Statement of
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Regarding
The Innocence Protection Act of 2001
Committee on the Judiciary
United States Senate
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Mr. Chairman and Members of the Committee:

Thank you for this opportunity to address the committee regarding Title II of the Innocence Protection Act of 2001, which is absolutely essential to minimizing the risk of executing innocent people.

I have been interested in the quality of legal representation for the poor for over 25 years, as a public defender, as the director of a law school clinical program here in the District of Columbia, for the last 19 years as director of the Southern Center for Human Rights, and, since 1993, as a teacher of criminal law, including the right to counsel, at Yale, Harvard and Emory Law Schools. I have testified as an expert witness on the subject in the courts and have written a couple of law review articles on the subject.

People are wrongfully convicted because of poor legal representation, mistaken identifications, the unreliable testimony of informants who swap their testimony for lenient treatment, police and prosecutorial misconduct and other reasons. Unfortunately, DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system – in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing – to bring out all the facts and help the courts find the truth. But even with a properly working adversary system, there will still be convictions of the innocent. The best we can do is minimize the risk of wrongful convictions. And the most critical way to do that is to provide the accused with competent counsel and the resources needed to mount a defense.

**I.**

We have been very fortunate that the innocence of some of those condemned to die in our courts has been discovered by sheer happenstance and good luck. A few of many examples illustrates the point.

Anthony Porter came within hours of execution before his innocence was established by the journalism class at Northwestern. Porter had been convicted by a jury. He had been sentenced to death. His case had been reviewed and affirmed on appeal by the Illinois Supreme Court. He had

gone through the state and federal post-conviction processes and every court had upheld his conviction and sentence. He was scheduled to be executed.

However, a question arose as to whether Porter was mentally competent to be executed; that is, whether he understood that he was being put to death as punishment for the crime of which he had been convicted. A person who lacks the mental ability to understand this relationship cannot be executed, but is instead treated until he is "restored to competency." When he has improved to the point that he can understand why he is being executed, he is put to death. Anthony Porter was a person of limited intellectual functioning and mental impairments. Because there was a question about whether he could understand why he was being executed, a court stayed his execution in order to determine his competency to be executed.

After the stay was granted, the journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent. They obtained a confession from the person who committed the crime. Anthony Porter was released from death row. He was the third person released from Illinois's death row after being proven innocent by the journalism class at Northwestern. Since Illinois adopted its present death penalty statute in 1977, thirteen people sentenced to death have been exonerated and twelve have been executed.

In 1994, the governor of Virginia, Douglas Wilder, commuted the sentence of a mentally retarded man, Earl Washington, to life imprisonment without parole because of questions regarding his guilt. Six years later, DNA evidence – not available at the time of Washington's trial or the commutation – established that Earl Washington was innocent.

Frederico Martinez-Macias was represented at his capital trial in Texas, by a court-appointed attorney paid only $11.84 per hour. Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the prosecutor's case. Martinez-Macias was sentenced to death. Martinez-Macias received competent representation for the first time when the Washington, D.C., firm of Skadden, Arps, Slate, Meagher & Flom volunteered to take his case and represented him without charge. After a full investigation and development of facts regarding his innocence, Martinez-Macias won federal habeas corpus relief. A grand jury refused to re-indict him and he was released after nine years on death row.

Similarly, volunteer lawyers from the Houston firm of Vincent & Elkins established in federal habeas corpus proceedings that Ricardo Aldape Guerra had been convicted in violation of the Constitution and was innocent. He was released and he returned to Mexico.

Gary Nelson was represented at his capital trial in Georgia by a solo practitioner who had never tried a capital case. This court-appointed lawyer, who was struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour. His request for co-counsel was denied. The case against Nelson was entirely circumstantial, based on questionable scientific evidence, including the opinion of a prosecution expert that a hair found on the victim's body could have come from Nelson. Nevertheless, the appointed lawyer was not provided funds for an

investigator and, knowing a request would be denied, did not seek funds for an expert. Counsel's closing argument was only 255 words long. The lawyer was later disbarred for other reasons.

Nelson had the good fortune to have some outstanding lawyers volunteer to represent him in post-conviction proceedings, who devoted far more time to the case than had the court-appointed lawyer and spent their own money to investigate Nelson's case. They discovered that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison. Indeed, they found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared. As a result of such inquiry, Gary Nelson was released after eleven years on death row.

But for the vast majority of those sentenced to death, there are no journalism students or volunteer lawyers who come forward and examine their cases.

For example, Exzavious Gibson, a man whose IQ has been tested between 76 and 82, was forced to represent himself at his state post-conviction hearing in Georgia because he could not afford a lawyer. There are dozens of people on death row in Alabama who do not have lawyers to represent them in post-conviction proceedings. And the statute of limitations is running on them.

Some of the lawyers provided in post-conviction proceedings are worse than no lawyer at all. Ricky Kerr was assigned a lawyer by the Texas Court of Criminal Appeals who had been in practice only four years, had no capital experience and suffered serious health problems. Federal Judge Orlando Garcia said the appointment of the lawyer "constituted a cynical and reprehensible attempt to expedite [the] execution at the expense of all semblance of fairness and integrity."

If the journalism class had not become involved in Anthony Porter's case, he would have been executed and we would never know to this day of his innocence. Those who naively proclaim that no innocent person has ever been executed would continue to do so, secure in their ignorance. If Martinez-Macias, Guerra, Nelson and others had been left without any post-conviction representation, as was Exzavious Gibson in Georgia, or had been provided a lawyer like the one assigned by the Texas Court of Criminal Appeals to represent Ricky Kerr, they would be dead and their innocence would have gone to the grave with them.

We should not count on luck to discover the innocent. We do not know how many Anthony Porters have been put to death and we never will. We can be confident that innocent people will be convicted and sentenced to death so long as those accused receive inadequate representation at trial and equally inadequate representation – or no representation at all – during post-conviction review.

Some have said that the fact that Anthony Porter and others have been released shows that the system works. However, someone spending sixteen years on death row for a crime he did not commit is not an example of the system working. When journalism students prove that police, prosecutors, judges, defense lawyers and the entire legal system did not discover a man's innocence and instead condemned him to die, the system is not working. And it is not a system of justice. It is a cruel lottery.

**II.**

The major reason that innocent people are being sentenced to death is because the representation provided to the poor in capital cases is often a scandal. The state legislatures have been unwilling to provide the resources and structure necessary to provide competent legal representation. And the courts have been willing to tolerate representation that is an embarrassment to our legal system and the legal profession.

In at least four cases in Georgia, counsel referred to their clients *before the jury* with a racial slur. A woman in Alabama was represented by a lawyer so drunk that her trial had to be suspended for a day and the lawyer sent to jail to sober up. The next day, both lawyer and client were produced from jail and trial resumed. Defense lawyers in Alabama and Missouri cases had sexual relations with clients facing the death penalty. There have been far too many cases in which defense lawyers defending capital cases were impaired by alcohol, drugs or infirmity. In case after case, defense lawyers for people facing the death penalty are denied investigators and funds for expert assistance.

Last January, 14 judges of the United States Court of Appeals for the Fifth Circuit earnestly considered the issue of whether a death sentence can be carried out in a case in which the one lawyer appointed to defend the accused slept through much of a trial that lasted only 18 hours. The Texas Solicitor General's office argued that Calvin Burdine's conviction and death sentence should be upheld because a sleeping lawyer is no different from a lawyer who is intoxicated, under the influence of drugs, suffering from Alzheimer's disease or having a psychotic break. The judges engaged the assistant solicitor general on this argument, asking whether there was not some difference between a lawyer who was merely impaired by alcohol and a lawyer who was completely unconscious. A panel of three members of that court had previously concluded in a 2-1 opinion that sleeping did not violate the right to counsel. The two judges in the majority held that the record did not show that the lawyer slept through an important part of the trial. Of course, the person responsible for making the record was the lawyer. And he was asleep. The entire Court is now reconsidering the case.

The standard for counsel is so low that Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit, once observed that, "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel." A trial judge in Houston put it even more bluntly, saying that while the Constitution guarantees a lawyer, "[t]he Constitution doesn't say the lawyer has to be awake." That judge presided over the case of George McFarland, another of the three capital cases tried in a single city, Houston, in which the defense lawyers slept through trial. The *Houston Chronicle* described McFarland's trial as follows:

Seated beside his client - a convicted capital murderer - defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year old longtime Houston lawyer explained.

. . .

Court observers said Benn seems to have slept his way through virtually the entire trial.

The Texas Court of Criminal Appeals affirmed McFarland's conviction and death sentence, as it did in the cases of Calvin Burdine and Carl Johnson. Johnson was executed by Texas in 1995.

For poor people facing the death penalty, this is what is means to be represented by the "dream team."

The old adage "you get what you pay for" applies with particular force in the legal system, and many states pay very little to lawyers appointed to defend capital cases. Studies of capital cases in Illinois, Kentucky and Texas have found that about one-third of those sentenced to death in those states were represented by lawyers who were later been disbarred, suspended or convicted of crimes.

States also fail to provide a structure, such as there is on the prosecution side, so that lawyers defending the poor are trained and supervised and develop an expertise in criminal law and the sub-speciality of capital punishment law. The lawyer who defended Wallace Fugate at his capital trial in Georgia had never heard of *Furman v. Georgia*, the case which declared Georgia's death penalty law unconstitutional in 1972, or *Gregg v. Georgia*, the case which upheld Georgia's current death penalty law in 1976. He could not recall ever having had an investigator in over 40 years of defending people in court-appointed cases and thought he may have had an expert on one occasion. He failed to find out that the gun, which his client said had fired accidentally, had a design defect that made it susceptible to accidental discharge.

Another lawyer who handled the cases of a several people sentenced to death in Georgia, when asked to name all the *criminal* cases with which he was familiar, answered, "the *Miranda* and *Dred Scott*." (*Dred Scott* was not a criminal case.)

These are only a few of the most egregious examples of the poor quality of legal representation that one sees every day in states that lack a structure for providing indigent defense, that fail to provide the resources to defend a case properly and that fail to provide for the independence of defense counsel from the judiciary. But they tell you how urgently this legislation is needed.

Unfortunately, many jurisdictions – including many which are sending large numbers of people to their death rows – still do not have a working adversary system, even in cases in which a person's life is at stake. In those states, it is better to be rich and guilty than poor and innocent because the poor are represented by court-appointed lawyers who often lack the skill, resources, and, on occasion, even the inclination to defend a case properly.

There are exceptions. Some states, like Colorado and New York, not only have public defender offices, but capital defender offices that specialize in the defense of capital cases. But other states, such as Alabama, Georgia, Mississippi, Texas and Virginia have no state-wide public defender system. There are some outstanding lawyers who will occasionally take a capital case, but they find those cases drain them emotionally and financially. In states where at any one time there are hundreds of people facing capital trials and hundreds more on death row whose cases are under review in the courts, there are not nearly enough good lawyers willing to take the cases for the small amount of money paid to defend them. There are also lawyers who, although lacking in experience, training and resources, make conscientious efforts to do the best they can in defending people in capital cases, but many find it simply impossible to overcome these disadvantages in these complex and difficult cases. And, unfortunately, there are too many lawyers who are taking court-appointed cases because they can get no other work and do not even make conscientious efforts.

**III.**

One of the very important provisions of Title II is the requirement of an independent authority for appointing attorneys in capital cases. Lawyers are ethically, professionally and constitutionally required to exercise independent professional judgment on behalf of a client. The appointment of counsel by judges creates – at the least – the appearance that lawyers are being assigned cases to move dockets and that lawyers may be more loyal to the judge than to the client. A lawyer's conduct in a case should not be influenced in any way by considerations of administrative convenience or by the desire to remain in the good graces of the judge who assigned the case. However, because some lawyers are dependent upon judges for continued appointments – which, in some cases, are the only business the lawyer receives – a lawyer may be reluctant to provide zealous advocacy for fear of alienating the judge. Some lawyers have remarked that one way to avoid being assigned indigent cases is to provide a vigorous defense in one.

Almost half of the judges in Texas, responding to a survey, said that an attorney's reputation for moving cases quickly, *regardless of the quality of the defense*, was a factor that entered into their appointment decisions. One-fourth of the judges said an attorney's contribution to the judge's campaigns was a factor in appointing counsel. When the judges were asked whether contributions influenced appointments by other judges they knew, over half said that judges they knew based their appointments in criminal cases in part on whether the attorneys were political supporters or had contributed to the judge's political campaign. The perception of lawyers and court personnel is that the influence of campaign contributions on elected judges' decisions is even more significant, with 79 percent of the lawyers and 69 percent of the court personnel saying they believe campaign contributions effect judges' decisions.

The same factors influence some judges in other states. But even if a judge appoints lawyers based their reputation for providing competent representation, there is the danger that some lawyers may not always provide the zealous representation that the Constitution requires because of the fear – whether justified or not – that the lawyer risks losing future appointments from the judge. For lawyers whose entire practice is made up of appointments from the court, such fears may considerably chill their performance.

This is a system riddled with conflicts. A judge's desire for efficiency conflicts with the duty to appoint indigent defense counsel who can provide adequate representation; a lawyer's need for business taints the constitutional and ethical requirement of zealous advocacy. And later, if there is a claim of ineffective assistance, the judge who appointed the lawyer is the one to decide the claim. This is not a good way to run a system of justice. Judges do not appoint prosecutors to cases. Judges should be fair and impartial. They should not be managing the defense.

Accordingly, Standard 5-1.3 of the American Bar Association's Criminal Justice Standards, provides:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

The Innocence Protection Act will bring jurisdictions to where they should have been long ago in having independent defender programs whose primary concern is providing zealous and effective representation to those facing the death penalty so that the adversary system can work properly.

## CONCLUSION

The states have received enormous amounts of federal funds to improve their law enforcement and prosecution functions. But they have failed to develop and maintain a properly working adversary system in criminal cases involving poor defendants. Many states – those I have

mentioned and many others – lack the key elements of an effective indigent defense system: a structure, independence from the judiciary and the prosecution, and adequate resources.

It is much easier to convict a person and obtain the death penalty when the defendant is represented by a lawyer who lacks the skill and resources to mount a defense. And it is much easier to execute people who are not adequately represented in post-conviction proceedings. But there is a larger question than whether adequate indigent defense systems make it harder for prosecutors to obtain convictions and for attorneys general to carry out executions swiftly. There is the question of fairness. It is not supposed to be easy to convict someone. Under our system required by our Constitution, the prosecution's case is supposed to undergo a vigorous adversarial testing process.

The American people are realizing that we have sacrificed fairness for finality and reliability for results. They want protection from crime, but they want fairness. The system is woefully out of balance. The many exonerations from DNA evidence as well as the release of over 95 people those sentenced to death shows that the system is broken. A major component, the defense function, lacks the structure, independence and resources to contribute to a fair, reliable and just result. It is not unreasonable for Congress to require the states as a condition of receiving millions of federal dollars to implement an adequate indigent defense system to protect the innocent at least in capital cases.