "brought grief to the lives," of, "Rucker," and the "other officer." Is that correct?

Mr. D'ALEMBERTE. That is correct.

Senator HATCH. That is what his own letter said?

Mr. D'ALEMBERTE. That is the letter which he never had an opportunity to explain to any court.

Senator HATCH. But it was on him at the time and that is what it said, right?

Mr. D'ALEMBERTE. That—there was a letter found on him after he had been the subject of a rather massive manhunt and——

Senator HATCH. Fine, but that is what was found on him——

Senator METZENBAUM. Why don't you let him finish, Senator Hatch?

Senator HATCH. Sure, sure.

Mr. D'ALEMBERTE. And I think the record is fairly clear, Senator, that he also—again, he had a rather severe drug problem, I think, when he wrote that letter and I don't think that is contested.

Senator HATCH. All right, but this is what the letter said, those are the facts in the letter, right?

Mr. D'ALEMBERTE. Yes, sir, and that letter—I think I am correct, Senator—at no point says that he is the person who shot the policemen.

Senator HATCH. All right. It said he was terribly sorry for having brought grief to their lives.

Mr. D'ALEMBERTE. Yes, sir, but the letter, in context, also points out that there were police who were involved in drug activity.

Senator HATCH. All right.

Mr. D'ALEMBERTE. And when we put this letter in context, you really understand why Judge Hinojosa wanted to have a hearing.

Senator HATCH. But isn't it also true that Officer Carrisalez, on his death bed, identified Herrera as his attacker?

Mr. D'ALEMBERTE. He did, under very suspicious circumstances which, on review, brought a divided Texas Court of Criminal Appeal, yes, sir.

Senator HATCH. All right, and Carrisalez's squad car companion also identified Herrera, is that right?

Mr. D'ALEMBERTE. Did, and please, Senator, you understand that our contention, supported by an eyewitness, is that it was his brother and they are quite similar in appearance.

Senator HATCH. Who had died in 1984, a long time before this matter was brought to the court?

Mr. D'ALEMBERTE. That is correct, sir; that is correct.

Senator HATCH. And it was also shown that the car that Carrisalez stopped was registered to Herrera's live-in girlfriend and that Herrera was known to drive that car, wasn't it? That was part of the evidence?

Mr. D'ALEMBERTE. He sometimes drove that car. That is correct, sir.

Senator HATCH. Right, and evidence against Herrera at trial also included various blood and hair tests?

Mr. D'ALEMBERTE. It did.

Senator HATCH. OK. Now, the only thing I am saying is that even though some of these things—you have raised some questions. Let me just finish this because it is important.

Senator METZENBAUM. Sure.

Senator HATCH. I think that everyone can see what Justice O'Connor meant when she described the evidence against Herrera as overwhelming. But let me add further to the record that, by my count, Herrera has had some 15 separate judicial proceedings in the nearly 12 years since he murdered Police Officers' Carrisalez and Rucker and none of his claims has been found to have any merit.

Yet, by filing his claims on or near the eve of the scheduled execution dates, he had repeatedly managed to postpone his execution. Now, many feel that this is what is wrong with the criminal justice system, and that is an abuse of the current criminal justice system and something that we should be acting against and not facilitating. That is the problem.

I think, again, back to Federal District Judge Hinojosa, the Justices on the Supreme Court had every bit as much power, right and knowledge and opportunity to discover that threshold situation as did Hinojosa.

Mr. D'ALEMBERTE. Senator Hatch, if I could just say that I think what you say about Leonel Herrera's case as we look at it today could at one point have been said as well about the case of Randall Dale Adams. The evidence was overwhelming, if you wanted to look at it in a certain perspective.

The evidence, I believe, about Walter McMillian was sufficient to support a verdict. We look at it in that context. We understand at some point, unless you examine this evidence of innocence, you are not going to be very confident that you are doing the right thing.

Senator METZENBAUM. I am going to have to cut you off, Senator Hatch.

Senator HATCH. Well, I just want to compliment Sandy. I understand how you feel and I compliment you for fighting hard for what you believe may be right.

Senator METZENBAUM. Thank you.

Senator HATCH. But I have to say I have to agree with Justice O'Connor.

Mr. D'ALEMBERTE. I believe Leonel Herrera is innocent, Senator.

Senator HATCH. I acknowledge that and I compliment you for feeling the way you do.

Senator METZENBAUM. There is a roll call on. We have got a second panel. I am trying to keep this thing moving. Senator Feinstein, please proceed. Senator Heflin will preside.

Senator FEINSTEIN. Thank you, Mr. Chairman. I would like to ask this question, if I might, of Mr. Stevenson and Mr. Adams: Could you describe for us the specific nature of the evidence that was brought forward that proved your innocence, and also the time delay involved?

Mr. STEVENSON. Yes. Mr. McMillian was convicted on the testimony of one alleged codefendant who said he was with him at the time of the crime. Mr. McMillian had half a dozen witnesses who contradicted this alleged codefendant and testified. Mr. McMillian could not have committed the crime, and they all verified his presence some 20 miles from the crime scene.

The alleged codefendant who testified against Mr. McMillian later came forward and admitted that his trial testimony was false. Now, the codefendant had told police officers that prior to his arrest a month before the trial, but those statements were——

Senator FEINSTEIN. Prior to whose arrest?

Mr. STEVENSON. After the codefendant was arrested on an unrelated murder——

Senator FEINSTEIN. The witness?

Mr. STEVENSON. The witness, yes. He told the police "you want me to frame an innocent man for murder and I don't want to do that." After several days of, we contend, coercive questioning, the codefendant agreed to testify falsely against Mr. McMillian. Now, those statements and interviews were recorded and withheld from the defense at the time of trial so they could not prove that the codefendant did not consistently say that Mr. McMillian was guilty.

He also told State doctors when he was sent to a mental health facility for a pre-trial evaluation a month before the trial, "I am about to frame an innocent man for murder." The reports which contained that statement were sent to the prosecutor and to the trial judge, but again withheld from Mr. McMillian's defense coun-

sel. We uncovered that evidence, in addition to presenting evidence that the witness who testified against him, this witness—

Senator FEINSTEIN. How did you uncover the evidence?

Mr. STEVENSON. The court granted our discovery requests although discovery was opposed and resisted by the State in this case. We got a release through the codefendant to go to the State hospital without a discovery order after we knew he had made these statements. We found the evidence that way. We filed discovery in another case and, through that discovery motion, uncovered these other records that pointed to other witness statements which showed that lots of folks had told the police that this codefendant was framing an innocent man for murder.

Subsequent to that, the other two witnesses also recanted their trial testimony and acknowledged that their testimony against Mr. McMillian had been false. We could prove that Mr. McMillian didn't even know this man at the time of the crime because he came up to him some 6 months later and didn't know who he was. There was a great deal of evidence that we uncovered.

Senator FEINSTEIN. So there were three witnesses, essentially, that had lied?

Mr. STEVENSON. That is correct, that is correct.

Senator FEINSTEIN. And the prosecution was aware of this?

The prosecutor told the jury at trial that the main witness had only made two statements and they could believe him because those two statements consistently pointed to Mr. McMillian's guilt. That was clearly not true. The prosecution did not tell the jury that these other witnesses had been paid reward money.

Could you hold one second? I want to hear this and I have got to find this ruddy beeper. Go ahead. Sorry.

Mr. STEVENSON. So the prosecutor basically did not tell the jury that there were all these other statements that have been made by the codefendant that contradicted what he was telling the jury at trial, which was that Mr. McMillian was guilty. They also knew that the police had arranged to show one of the witnesses—what the other two witnesses basically did was say that they saw Mr. McMillian's truck there. They didn't have any evidence of guilt for the murder.

What the police had done was basically arrange for one of the witnesses to be brought from jail to see his truck after this arrest, this pretextual arrest for this alleged sodomy charge which was later dismissed. He was brought from jail, shown the truck, and then gave a statement saying "I saw that truck on the day of the crime."

The mistake they made was that he described the truck as it was, which was a low-rider modified to sit low to the ground. We were able to prove that the truck was not modified until 6 months after the crime. Again, the prosecution was aware of the efforts to kind of facilitate the witness testimony that was given by these two witnesses, all three witnesses.

Senator FEINSTEIN. Thank you very much. Mr. Adams?

Mr. ADAMS. Yes, Senator Feinstein. Basically, what the State did, they used five people at trial to convict me. The State's star witness, if you want to call him that, was a person by the name of David Harris that was a person that I had met on a Saturday

after work. I was driving home from work. I ran out of gas, I walked to a gas station. He pulled into the gas station and helped me get my car started.

Because of his assistance—while doing this, he told me he was from the Houston area in Dallas looking for work. I took him back to the job site to get him a job. Of course, no one was there so he didn't see the boss. He didn't see any work crew or anything. I never saw him again, never heard from him again.

A month later—you must understand this was the longest unsolved police officer killing in Dallas history, probably Texas history. They came out to work, they showed me a picture, asked me if I had ever seen this guy, David Harris. I said yes, he helped me get my car started. That is how I got tied into this. This is how I got arrested.

The way the case broke, David Harris had returned after the killing within 24 hours, was bragging about the killing, doing this. When the case finally broke, after telling at least eight people when, where and how he had executed a man, he finally tells them, OK, I have been bragging, but I didn't do it, this guy that I picked up and helped get his car started—this is what he testified to.

Another witness that they used was Police Officer Turko. She made three original statements, one directly after the killing, I believe one the next day or so, and then her in-court testimony. Her original statement to the first officer at the scene and her in-court testimony varied very differently. We did not know and the State did not allow us to know that she had been hypnotized in between here so, you know—which we should have known.

There was a third statement that she made the day after the killing that the car windows of the car they had stopped, her and her partner, were so dirty she could not see inside, which disputed both of her other two testimonies that we heard. That is one of the statements that the district attorney hid as far as we know. We found it in his files.

There was three other surprise witnesses who came forth at the last day of trial. They all stated that they had passed the scene of the crime, they could positively identify me, and the woman, one woman of the three, stated in open court that she viewed a lineup and picked me out.

Senator FEINSTEIN. Excuse me just a minute.

Senator MOSELEY-BRAUN. Mr. Chairman, unfortunately we have a vote pending and I have to get over to the Capitol, and I really regret that because I wanted to have a chance to ask some questions and make a statement for the record. So I will have to leave, but I did want to congratulate Mr. Stevenson for his fine, heroic work and what you have done, and Ms. Jones and the witnesses for giving us this hearing.

I hope that we can avoid any confusion about what this bill does. It does not mandate that a prisoner be released upon an application of innocence, but rather that the court at least give it a hearing, and I think that is really important as this debate happens because looking at some of the testimony for the next panel which I won't be here for because we have got to go vote, unless it is going to be rescheduled, Mr. Chairman, and I don't know if it will—

Senator HATCH. It will continue until it is over, I think.

Senator MOSELEY-BRAUN. It will continue until it is over, yes. Well, again, the next panel—I read some of the testimony and I was really concerned, frankly, that there might be a misapprehension of what it is this legislation does or is intended to do.

So, again, I want to thank you very much for this opportunity to hear you.

Senator FEINSTEIN. I think you may have misunderstood the question. The question was the evidence that was forthcoming that proved your innocence—when did it come and what specific was it?

Mr. ADAMS. OK. Again, I did misunderstand your question. I apologize. The question—the evidence actually was perjured testimony, of course, on Emily Miller. It was—we did not know that until, I would say, 8 to 9 years. At trial she, of course, stated she picked me out of the lineup. Eight years later, she told the film producer when talking to him that she, in fact, had picked out a decoy and that the officer that took her into the lineup room told her, that is not who we want, we want this guy over here, and, of course, she walks into trial and positively identified me at the lineup. The prosecutor, of course, says he did not know she was committing perjury, but that is one of the items.

Senator FEINSTEIN. So when did they find out?

Mr. ADAMS. Eight to nine years after my trial.

Senator FEINSTEIN. And how did it happen?

Mr. ADAMS. Through the making of the film, the investigation of "The Thin Blue Line."

Senator FEINSTEIN. And what did happen there? I am just not familiar with the film.

Mr. ADAMS. During the investigation of "The Thin Blue Line"—it is, of course, a documentary on my case—he tracked down all the witnesses. He interviewed the State, he interviewed myself, and these people told—different things came out during the testimony to him and, of course, with that we went back into a evidentiary hearing in Federal court, and this is when we got into the record the statements that were false, the evidence that was hidden and not given to us, and so forth.

Senator FEINSTEIN. Thank you very much, Mr. Adams. Thank you, Mr. Stevenson.

Senator HEFLIN [presiding]. Let me ask a few questions. Senator Metzenbaum will get back and I will leave, so whenever he gets back I will be leaving in order to be able to meet the vote.

Mr. Stevenson, I congratulate you on your fine work. I happen to know Mr. Chestnut, who was the original attorney and who is an outstanding trial attorney in the State. Actually, in your situation Alabama has rule 32.2, which is different from most States rules of criminal procedure. Most States have a time period in which newly discovered evidence can be used in a postconviction remedy procedure.

Actually, the Alabama Supreme Court establishes, under a judicial reform procedure, rules of criminal procedure. It allows at any time after any conviction newly discovered evidence can be used, provided it is presented to the court within 6 months after it has been discovered. This was basically the rule, I think, that you bot-tomed your petition to get Mr. McMillian released. Is that correct?

Mr. STEVENSON. That is correct, Senator Heflin.

Senator HEFLIN. So, actually, this case was not in the Federal courts, but it was in the State courts in which you used the procedure of Alabama's rules. Subsequently the Alabama Court of Criminal Appeal was the one that granted relief. Now, Alabama has some other rules—some of it is controversial—as to whether, after a jury brings in a verdict, the trial judge has the right to raise the jury determination. In this instance the jury found life imprisonment as a punishment and the trial judge raised it to capital punishment. That issue has been a controversial issue and I don't think it has ever really gotten fully decided by the Supreme Court.

Mr. STEVENSON. I think that is correct, Senator.

Senator HEFLIN. And that is an issue that he is involved. So, actually, the procedure in Alabama, under its rules and its courts, in effect ended up doing justice.

Mr. STEVENSON. I think that can be said, and I mean I think you are right that Alabama does provide a procedural remedy, at least to a certain extent, for some of these claims. The problem is that in Alabama to file that rule 32 petition, to do the kind of investigative work when you can uncover that evidence of innocence, you must have counsel, and you must have counsel adequately compensated to do the kind of work necessary.

Although rule 32 exists, there is a statute which precludes counsel from getting more than \$600 for any work it does in connection with that litigation. So there is that barrier to presenting that evidence and developing that evidence effectively. The second barrier which—

Senator HEFLIN. I think, though, they have raised that now.

Mr. STEVENSON. Not for postconviction counsel. It is still—

Senator HEFLIN. Well, I thought [continuing]. Although I am not sure. Given I am away from Alabama rulemaking.

Mr. STEVENSON. Sure. Well, the statute still reads that you can only get \$600 for the—

Senator HEFLIN. Well, certainly, this needs to be remedied. There is no question about that.

Mr. STEVENSON. I totally agree, Senator, and I guess the second concern even with making those procedures meaningful is that some of the same kind of problems in terms of enthusiasm with the death penalty continue to exist. The court that granted us relief, the Court of Criminal Appeals, has been attacked by legislative efforts coming from the Attorney General's Office and other communities to remove it from review of these cases.

Every year for the last 4 years, they have passed legislation at least in committee to remove the Court of Criminal Appeals from even reviewing these cases, which would have made it impossible for us to even be in court long enough to avail ourselves of these kinds of procedural remedies. And, of course, without compensation to do this stuff in State court, we can only hope that in Federal court we will have a similar opportunity.

Senator HEFLIN. Well, there are various groups, your organization and the Southern Poverty Law Centers being one, and others that get involved in these death penalties cases. You all have really provided tremendous expertise and presented people who are experts in regard to capital cases. I think that those people, from the

viewpoint of seeing that justice is to be done, are to be commended for their work.

Now, I am delighted to see you, Sandy, and glad to have you here. Let me ask you this. In the *Herrera* case, was the issue pertaining to constitutional prohibition against cruel and unusual punishment raised? It seems to me that the whole decision could have been bottomed under that constitutional aspect. Was that raised in this case?

Mr. D'ALEMBERTE. It was at the core of our presentation to the court, Senator, and we were trying to make a submission to the court that was as narrow as possible and we submitted that it was cruel and unusual punishment to execute a person who had a bona fide claim of innocence, and that was essentially the thrust of our presentation. We did not even seek in our submission to have the court lay down a rule that a trial judge, a district judge had to hear such a case, just that a district judge ought to be allowed to have such a case.

Senator HEFLIN. I see Senator Metzenbaum is coming so I am going to have to run to vote, so I will go ahead with one more thought. You know, one thing that appears to me that we ought to consider is the withholding of exculpatory evidence. It may well be that this act has to be made a Federal criminal offense. Unfortunately, we have had prosecutors who desire to win at all costs. The desire to win is such that they withhold exculpatory evidence. Presently, I am looking at various remedies to try to prevent these types of things from happening in the future.

Senator METZENBAUM. We are waiting for some of the others to return who may want to have questions, but I might ask you, Ms. Jones, just a question. Some people might argue that Mr. McMillian's case and Mr. Adams' case demonstrate there is no real need for Federal review of alleged constitutional errors in State death penalty cases since Mr. McMillian and Mr. Adams were exonerated through State court process. Doesn't that suggest the States can handle these matters adequately?

Ms. JONES. No, Senator Metzenbaum, it does not. As I indicated earlier, and as related to your earlier question, it takes extraordinary effort, really, to get innocent death-sentence inmates—to put them in the position that Mr. McMillian and Mr. Adams are in today. Also, when you look at the system, the way the system works is, you know, the penalty is—you finally overwhelmingly, disproportionately, have given it to blacks, the people who do not have adequate access and funds to get counsel.

You look at our indigent defense systems across the State, and when you shut the door at the postconviction level it makes it very difficult for these people to get these claims vindicated. Also, you are working against the tide because there is overwhelming—even when a defendant is charged, there is an overwhelming presumption of guilt. You know, the public seems to think, well, the fact that you are charged means that you must have done something.

And so in order to vindicate these defendants who are innocent, we do have to put the resources into the system, but at the same time we are talking about a death penalty. As I go back to the point, when we are talking about a death penalty we cannot close the courthouse door, and you set out the standard in your bill, in

S. 221, which is where there is a substantial claim, a factual claim of innocence which is established which shows probable innocence, but then we cannot say in this society we are going to have this death penalty, that we are not going to let those claims be aired.

Senator METZENBAUM. Thank you very much, and that will conclude this panel. I want to express my appreciation to the lawyers and to the individuals themselves who have been involved in this matter. Your testimony has been extremely helpful and we are very grateful to you. Thank you.

Our next panel consists of Miriam Shehane, State President of Victims of Crime and Leniency, of Montgomery, AL; Kenneth Nunnelley, Deputy Attorney General of the State of Alabama; Paul Cassell, Associate Professor of Law at the University of Utah College of Law, Salt Lake City, UT; and Ward Campbell, Deputy Attorney General, State of California.

In order that I follow the same procedure that I did with the first panel, I am going to ask the witnesses to be sworn. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. SHEHANE. I do.

Mr. NUNNELLEY. I do.

Mr. CASSELL. I do.

Mr. CAMPBELL. I do.

Senator METZENBAUM. I think you know of our 5-minute rule. We try to keep to it. Ms. Shehane, we are happy to welcome you this morning.

**PANEL CONSISTING OF MIRIAM SHEHANE, STATE PRESIDENT, VICTIMS OF CRIME AND LENIENCY, MONTGOMERY, AL; KENNETH S. NUNNELLEY, DEPUTY ATTORNEY GENERAL, CAPITAL LITIGATION DIVISION, STATE OF ALABAMA; PAUL G. CASSELL, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT; AND WARD A. CAMPBELL, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA**

#### **STATEMENT OF MIRIAM SHEHANE**

Ms. SHEHANE. Thank you, Mr. Chairman.

Senator METZENBAUM. Do you want to bring the mike closer to you?

Ms. SHEHANE. Thank you, Mr. Chairman. To you and to any of the other committee members—

Senator METZENBAUM. Could you bring that mike closer? We are not getting you. Thank you.

Ms. SHEHANE. I appreciate the opportunity to speak to you today on a very critical issue from a victim's perspective. As you know, my name is Miriam Shehane and I represent an organization called VOCAL, but I am a crime victim. I also have a death sentence, and we are here to address what the scales of justice is all about—the crime, the punishment, the guilt and the innocence.

My daughter, Quenette, was brutally murdered in 1976, and as a parent of a child that has been murdered that life is more precious than your very own. You cannot understand, you cannot even comprehend what we are talking about here today.