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The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel

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THE DEFUNDING OF THE POST CONVICTION
DEFENSE ORGANIZATIONS AS A DENIAL OF THE
RIGHT TO COUNSEL

ROSCOE C. HOWARD, JR.*

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I. INTRODUCTION

The concept of a “fair trial” is embodied in the Bill of Rights. No provision of the Bill of Rights is any more important to an individual accused of a crime than the requirement that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” The ultimate penalty this country allows for committing a crime is death. For more than 60 years states have been required to provide counsel for those tried for crimes punishable by death. This Article is not meant to comment, pro or con, on the propriety of the death penalty as a punishment, but to recognize that if we, as a society, decide to end the life of an individual for criminal convictions, the decision should be based on a “fair trial” — because with death we get no second chance if we are wrong. Providing effective counsel

1. U.S. CONST. amend. VI.
3. A report of the Judicial Conference of the United States noted:
   Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. The Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit the imposition of this punishment for some offenders. Of course, both Court and society have recognized that, because it is irreversible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.
for capital defendants is the pivotal step to ensure that a death penalty conviction is "fair" and constitutionally implemented.

The death penalty is society's most vehement response to the commission of particularly heinous crimes. Statistics indicate that it is implemented with a racial bias. Because of the penalty's unique severity it requires special procedures and post-conviction oversight not found with any other criminal proceeding. Attorneys involved in death penalty representation should be familiar with and trained in this specialized litigation.

The complexity of the litigation dictates that competent counsel be identified, compensated and retained by the state for those defendants who cannot afford it. Many states, however, do not ensure that indigent death penalty defendants are provided counsel who are equal to the task, that is, competent, experienced and effective. Death penalty appeals clog the court dockets in part because of the inability of counsel to effectively represent their clients in trial or present their cases in post-conviction appeals.

Post Conviction Defender Organizations (PCDOs) were created by Congress in 1988 to provide a service that would identify, train and support competent death penalty counsel in state and federal proceedings. The PCDOs ensured that death penalty defendants had counsel at every stage of the litigation, and that the counsel had the information needed for adequate representation. The cost was fairly minimal, but nevertheless, it prevented executions based on ineffective counsel rather than actual guilt.

PCDOs will no longer be funded by the federal government after September 30, 1996. This decision by Congress threatens to return the court system to a time of inadequately represented capital defendants with appeals clogging the courts. This article will review some of the history of the death penalty prior to the establishment of PCDOs and the effect of these federally funded organizations on litigation since their inception.
This article discusses how PCDOs brought trained and supported counsel to the defendant's table that were equal to the well-trained and funded government side, a phenomenon that was not present for indigent defendants prior to 1988. By defunding the PCDOs, the government almost ensures that a death penalty trial will result in a death penalty conviction. For the indigent, the trial is reduced to a technicality on the way to the gallows instead of being a hard-fought battle for the truth. The responsibility of finding competent counsel for indigent defendants will fall back on the states, but this article discusses how many of the states have, historically, abdicated that responsibility.

II. BACKGROUND

A. The Supreme Court Decisions Leading to the Death Penalty

On June 29, 1972, the Supreme Court, in a 5 to 4 per curiam decision, held in *Furman v. Georgia*\(^4\) that the death penalty was cruel and unusual punishment and thus violated the Eighth and Fourteenth Amendments to the Constitution.\(^5\) Historically, the Eighth Amendment prohibition against "cruel and unusual" punishment did not include the punishment of death as practiced in this country when the Constitution was written.\(^6\) Initially, the Court was inclined to interpret the Eighth Amendment by the practices and standards existing in 1789.\(^7\) Death was a "traditional" punishment, which "[had] been employed throughout our [country's] history."\(^8\) However, the Court eventually recognized that the Eighth Amendment was "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"\(^9\) and should be interpreted in

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6. *See, e.g.*, Weems v. United States, 217 U.S. 349, 370 (1910) (citing *In re Kemmler*, 136 U.S. 436, 437 (1890)) ("Punishments are cruel and unusual when they involve torture or a lingering death: but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, and something more than the mere extinguishment of life.").
view of "the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{10} The Court eschews subjective judgment to determine the standards of society and looks for "objective indicia that reflect the public attitude toward a given [criminal] sanction"\textsuperscript{11} and that "[f]irst among these indicia are the decisions of state legislatures . . . ."\textsuperscript{12}

In \textit{Furman v. Georgia}, the Court held that two state legislatures had exceeded the bounds of the Eighth Amendment.\textsuperscript{13} The Court did not strike down the death penalty itself as a \textit{per se} violation of the Eighth Amendment, but found that death penalty statutes that provided the trial judge or petit jury unfettered discretion to determine whether to impose the death penalty constituted cruel and unusual punishment as proscribed in that Amendment.\textsuperscript{14} Justice White observed in a concurring opinion that:

death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in [the years that the petitioners committed their crimes], many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.\textsuperscript{15}

Indeed, the death penalty was regarded as a traditional punishment, but for only selected groups in this country. Justice Douglas stated in his concurring opinion in \textit{Furman v. Georgia} that:

What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penal-

\textsuperscript{10} \textit{Trop}, 356 U.S. at 101.
\textsuperscript{13} See \textit{McAllister}, supra note 5 at 1039-40 (discussing Furman v. Georgia, 408 U.S. 238 (1972)).
\textsuperscript{14} Id. at 1044-45.
\textsuperscript{15} \textit{Furman}, 408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted).
ty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”

The Court went on to add that “[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.”

Justice Douglas cited a study which concluded:

Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

Justice Douglas also relied on a study of capital cases in Texas from 1924 to 1968 which reached equally troubling conclusions:

Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.

Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

Justice Douglas cited a 1928 statement by Warden Lewis E. Lawes of Sing Sing Federal Prison, who said:

17. Id. (quoting Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1792 (1970)).
18. Id. at 249-50 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).
19. Id. at 250-51.
Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.

Justice Douglas' opinion cited former Attorney General Ramsey Clark who said in 1970: "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." The Court found that "[o]ne [can] search[] our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb are given prison terms, not sentenced to death." Nevertheless, the death penalty re-

20. Furman, 408 U.S. at 251 (footnotes omitted). The death penalty is often considered a politically charged topic for elected officials, as well as judges who are subject to state elections. It is often "politics" that dictate the availability or invocation of the death penalty. See, e.g., Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759 (1995).

21. Id. (footnote omitted).

22. This reference is to the 1924 murder trial in Chicago of Richard Loeb, an 18-year-old post-graduate student at the University of Chicago as well as the youngest graduate of the University of Michigan, and his lover, 19 year old Nathan Leopold, a law student at the University of Chicago. The defendants were sons of wealthy Chicago families and self-proclaimed geniuses, who were charged with bludgeoning to death the 14-year-old son of a millionaire neighbor of the defendants who was Loeb's cousin. The defendants wanted to commit the "perfect murder" merely for "the thrill of it." Thus, they randomly picked the young boy as their victim. The trial was referred to as the "The Trial of the Century" and the defendants' families retained the legendary attorney Clarence Darrow to represent them for an agreed-upon fee of $100,000. Darrow unexpectedly pled the defendants guilty to the murder at the start of the trial, thus sparing the defendants the wrath of a jury and allowing the presiding judge to determine the sentence. Darrow's impassioned allocution spared the defendants the death penalty. Both defendants received life sentences for the murder and 99 years for kidnapping. Loeb was murdered in prison in 1936. Leopold had his sentence reduced in gratitude for his contributions in testing malaria during the war and was paroled in 1958. He migrated to Puerto Rico and died in 1971. Darrow died in 1938 having collected only $40,000 of his fee. See Edward W. Knappman, Great American Trials 307-11 (1993).

23. Furman, 408 U.S. at 251-52.
mained an option and could be implemented if the states could devise a statute that provided more guidance to the jurors and court on how it was to be implemented.

Four years after Furman v. Georgia, the Court reviewed the death penalty statutes of three states and approved Georgia’s capital punishment statute in Gregg v. Georgia as fulfilling the Court’s mandate for guidance for the sentencing authority. The Court sanctioned Georgia’s invocation of capital punishment because the statute required the sentencing authority, before imposing the death penalty, to find at least one aggravating factor listed in the promulgated death penalty statute while considering the circumstances of the crime and the background of the defendant in mitigation of implementing the death penalty. The statute was found to be appropriate since it also provided for judicial review of the decision. This decision cleared the way for the reimposition of the death penalty as a punishment option in this country. The states and the federal government did just that in the years that followed.

B. The Death Penalty as a “Magnet” for Minorities

Since Gregg v. Georgia, forty jurisdictions have passed statutes providing for capital punishment. This legislative action was recognized as “[t]he most marked endorsement of the death penalty for murder” There have been three hundred and two executions since

25. See McAllister, supra note 5, at 1052-53.
26. Gregg, 428 U.S. at 162-68.
27. Id. at 206-07.
29. Gregg, 428 U.S. at 179.
Gregg v. Georgia reinstated the death penalty in this country.\textsuperscript{30} Unfortunately, little has changed in the application of the death penalty since Furman v. Georgia.

Since 1976, black defendants have made up 39.4 percent of the defendants executed, Latinos have made up 16 percent, and one Native American was executed; meanwhile, whites made up almost 55 percent of the executed defendants.\textsuperscript{31} However, almost 83 percent of the 408 victims of those executed were white, while less than 13 percent were black, 3.43 percent were Latino, and 1.22 percent were Asian.\textsuperscript{32} This is true despite the fact that only 50 percent of the murder victims are white.\textsuperscript{33}

Of those executed since Gregg v. Georgia, 57.35 percent of the defendant/victim racial combinations involved a white defendant and a white victim, and 23.53 percent involved a black defendant and white victim.\textsuperscript{34} On the other hand, less than one percent of the defendant/victim combinations involved a white defendant and a black victim, while 11.52 percent involved a black defendant and a black victim.\textsuperscript{35}

Of the 3,046 inmates on death row, half are minorities.\textsuperscript{36} The cruelty of the death penalty takes on less of the random characteristics

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (1995) [hereinafter FACTS ABOUT THE DEATH PENALTY].
\textsuperscript{34} 1995 DEATH ROW, U.S.A., \textit{supra} note 28, at 3.
\textsuperscript{35} \textit{Id.} White defendants and Asian victims make up 0.49% of the executed death penalty cases since 1976, white defendants and Latino victims or other victims make up 1.22% of the cases, black defendants and Asian victims make up 0.49% of the cases, black defendants and Latino victims make up 0.24% of the cases, Latino defendants and white victims make up 1.96% of the cases, Latino defendants and Latino victims make up 1.71% of the cases, Latino defendants and Asian victims make up 0.24% of the cases, and the lone Native American executed had a white victim, which constitutes 0.24% of the cases. \textit{Id.}
\textsuperscript{36} One thousand two hundred and thirty five (40.54%) of the death row inmates are black, 234 are Latin (7.68%), 52 are Native American (1.71%), 24 are Asian (0.79%) and 25 are presently unknown (0.82%). One thousand four hundred and seventy six (48.46%) death row inmates are white. \textit{Id.} at 1.
of "lightning," as the Court noted in Furman v. Georgia, and more of the select characteristics of a "magnet." The cases involving black defendants and/or white victims "attract" the penalty more so than other cases. This is not to argue that the penalty is undeserved or deserved in any of the 302 instances in which it has been employed, but to note that the concerns expressed in Furman v. Georgia in 1972 are still present today.

In 1990, the United States General Accounting Office (GAO), in a report to Congress, did an evaluation of all potentially relevant state, local, and national studies on death penalty sentencing since the Furman decision to determine if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death. The GAO’s synthesis of the twenty-three relevant studies showed that race plays a role in sentencing. In the relevant studies, the GAO found that there was "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision." The report concluded that "[i]n 82 percent of the studies, [the] race of [the] victim was found to influence the likelihood of being charged with murder or receiving the death penalty, that is, those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." The study found that the race of the victim had the greatest influence at the earlier stages of the judicial process, such as the prosecutor’s decision whether to charge the defendant with a capital offense or to offer a plea to the defendant rather than proceed with the trial. However, the race of the victim was found to be an influence

37. Furman, 408 U.S. at 309-10.
38. The report was provided to Congress as required by The Anti-Drug Abuse Act of 1988, which called for the GAO to determine if the race of victim or defendant influences the imposition of the death penalty. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1 (1990) [hereinafter DEATH PENALTY SENTENCING].
39. Id. at 5-6.
40. Id. at 5.
41. Id. (footnote omitted).
42. Id. at 5-6.
on charging decisions in death penalty cases at all stages of the crimi-
nal justice system process. 43

The Court had already directly addressed the issue of racial dispar-
ity in death penalty sentencing in McCleskey v. Kemp. 44 McCleskey, a
black man, was convicted in Fulton County, Georgia in 1978 on two
counts of armed robbery and the murder of a white police officer. 45
McCleskey presented a statistical study showing that, in the state of
Georgia, defendants charged with killing white victims received the
death penalty more frequently than defendants charged with killing
black victims; that black defendants convicted of killing white victims
were much more likely to receive the death penalty than any other
black/white racial combination of defendants and victims; and that in
70 percent of the cases involving black defendants and white victims
the Georgia prosecutors have sought the death penalty (compared to 32
percent of the cases involving white defendants and white victims, 15
percent of the cases involving black defendants and white victims, and
19 percent of the cases involving white defendants and black vic-
tims). 46 The study "indicat[ed] that black defendants, such as
McCleskey, who kill white victims have the greatest likelihood of
receiving the death penalty." 47

The McCleskey Court found that these statistics only show "a
likelihood" that race entered into the decision to impose the sentence
of death on McCleskey. 48 Nevertheless, the Court found that "[t]here
is, of course, some risk of racial prejudice influencing a jury's decision
in a [death penalty] case." 49 According to the Court, "[a]t most,
the . . . study indicates a discrepancy that appears to correlate with
race. Apparent disparities in sentencing are an inevitable part of our
criminal justice system. The discrepancy indicated by [this] study is a
'far cry from the major systematic defects identified in Furman." 50

43. DEATH PENALTY SENTENCING, supra note 38, at 5.
45. Id. at 283.
46. Id. at 286-87.
47. Id. at 287.
48. Id. at 308.
49. McCleskey, 481 U.S. at 308.
50. Id. at 312-13 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)) (footnote omit-
The Court noted that any mode of implementing the death penalty "has . . . the potential for misuse."\textsuperscript{51} However, to eliminate the jury’s exercise of "difficult and uniquely human judgments that defy codification" or "the capacity of prosecutorial discretion to provide individualized justice" would create a capital punishment system, devoid of discretionary acts, that "would be totally alien to our notions of criminal justice."\textsuperscript{52} The Court noted that McCleskey’s challenge is applicable to all criminal punishment and all sorts of factors other than race, therefore without any limiting principal to his challenge the Court refused to recognize its validity.\textsuperscript{53} The Supreme Court, in essence, told minorities they must live with racially implemented death.

With \textit{McCleskey v. Kemp} the need for competent representation heightened. Moreover, those death penalty defendants placed on trial in the south faced steeper challenges. Southern states have executed over 80 percent of the death row inmates since 1976.\textsuperscript{54} The number of executions in the south have earned it the moniker of the "Death Belt." The propriety of death sentences in the South have come under question since state courts in this area have had difficulty providing constitutionally acceptable trials,\textsuperscript{55} and, the states themselves seek strict enforcement of procedural bars to state appellate review of death penalty convictions in order to carry out the sentences.\textsuperscript{56} This Article describes a number of cases in the South where the states used constitutionally impermissible tactics to secure convictions. Competent representation becomes paramount for the death row defendant in the face of this sort of effort by the states to "ramrod" death penalty convictions through trial and post-conviction review. This "Death Belt" has

\textsuperscript{51} Id. at 313 (quoting Singer v. United States, 380 U.S. 24, 35 (1965)).
\textsuperscript{52} Id. at 311-12 (citation omitted).
\textsuperscript{53} Id. at 314-19; McAllister, \textit{supra} note 5, at 1087.
\textsuperscript{54} The states, in order of number of executions, are: Texas (100), Florida (34), Virginia (27), Louisiana (22), Georgia (20), Alabama (12), Arkansas (11), North Carolina (8), South Carolina (5), and Mississippi (4). 1995 \textit{Death Row, U.S.A.}, \textit{supra} note 28, at 4-10.
\textsuperscript{56} Id. at 682-83.
been described as an area "where fairness is more like the random flip of a coin than a delicate balancing of the scales of justice." 57

C. The Lessons of Furman v. Georgia Revisited

Recent legal history also echoes the lesson of Furman v. Georgia: the death penalty is reserved for those without adequate representation in court. 58 Two of the most infamous criminal murder trials in history, the trials of O.J. Simpson and Susan Smith, took place during the past year. The O.J. Simpson trial demonstrated that the impact of competent, aggressive representation at the earliest stages of the criminal justice system cannot be underestimated. The Susan Smith trial demonstrated how an accused benefits from knowledgeable representation in the courtroom.

The world was captivated by the trial of People v. Simpson. 59 The defendant, a former college Heisman Trophy winner from the University of Southern California, a well-known former professional football player and television and movie personality, was charged with the brutal murders of his estranged white wife and a local white waiter. Simpson, who is black, had accumulated and had access to substantial financial assets. 60 He, therefore, had the financial resources to assemble the so-called "Dream Team" of criminal defense attorneys to represent him. 61 Simpson, who was eventually acquitted, 62 never faced the prospect of the death penalty because the Los Angeles County prosecutor’s office made the decision before trial not to seek the

58. 408 U.S. at 251-52.
60. Gale Holland, For Simpson, Money Picture Not That Dim, USA TODAY, Oct. 23, 1995, at 3A.
61. Id.
death penalty in this case. Presumably the formidability of Simpson’s defense team played a role in that decision.

Susan Smith was a young white woman from South Carolina who publicly pleaded for the return of her two young sons, ages three and one, who she had said were carjacked by a young black assailant, only later to confess that she had sent her offspring to a watery grave. Concern for the safety of the young boys gripped the nation before Smith’s confession and the cruelty of her acts shocked the collective consciousness of the country after her admission. Smith faced the death penalty, yet she eluded the electric chair despite the senselessness of the crime, the vulnerability of her victims, and the cold-blooded carelessness of her original pleas to the public. Smith, who did not testify, had an experienced death penalty attorney who expertly gave the jury her background of depression, abuse and abandonment at a young age, her father’s suicide when she was six years old, molestation by her stepfather when she was young and a sexual relationship with him that continued until just before the murders, her own suicide attempts and extramarital affairs. Smith’s attorney understood the use of mitigating factors in the sentencing phase of a death penalty trial, and expertly provided them to the jury. All twelve jurors voted to spare her life, when only one juror was needed to prevent the implementation of the death penalty. Smith is now serving a life sentence. Smith had the luxury of a family that could afford a skilled and competent death penalty attorney to help her with her case.


68. Burritt & Warner, supra note 64.

Simpson and Smith could afford competent counsel. They were spared the death penalty. The aura of Loeb and Leopold was present again with these two trials.  

III. REPRESENTATION IN DEATH PENALTY CASES

A. Death Penalty Procedures are Difficult to Master

Because of the enormity of the penalty, and "the Eighth Amendment's requirement of heightened reliability in capital cases," death penalty litigation has evolved into a practice that is not only ominous in its final outcome, but also "extraordinarily complex... for both the courts and the trial attorneys." Death penalty trials contain unique procedures such as special jury voir dire questions, presentation of evidence in the guilt phase and in a separate punishment phase, and special penalty procedures in the punishment phase. Moreover, appellate review may involve proportionality challenges under state as well as federal post-conviction proceedings; challenges to the competency of trial counsel to fairly and adequately represent the death row inmate; and issues of when stays of execution may be granted to allow additional time for consideration of the merits of appellate petitions. Death penalty post-conviction litigation has the complicated issues of procedural default of possible appellate claims,

70. Another statistical bias of capital punishment is that it is a crime reserved almost exclusively for men. Although 2,000 women commit murders each year, only about 1% of them are sentenced to death, and about 98% of those convictions are overturned on appeal. Only one woman has been executed since the death penalty was reinstated in 1976 (in North Carolina in 1984) and just 29 women have been executed in the past 278 years. Gerrie Ferris et al., The Susan Smith Case: Women Who Kill Usually Escape Ultimate Penalty, ATLANTA CONST., July 29, 1995, at A10. Of the 3,046 death row inmates today, only 49 are women (1.61%). 1995 DEATH ROW, U.S.A., supra note 28, at 1. Again, the death penalty appears to be reserved for defendants with certain characteristics.


72. McAllister, supra note 5, at 1054.

73. Robbins, supra note 71, at 55.

74. Id.; see also Barefoot v. Estelle, 463 U.S. 880 (1983).
exhaustion of state judicial remedies, and abuse of the writ of habeas corpus. 75

The crime itself is usually “horrible” with “compelling” evidence of the defendant’s guilt. 76 This focuses the attorney’s job on the penalty phase and trying to save the client from a death sentence. 77 After the state demonstrates the “aggravating circumstances that demonstrate the defendant should forfeit his life, the death penalty attorney must present evidence to show ‘mitigating’ circumstances such as the defendant’s personal background, mental capacity and/or character, led him to commit the crime and therefore the death penalty is inappropriate.” 78 This phase can be “unbelievably brief,” 79 following immediately at the conclusion of the guilt phase, with “no opening statements, no cross-examination and . . . no witnesses.” 80 However, the penalty phase is vitally important for the death capital defendant, since almost any aspect of a defendant’s character, background, life, or personal history may be used in mitigation of imposing the death penalty. 81

Counsel must be prepared to defend the death penalty client at this juncture. Although counsel may not be able to prove innocence in the trial phase, it may be possible to literally save the client’s life in the penalty phase. However, if counsel is untrained or unprepared for this type of litigation, the death penalty phase serves no function and a sentence of death is the inevitable outcome.

The unique procedures for the imposition of this punishment demand that attorneys with special training handle them. The complexity and stakes involved in death penalty litigation make it beyond the capacity of even the most well-meaning of attorneys to undertake. As death penalty veteran litigator Millard Farmer, Jr. noted, “[i]t’s not that

75. Robbins, supra note 71, at 55.
76. Coyle et al., supra note 57, at 30.
77. Id.
78. Id. at 31.
79. Id. The National Law Journal authors found that death penalty trials may take as little as one to two days, or up to two weeks to two months with “sophisticated indigent defense systems,” followed by a penalty phase that may take only several hours, and in one case only 15 minutes. Id.
80. Id.
the lawyer gets into trial and offers less skill than he is capable of
giving. But it would be just like appointing me to play for the Chicago
Bulls — it’s beyond my capability."82

The states recognize the need for such specialization and training
and maintain well-funded units with decently compensated attorneys
who know the death penalty system and learn to handle the complexi-
ties of the trials and post-conviction appeals; however, all of these
attorneys are the state’s prosecutors.83 Most states do little or nothing
to ensure that those who take on death penalty representation are up to
the task, have the resources to mount a defense, or are properly com-
pensated for their efforts. The state’s efforts are reflected in death
penalty counsel’s performance.

B. The Nature of Death Penalty Crimes often Leads to Unwarranted
Outcomes

The crimes involved in death penalty trials are heinous, gruesome
offenses against humanity. In one observation of death penalty litiga-
tion before the Supreme Court, it was noted:

One of the most striking impressions is the utter savagery of the
crimes involved . . . . Some of the truly gruesome crimes stand out. [T]he
Texas convict . . . [who] was convicted of brutally raping and murdering
a young housewife . . . . [A] gash was found in the victim’s stomach, and
there were allegations that the assailant’s penis had been inserted into the
wound. A Georgia convict had killed his homosexual lover by jamming a
screw driver into his ear and twisting it; he then tried to dispose of the
body by dismembering it and flushing it down the garbage disposal.

Just as terrifying are the routine acts of violence — the mindless
shootings of clerks in convenience stores, or the aimless beatings and
killings of feeble old ladies . . . . In one case . . . two young Georgians
robbed a cabdriver. They stripped [him] at knife point and put him the
trunk, laughed as he pleaded for mercy, and eventually drove the car into
a pond.

82. Coyle et al., supra note 57, at 30.
83. Stephen B. Bright, Counsel for the Poor: The Death Sentence Not For The Worst
[T]here rarely seemed to be any doubt about whether the defendant had committed the crime for which he had been sentenced to death.  

The sheer depravity of the crimes makes the outcome of the trials almost predictable. The violent nature and sensational circumstances guarantee community pressure that the assailants be punished and the sense of outrage be satiated. When a minority defendant may not be viewed as a member of the community, or when the victim is white and may be viewed more as one of the community, the sense of community outrage is heightened. In these circumstances the death penalty essentially becomes the punishment of choice.

Nonetheless, the defendant is still guaranteed a fair and impartial trial. The defendant still has the protections of the Constitution and is considered innocent until the government proves his guilt beyond a reasonable doubt. Competent, aggressive representation can spare a defendant the death penalty by focusing the court and jury on relevant issues and defusing the inflammatory aspects of the trial. However, without competent knowledgeable counsel, the urgency and notoriety of a death penalty trial often leads to a verdict that is not supported by the evidence.

Certainly, the prospect that an individual may die for a crime that he or she did not commit should heighten the desire for effective representation in death penalty cases. A society should strive to ensure that when the death penalty is implemented, the courts have gotten it right. In fact, people have been sentenced to death by our justice system for crimes they have not committed.

There have been forty-eight people released from death row since 1970 with significant evidence of their innocence. Forty-three inmates were released from death row between 1973 and 1993 who were

85. U.S. CONST. amend. V.
86. U.S. CONST. amends. V, VI.
subsequently acquitted, pardoned or had their charges dropped by the government.\textsuperscript{88} Since 1900, twenty-three people have been executed in this country who were demonstrated to be innocent of the crimes for which they were convicted after their executions.\textsuperscript{89} The over-representation of minorities on death row today has to make society pause and wonder if race is a deciding factor in a defendant’s sentence of death. Further, evidence of an innocent being sentenced to death raises the question of what defense counsel was doing during trial. As the O.J. Simpson and Susan Smith cases have recently taught us, the effective attorney can spare a defendant from a sentence of death. However, too often, it is the indigent death penalty defendant who is provided the ineffective attorney.

\textbf{C. Death Penalty Trial Counsel are often Ineffective}

The quality of representation of a capital defendant can be the determining factor whether there is a fair outcome in a death penalty case. Justice Thurgood Marshall made the following comments in 1985, when discussing the importance of effective, knowledgeable counsel in death penalty representation:

\begin{quote}
[T]he unique finality of a capital sentence obliges society to assure that capital defendants receive a fair chance to present all available defenses, and that they have at least the same opportunities for acquittal as noncapital defendants.

The system now in place, however, at times affords capital defendants a lesser opportunity to present their cases than virtually any other litigant.

\ldots

[C]apital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases. Death penalty litigation has become a specialized field of practice, and expensive. And even the most well-intentioned attorneys often are unable to recognize, preserve and defend their clients' rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases.
\end{quote}

\begin{itemize}
\item \textsuperscript{88} Linda Monk, \textit{Executing the Guilty Costs Too Much}, BALTIMORE SUN, November 9, 1993, at 11A.
\item \textsuperscript{89} \textsc{facts about the death penalty}, supra note 33, at 4 (citing RADELET \& BEDAU, IN SPITE OF INNOCENCE (1992)).
\end{itemize}
Counsel, whether appointed or retained, often are handling their first criminal cases, or their first murder cases. When confronted with this, the prospect of a death penalty is ominous.

Though acting in good faith, they often make serious mistakes. Thus, in capital cases . . . counsel have simply been unaware that certain death penalty issues are pending before the appellate courts and that the claims should be preserved; that certain findings by a jury might preclude imposition of a death penalty; or that a separate sentencing procedure or phases of the litigation must follow a conviction. The federal reports are filled with stories of counsel who presented no evidence in mitigation of their clients' sentences, simply because they did not know what to offer or how to offer it, or had not read the state sentencing statute . . . .

[C]apital trials are often defended by relatively young and inexperienced attorneys, without investigative sources and with no real expectation that the defendant may actually face execution.

Trial counsel’s lack of expertise takes a heavy toll. A capital defendant seeking postconviction relief is, today, caught up in an increasing pernicious visegrip. Pressing against him from one side is the Supreme Court’s continual restriction of what Federal Courts can remedy on postconviction review . . . .

Pressing against the capital defendant from the other side is the Supreme Court’s restrictive definition of what constitutes unconstitutional ineffective assistance of counsel at trial . . . . The Court has not yet recognized that the right of effective assistance must encompass a right to counsel familiar with death penalty jurisprudence at the trial stage. Instead, in all but the most egregious case, a court cannot or will not make a finding of ineffective assistance of counsel because counsel has met what the Supreme Court has defined as a minimal standard of competence for criminal lawyers.

As a consequence, many capital defendants find that errors by their lawyers preclude presentation of substantial constitutional claims, but that such errors — with the resulting forfeitures of rights — are not enough in themselves to constitute ineffective assistance.

To quote a recent commentary, “There is little the experienced lawyer can do but regret the failure to preserve rights and to go through the paces of yet another futile round of litigation.”

Justice Marshall’s observations have been proven all too true.91

91. In a capital murder trial in Alabama in November of 1987, James W. Smith was
The episodes of inexperienced and unqualified counsel standing between a defendant and execution are legion. In addition, the trials are ordinarily sensational because of the nature of the crime, bringing the spotlight of publicity to the calculus of a complex case and a charged courtroom.\textsuperscript{92} In this mix, attorneys without the skills to handle the trial leave their clients defenseless and the imposition of the death penalty becomes almost inevitable. Unfortunately, examples abound.

"PLEASE HELP. DESPERATE."

Although this might be an appropriate cry for a death row defendant, this plea came from Judge Raymond E. Lape, Jr. in a notice he posted in the Kenton County, Kentucky courthouse in 1988.\textsuperscript{93} Judge Lape was looking for an attorney to handle the abduction/murder/rape death penalty trial of defendant Gregory Wilson.\textsuperscript{94} The court was authorized to pay only $1,250 for the trial and had difficulty attracting attorneys for the effort.\textsuperscript{95} Attorney William Hagedorn stepped forward to represent Wilson.\textsuperscript{96} He was a lawyer without an active practice, without training in death penalty cases,\textsuperscript{97} and with a reputation for

\begin{footnotesize}
\begin{enumerate}
\item[92.] In Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), the Eleventh Circuit outlined the prejudicial pretrial publicity that preceded the sensational death penalty trial of four defendants charged with killing a family in a small, rural Georgia town. In one newspaper account it stated, "[a]pparently none of the eight lawyers named want the job, but under the law in such cases, the judge must appoint defenders for the accused, and there are stiff and severe penalties for attorneys who refuse." \textit{Id.} at 1494. One court-appointed attorney was quoted as stating that "[t]his is the worst thing that's ever happened to me professionally . . . ." \textit{Id.} at 1503. One attorney was quoted in an article as stating that the appointment would cost him "money and friends." \textit{Id.} at 1504. In another part of the of the relentless pretrial coverage an attorney was quoted by a paper on his appointment as stating "I've done everything I can to get out of it. It's worse than a dose of Colomel [a laxative] but I have to take it." \textit{Id.} at 1522.
\item[93.] Saul, \textit{supra} note 57, at 4.
\item[94.] \textit{Id.}
\item[95.] \textit{Id.}
\item[96.] \textit{Id.}
\item[97.] The appeal record in the case indicated that Hagedorn had previously tried fifteen
\end{enumerate}
\end{footnotesize}
unethical conduct. Hagedorn had stolen property recovered in his law office, appeared in court drunk, and had been held in contempt for missing a court hearing. However, since the court was “desperate,” Hagedorn was appointed. Wilson was convicted and sentenced to die in the state’s electric chair.

Black defendant Aden Harrison, Jr. was tried for murder and faced the death penalty in Atlanta, Georgia in 1986. Harrison’s lawyer, 83-year-old James Venable, “slept a ‘good deal’ of the time” according to the trial judge. What Harrison did not know at the time was that Venable had been a member of the Ku Klux Klan since 1923, and was a former imperial wizard of the racist hate group. Another lawyer, William Sykes, Jr., appointed to “assist” Venable because of Venable’s “reputation, advanced age, and numerous lapses of memory and judgment,” unsuccessfully attempted to withdraw from the case because “he sensed serious problems with Venable’s representation” of Harrison. On the first day of the trial in 1984, Sykes learned that he would be giving the opening statement and trying the case “virtually on his own.” It was Sykes’ first death penalty case — Harrison was convicted and sentenced to death. Venable later surrendered his law license after the state began disbarment proceedings, and Harrison was eventually granted a new trial. While Harrison’s case may be extreme, such incompetence is not unusual.

98. Saul, supra note 57, at 4.
99. Id.
100. Id.
101. Wilson, 836 S.W.2d at 876.
103. Id.
104. Id.
105. Id.
106. Id.
109. Id.
110. There are enlightening examples in WITH JUSTICE FOR FEW, supra note 69, and Bright, supra note 83.
During the 1982 murder trial of Jerry White in Orlando, Florida, the judge called counsel to his chambers daily and had the state’s trial prosecutor monitor defense attorney Emmett Moran’s breath for signs of alcohol usage. The prosecutor, in a post-conviction affidavit, stated that Moran appeared confused and fatigued during the trial, was frequently late for proceedings, even though the court accommodated him with late starting times, and frequently complained about not feeling well and being fatigued, particularly in the afternoon. Moran’s investigator stated in a post-conviction affidavit that Moran would shoot up cocaine during the trial recesses, and would use speed, alcohol, Quaaludes, morphine and marijuana after trial. Moran admitted being so tired and overwhelmed at trial that he was unable to make use of his client’s extremely low IQ test scores as a mitigating factor against implementation of the death penalty. Moran’s health problems affecting his trial judgment were not enough to declare him ineffective. White sits on death row today.

Judy Haney, on trial for the contract murder of her husband in 1989, was provided a court-appointed attorney who was held in contempt of court and jailed during the trial for appearing at the trial intoxicated. The counsel also failed to present to the jury hospital records showing her as a battered spouse — despite being informed by Haney about them three months prior to the trial. These records may have helped convince the jury that she should be spared the death penalty.

Jack House stood trial in 1973, facing the death penalty for the murder of two boys in Atlanta, Georgia. He was represented at trial by a husband/wife team, Ben and Dorothy Atkins. In the habeus corpus

111. Coyle et al., supra note 57, at 30.
114. White, 664 So. 2d at 245-46 n.4.
115. Id. at 244.
117. Haney, 603 So. 2d at 377.
118. WITH JUSTICE FOR FEW, supra note 69, at 8.
petition reviewed by the Eleventh Circuit after House’s conviction, the
court found Ben and Dorothy Atkins sought no discovery from the
prosecution or police. They did not know of any blood spot evidence
until the trial. When the state presented evidence showing blood found
on House’s pants was the same type as one of the victims, the two
defense counsel were unable to present evidence showing that the
blood was also the same type as House’s wife.119

The failure of defense counsel to obtain rudimentary discovery is
even more incredible upon learning the reasons behind this failure:
Dorothy Atkins stated that she was “too busy”120 and barely spoke to
their client.121 The attorneys also were unaware of a court-ordered
pretrial psychiatric examination that showed their client to be schizo-
phrenic.122 During the trial, one of the attorneys left the courtroom
during the testimony of a key prosecution witness whom he later cross-
examined.123 Defense counsel even failed to present evidence at the
sentencing phase of the trial because they were unaware of the sentenc-
ing phase, having failed to read the death penalty statute before or
during the trial.124 After learning of the sentencing phase, counsel
failed to request a continuance.125 Ben Atkins made a closing argu-
ment consisting of four sentences, making no reference to any mitigat-
ing circumstances or to why the evidence did not support a finding of
aggravating circumstances to support the death penalty.126

After House was sentenced to death, counsel filed “standard mo-
tions taken from a form book” for a new trial, failing to identify three
witnesses known to the Atkins who had seen the victims after the
state’s alleged time of death, which would have provided their client

119. House presented evidence at the trial that he had sexual intercourse with his wife
on the morning that the murder victims’ were found, and had kept his pants on during
intercourse. His wife was bleeding from her menstrual cycle at the time. House v. State,
205 S.E.2d 217, 219 (Ga. 1974).
120. House v. Balkcom, 725 F.2d 608, 617 (11th Cir. 1984).
121. WITH JUSTICE FOR FEW, supra note 69, at 8.
122. Id.
123. Id. at 619.
124. Id.; In re Ben S. Atkins, 320 S.E.2d 146 (Ga. 1984).
125. Atkins, 320 S.E.2d at 146.
126. Id. at 146-47.
with an alibi. 127 To compound matters, neither of the Atkins appeared to argue the motion for a new trial. 128 The Eleventh Circuit, in setting the death sentence aside, found that Ben and Dorothy Atkins, representing a man on trial for his life, “qualified only as spectators,” based on their woefully inadequate preparation. 129 In ordering Ben Atkins disbarred, the Georgia Supreme Court noted that Ben Atkins’ representation of House was “the functional equivalent in every respect of having no representation at all.” 130 The Atkins’ representation of House was found to be constitutionally ineffective. 131

Gary Nelson was placed on trial in 1980 for the 1978 murder of an eight-year-old girl and faced the death penalty. 132 His attorney at trial was a sole practitioner who had never before tried a death penalty case. 133 Nelson’s attorney was paid “between $15 and $20 per hour,” was denied a request for co-counsel as well as funds for an investigator, and failed to request funds for an expert witness. 134 The attorney’s closing argument on behalf of a man facing death consisted of 225 words. 135 Nelson’s appeal of his death sentence conviction was taken over by a private law firm and he was eventually cleared of all charges and released. 136 Although his trial counsel was eventually disbarred, 137 Nelson spent eleven years on Georgia’s death row. 138

The trials of John Eldon Smith 139 and his wife, Rebecca Akins Machetti, 140 poignantly demonstrate the cruel arbitrariness of the death penalty and the profound impact of inexperienced counsel on death

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127. *House*, 725 F.2d at 613; WITH JUSTICE FOR FEW, *supra* note 69, at 8.
128. *House*, 725 F.2d at 613.
129. *Id.* at 619.
131. *House*, 725 F.2d at 619.
132. WITH JUSTICE FOR FEW, *supra* note 69, at 8.
133. *Id.*
134. *Id.* at 8-9.
135. *Id.* at 9.
137. *Nelson*, 405 S.E.2d at 253 n.3.
penalty litigation. Smith and Machetti were convicted and sentenced to death for the 1974 shotgun shootings of Machetti's former husband and his wife in Bibb County, Georgia. The two defendants were tried in separate trials, starting within weeks of one another in the same county; however, both trials were heard by juries with the same constitutionally impermissible flaw. Both defendants were convicted and received the death penalty, but only Machetti's counsel challenged the jury composition. Smith's attorneys "were unaware of a United States Supreme Court decision decided only five days before Smith's trial began" on the issue. Machetti was successful in her habeus corpus petition to the Eleventh Circuit and received a new trial. In her retrial, with a constitutionally permissible jury, she received a sentence of life imprisonment. Smith's attorneys failed to preserve the identical issue and the Eleventh Circuit declined to consider it in his habeas corpus petition. Smith was executed, although not "the mastermind in this murder." The two defendants conspired and committed the same crime; yet, because of the difference in the competence of counsel for each, one was executed, while the other's life was spared. In his dissent, Justice Hatchett lamented that "[t]he fairness promised in Furman v. Georgia ... has long been forgotten."

John Eldon Smith has not been alone in suffering such fatal mistakes made by death penalty counsel. Repeatedly it is the indigent death penalty defendant who has the worst representation. For instance, six of the twenty-six defendants on Kentucky's death row in December, 1989, had lawyers who were eventually disbarred or had their licenses suspended. From the time of Gregg v. Georgia to 1990, the trial lawyers who represented death row inmates in Alabama, Georg-

141. Id.
142. The Georgia jury selection system systematically excluded women from the grand juries and trial juries seated in the state. Id. at 237-42; Bright, supra note 83, at 685.
143. Bright, supra note 83, at 685 (footnote omitted); Smith, 715 F.2d at 1471.
144. Machetti, 679 F.2d at 241-42.
145. Id.
146. Smith, 715 F.2d at 1476 (Hatchett, J., dissenting).
147. Id.
148. Id.
149. See, e.g., Bright, supra note 83; WITH JUSTICE FOR FEW, supra note 69.
150. Saul, supra note 57, at 8.
Georgia, Florida, Louisiana, Mississippi and Texas were disbarred, suspended or otherwise disciplined at a rate three to forty-six times the discipline rate for attorneys in those states.  

In a survey in 1990, over half of the defense counsel questioned said that they were handling their first death penalty trials when their clients were convicted. That same survey, in examining death penalty trials, found that in one quarter of the trials "no effort . . . was expended to present mitigating evidence at the penalty phase." Surveys indicate that federal appellate courts have found constitutional flaws in 40 percent to 73 percent of the state death penalty cases reviewed on the merits. These cases involve not only ineffective assistance of counsel, but also constitutional flaws such as prosecutorial misconduct and illegally gained confessions, which further emphasize the need for effective defense counsel.

D. Ineffective Counsel are also Found in Post-Conviction Proceedings

Alarmingly, these ineffective practices are found on appeal too. For example in Morgan v. Zant, the counsel for a death penalty defendant filed no notice of appeal after his client’s conviction. He eventually filed a brief after he was threatened with sanctions by the Georgia Supreme Court; however, that brief contained only five pages of argument and failed to address the trial court’s sentencing charge to the jury which ultimately led to a new sentencing hearing. Then, he failed to heed the request of the Georgia Supreme Court to file a supplemental brief on the adequacy of the trial court’s penalty charge, and also failed to attend the oral argument before the Georgia Supreme Court.

152. Id.
153. Id.
154. Id. Robbins, supra note 71, at 55 n.113 (citing brief amicus curiae for the NAACP Legal Defense & Education Fund in Barefoot v. Estelle, 463 U.S. 880 (1983)).
155. Id.
156. 743 F.2d 775 (11th Cir. 1984), overruled by Peek v. Kemp, 784 F.2d 147g.
157. Id. at 780.
Similarly, the attorney for Larry Heath, also a death penalty defendant, filed a brief with the Alabama Court of Criminal Appeals that was only six pages long and a brief with the Alabama Supreme Court which was only one page; each brief contained but one argument.\(^\text{158}\) Heath's counsel failed to appear for oral argument in the Alabama Supreme Court and his briefs were deemed deficient by the Eleventh Circuit, and would not have been filed by knowledgeable death penalty litigators.\(^\text{159}\) Nevertheless, the Eleventh Circuit found that Heath was not prejudiced by his appellate counsel.\(^\text{160}\) In 1992, Heath was executed by the state of Alabama.\(^\text{161}\)

The attorneys attracted to state death penalty trial appointments are also those attracted to handle the post-conviction appeals. Frequently, the inadequate death penalty trial counsel continues to serve as the death penalty post-conviction counsel. The defendant then is divested of what may be his only real post-conviction argument: ineffective assistance of trial counsel.

E. Ineffective Assistance of Counsel Wastes Time and Resources

Inadequate practice in death penalty litigation results in unnecessary expense and waste of resources. Trials conducted improperly because of poor and inadequate representation by defense counsel end up becoming retrials or, a rehearing, as in *Morgan v. Zant*.\(^\text{162}\) Either way, because of the state's failure to ensure adequate, competent representation at the initial trial, it ends up paying for the time of the court, its personnel, the prosecutor and a different, if not competent, defense counsel for the second trial or rehearing.

The prosecutor's goal is to do the trial once and do it right, that is, to make sure a case is tried properly and correctly in the first trial to eliminate appellate issues that would require the case to be remanded for a retrial or dismissed. This should be the goal of the criminal

\(^{158}\) Heath v. Jones, 941 F.2d 1126, 1131 (11th Cir. 1991).
\(^{160}\) Heath, 941 F.2d at 1132.
\(^{161}\) McFarland, 114 S. Ct. at 2787.
\(^{162}\) 743 F.2d 775 (11th Cir. 1984), overruled by Peek v. Kemp, 784 F.2d 147g.
justice system in general and the death penalty courts in particular. Ineffective defense counsel defeats this goal. By failing to provide defense counsel competent for the task of the death penalty trial and/or post-conviction appeal, the state ensures that the prosecutor is inefficient and must spend limited resources on one case for multiple trials and post-conviction appeals. Moreover, the trial judge is unable to move the case off the court’s docket, and the court system, as a result, bogs down. This inures to the ultimate detriment of the state’s taxpayers.\(^{163}\) Taxpayers pay the bill for the death penalty trial itself, including court-appointed defense counsel.\(^{164}\)

Despite the expenditure of taxpayer money in death penalty cases, it is not always allocated in a manner to ensure that attorneys who are capable of handling the capital trial are compensated at a rate that would encourage their participation in the system. It is the lack of resources and effort to attract competent death penalty trial counsel for the defense that weakens the system, causing retrials and appellate delays. Moreover, failing to compensate appointed trial counsel is unfair to the individual placed on trial for his life, since he ordinarily lacks the resources to make sure he is properly defended.

\textit{F. With Death Penalty Counsel, You Will often Get What You Pay for}

The low statutory fees offered by states to represent indigent death penalty cases act as a disincentive to those attorneys who are the most capable of handling the cases.\(^{165}\) Counsel are often paid less, if any-

\begin{itemize}
  \item 163. See, e.g., Robbins, \textit{supra} note 71, at 70 ("Jurisdictions that do not provide for more than inadequate defense of at the initial stages of capital litigation are being penny wise and pound foolish; they will likely pay the price later on in the process, in terms of both money and time.").
  \item 164. See \textit{infra} notes 331-54 and accompanying text (discussing "The False Economy of Eliminating the PCDOs").
  \item 165. For example, Mississippi has a flat, unwaivable fee cap of $1,000 per death penalty trial. \textsc{Miss. Code Ann.} \textsection{} 99-15-17 (1994 & Cum. Supp. 1987). This is the equivalent of about $5 per hour for many lawyers. Coyle \textit{et al.}, \textit{supra} note 57, at 30. Florida and South Carolina limit their fees to $3,500, although in South Carolina the attorney may petition the court to be paid more. \textsc{Fla. Stat. Ann.} \textsection{} 925.036(2)(d) (West 1985); \textsc{S.C. Code Ann.} \textsection{} 17-3-50 (Law. Co-op. 1976 & Supp. 1993).  
\end{itemize}
thing at all, for post-conviction representation.\textsuperscript{166} In the state of Texas, even though fees ranged widely, attorneys' fee requests were frequently cut by the courts.\textsuperscript{167}

It is difficult to attract the best and the brightest of the legal profession to a practice that will not compensate for representation of indigents in one of the most difficult practices in the profession. Judge Lape, of Kenton County, Kentucky, was provided only $1,250 to pay a court-appointed attorney to handle the abduction/murder/rape death penalty trial of defendant Gregory Wilson in 1988.\textsuperscript{168} This amount would not properly compensate a conscientious defense counsel. As discussed above, the attorney who finally stepped forward proved to be less than adequate for the task.\textsuperscript{169}

Capital defense attorneys also find that they simply do not have the investigative and expert support to conduct a proper defense because the state does not provide the funding that is required. In 1994, Justice Blackmun noted that:

Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. Louisiana limits the compensation for court-appointed capital-defense counsel to $1,000 for all pretrial preparation and trial proceedings. Kentucky pays a maximum of $2,500 for the same services. Alabama limits reimbursement for out-of-court preparation in capital cases to a maximum of $1,000 each for the trial and penalty phases . . . . Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense. A recent survey by the Mississippi Trial Lawyers' Association estimated that capital-defense attorneys in that State are compensated at an average rate of $11.75 per hour . . . . Compensation rates of $5 per hour or less are not uncommon . . . . The pros-

\textsuperscript{166} Robbins, \textit{supra} note 71, at 77.


\textsuperscript{168} Saul, \textit{supra} note 57, at 4.

\textsuperscript{169} \textit{Id}. 

https://researchrepository.wvu.edu/wvlr/vol98/iss3/10
pect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney’s zealous representation of his client.\footnote{170}

The low statutory fees make it unrealistic to believe that the lawyers who agree to take on a death penalty case will be willing to put in the time and effort it takes to properly handle a trial. Moreover, even though investigators and experts are critical to a proper investigation, the states rarely provide adequate funding to accomplish proper pretrial and post-conviction investigation.\footnote{171} Requests for funds for investigators and experts are frequently denied by courts.\footnote{172} For example, Mallory Holloway represented Randall Hafdahl in a death penalty trial in 1985 in Amarillo, Texas.\footnote{173} Judge H. Brian Poff, Jr. advised Holloway not to move for funds for an investigator since he had already taxed the county’s resources by insisting on co-counsel.\footnote{174}

Death penalty attorneys frequently have to spend substantial sums out-of-pocket for expert and investigative services.\footnote{175} In a survey of volunteer attorneys who handle collateral death penalty appeals in twenty-four states, it was found that they incurred an average of more than $10,000 in out-of-pocket expenses and spent a median of 665 hours on each case.\footnote{176} In Texas, it was found that post-conviction counsel spend an average of $15,627 per case in out-of-pocket expenses, and some counsel spend as much as $70,000 for these services on a case.\footnote{177} These types of expenditures could severely impair a law firm, and ruin a solo practitioner. With this sort of commitment of

\begin{footnotes}
\item[171] Id. at 2572.
\item[172] Coyle et al., supra note 57, at 30.
\item[174] Id.
\item[176] Linda Greenhouse, Supreme Court Roundup: Right to Death-Row Lawyer Curbed, N.Y. TIMES, June 24, 1989, at 8.
\item[177] Id.
\end{footnotes}
time and expense for appellate death penalty work, it is difficult to find attorneys willing to jump into the fray.\textsuperscript{178} Needless to say, it hardly works to attract the best of the bar to the practice.

G. States Lack Effective Minimum Standards to Ensure Representation by Qualified Counsel

Most states have such minimum standards for attorneys to meet to be appointed to death penalty cases that unskilled counsel are appointed. James Bell of Jackson, Mississippi, indicated, “I got on the [capital appointment] list my second year out of [law] school because I won some tough cases and [got] some respect. Well, my client got executed. I specialized in criminal defense, but I’ll tell you what: this is not criminal defense.”\textsuperscript{179}

In Alabama, appointed counsel is required to have five years active criminal practice.\textsuperscript{180} However, such a standard does little to ensure competency in a state with many rural areas where criminal court meets infrequently and criminal dockets are dominated by misdemeanors.\textsuperscript{181} In Louisiana, the court need only appoint an attorney who has been a member of the bar for five years, without regard to criminal experience;\textsuperscript{182} the court may appoint someone with “less experience” as assistant counsel.\textsuperscript{183} The states of Texas, Mississippi and Florida have no state-wide standards, while Georgia’s standards are unenforced by the courts.\textsuperscript{184}

In 1981, before an all-white jury in Mississippi, Bobby Caldwell, a black defendant, faced the death penalty for the robbery and murder of

\begin{thebibliography}{18}
\bibitem{178} Some courts have struck down fee caps and low fees for capital defense work, allowing attorneys to collect higher fees than those set by the state. \textit{See} Marcia Coyle \textit{et al.}, \textit{Efforts in the Death Belt to Bolster Indigent Defense Yield Mixed Results — But There Are A Few Hopeful Developments}, 13 \textit{NAT’L L.J.}, November 19, 1990, at 1.
\bibitem{179} Coyle \textit{et al.}, \textit{supra} note 57, at 30.
\bibitem{180} \textit{ALA. CODE} § 13A-5-54 (1975).
\bibitem{181} Coyle \textit{et al.}, \textit{supra} note 57, at 30.
\bibitem{182} \textit{LA. CODE CRIM. PROC. ANN.} art. 512 (West 1996).
\bibitem{183} \textit{Id.}
\bibitem{184} Coyle \textit{et al.}, \textit{supra} note 57, at 30.
\end{thebibliography}
a white shopkeeper.\textsuperscript{185} At trial, his counsel, a civil attorney,\textsuperscript{186} delivered an opening statement that required only one page of trial transcript.\textsuperscript{187} Counsel's closing argument for the trial, just before the jury was to deliberate on Caldwell's guilt, consisted of only two pages.\textsuperscript{188} Caldwell was found guilty and sentenced to death.\textsuperscript{189} The Mississippi Supreme Court rejected Caldwell's argument that he was denied effective assistance of counsel, opining that evidence of his guilt was so overwhelming, it would have done counsel little good to protest Caldwell's innocence.\textsuperscript{190} However, prosecutorial misconduct in the arguments provided Caldwell with a new trial.\textsuperscript{191} Counsel's lack of criminal experience was overcome by the state's overreaching.

The Supreme Court has observed that in many instances, the states' standards for death penalty attorneys provide no assurances that those who come forward are any more than "a person who happens to

\begin{itemize}
  \item \textsuperscript{185} Caldwell v. Mississippi, 472 U.S. 320 (1985).
  \item \textsuperscript{186} Coyle et al., \textit{supra} note 57, at 30.
  \item \textsuperscript{187} "As [the prosecutor] told you, there's a lot of proof in this case . . . If the proof shows, beyond a reasonable doubt, that Bobby Caldwell did on the 29th of October, 1980, kill a lady by the name of Elizabeth Faulkner . . . it is going to be your duty to return a verdict of guilty." Coyle, \textit{Fatal Defense, Scant Search for the Truth, supra} note 57, at 30, col.2.
  \item \textsuperscript{188} In closing, Caldwell's attorney stated:
  \begin{quote}
  \[W\]e knew of the abundance of evidence that would be presented here today that would point toward the ultimate guilt of Mr. Caldwell . . . I have thought, have searched my mind . . . as to what defense that we could possibly make in the face of all the evidence that was surely to be produced here in this Courthouse. Now, we feel that we have made the State of Mississippi perform its duty. You have within your discretion to bring in at least one of three verdicts. One — that of capital murder, and if that is done and that is your decision, we will go into another phase of this trial . . . a verdict of murder and, of course, a verdict of not guilty. I don't know of anything I could say further for, and on behalf of, Bobby Caldwell."
  \end{quote}
  \textit{Id.}
  \item \textsuperscript{189} Caldwell v. Mississippi, 443 So. 2d 806 (Miss. 1983).
  \item \textsuperscript{190} Caldwell v. State, 481 So. 2d 850, 852 (Miss. 1985).
  \item \textsuperscript{191} Caldwell v. Mississippi, 472 U.S. 320 (1985).
\end{itemize}
be a lawyer." It is troubling that the Court then did little to ensure adequate representation of death penalty defendants.

H. Strickland v. Washington Provides No Protection from Ineffectiveness

In Strickland v. Washington, the Supreme Court held that to show ineffective assistance of counsel the defendant has to demonstrate "that counsel's representation fell below an objective standard of reasonableness," and show prejudice that "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The unjust result is shown by "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Trial counsel is given a wide range of tactics to effectively represent a criminal defendant and there is a strong presumption that the tactics employed were effective for Sixth Amendment purposes.

A former clerk to Justice Stevens noted that:

Whether somebody received the death penalty very often seemed to be a function of the quality of their lawyers . . . [B]y and large the people who receive the death penalty are dirt poor. They are represented by overburdened public defenders or by court appointed counsel who frequently seem to lack much zest for the job.

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193. Strickland, 466 U.S. at 688.

194. Id. at 686.

195. Id. at 694.

196. Id. at 689.

197. Sloan, supra note 83 at 3. One death penalty counsel lacked such "zeal" for his duty that he gave a closing argument that was termed "an apology for having served as [defendant's] counsel." The defendant was granted a new trial because of counsel's ineffectiveness, the court holding that counsel's argument that the defendant's life would be spared if the jury felt sympathy for the attorney should be rejected. Mathis v. Zant, 704 F. Supp. 1062, 1064 (N.D. Ga. 1989). In another case, the Texas Court of Criminal Appeals held "it may have been difficult for the jury to realize whose side defense counsel were on when
Despite these poor efforts of representation, *Strickland v. Washington* has not provided death penalty defendants relief from this generally inadequate representation by counsel.\(^{198}\)

A number of cases in this article vividly demonstrates the inadequacy of *Strickland v. Washington*. For example, Larry Heath’s counsel’s failure to raise more than one issue on appeal of Heath’s death penalty conviction in Alabama, and his counsel’s filing of six-page and one-page appellate briefs, along with his failure to appear for oral argument in the Alabama Supreme Court, were deemed “deficient,” but did not violate the standards of *Strickland v. Washington*.\(^{199}\) Orlando counsel Emmett Moran’s daily intoxication in Jerry White’s 1982 murder trial was also permitted under the Supreme Court’s standards for effective assistance of counsel.\(^{200}\)

Gregory Wilson’s representation in his death penalty trial in Kenton County, Kentucky, despite his counsel having no active practice, no training in death penalty cases, and a reputation for unethical conduct, was found to be effective under the standards of *Strickland v. Washington*.\(^{201}\) Indeed, the court found that there was no basis to find that death penalty cases were so different as to constitute an entirely different area of expertise, and rejected Wilson’s argument that an intense background inquiry should have been performed to determine his

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they continued to refer to applicant as a ‘wetback,’ not only during voir dire when this arguably had some strategic value, but also during final argument on both guilt and punishment . . .” *Ex parte Guzman*, 730 S.W.2d 724, 733 (Tex. Crim. 1987). Black defendant Wilbur Dobbs was defended in his capital murder trial by a white defense attorney who stated, in describing his “outspoken” views on blacks, that many blacks “are uneducated and would not make good teachers,” that blacks are “less intelligent than whites” by nature, and that his “granddaddy had slaves.” *Id.* He also stated his belief that “integration has led to the deterioration of neighborhoods and schools,” referred to a particular black community as “black boy jungle,” and claimed that blacks from this neighborhood were “more troublesome” than blacks in a nearby county. Dobbs v. Zant, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989), *rev’d* 506 U.S. 357 (1993) (habeas corpus petition based on racially biased trial denied).

counsel's qualifications to try a death penalty case as a practice that would discourage the private bar from accepting appointments to represent death penalty defendants. With this decision, the Kentucky court has, in essence, acknowledged that it will appoint to handle a death penalty case whoever walks in the courthouse door with a license to practice law, whether qualified or not.

Jerry White's trial counsel was not found ineffective despite his intoxication and unprofessional conduct during the trial. Judy Haney's counsel in her death penalty trial in Alabama was found to be effective under the standards of Strickland v. Washington although counsel was incarcerated during the trial for contempt for his intoxication and failed to introduce critical documents into evidence that were known to him three months prior to the trial. Gary Nelson's counsel accepted the appointment of representing Nelson even though he had never handled a death penalty case before. He was having financial difficulties, and was paid between 15 dollars and 20 dollars per hour, well below an attorney's normal fee by the state. Nelson's counsel was refused assistance by the state and eventually turned in a performance worthy of his fee. Despite these factors, the courts never addressed the issue of the constitutional adequacy of counsel's performance. John Eldon Smith's trial counsel made a mistake that literally cost Smith his life: failing to preserve an issue that allowed his co-defendant to gain a new trial and a life sentence. However, his counsel's performance was never evaluated by the court and thus was deemed constitutionally adequate.

Alden Harrison's family learned, in hiring James Venable for Harrison's 1986 death penalty trial, that low fees will often guarantee a concomitant level of effort. Harrison, even though his family had some money to devote to his defense, was attracted to Venable because of

202. Id. at 880.
203. White, 664 So. 2d at 242.
205. With Justice for Few, supra note 69, at 8.
206. Id.
207. Id.
his low fees. Venable turned in a performance equivalent to his low fees, earning Harrison a death sentence. Venable was found to be ineffective at trial. However, it was just the third finding of ineffective assistance of counsel by a Georgia state court under *Strickland v. Washington.* Death row inmates are attracted to counsel who will not entirely deplete their family funds. Yet, those attorneys who charge low fees or will accept an appointment for low statutory fees are frequently unqualified to do the work.

Frederico Martinez-Macias was convicted in Texas of capital murder in June of 1984. Two days before his scheduled execution, Macias received a stay of execution, and then the law firm of Skadden, Arps, Slate, Meagher & Flom of Washington, D.C., assisted by the Texas PCDO, entered his case. In 1991, his conviction was overturned because his court-appointed trial counsel was shown to be constitutionally ineffective under the standards of *Strickland v. Washington.* His counsel failed to conduct even a cursory investigation, did not call witnesses who could have refuted the prosecution’s case, and missed considerable evidence pointing to Macias’ innocence. In affirming the District Court’s decision to grant Macias’ writ of habeas corpus for ineffective assistance of counsel and free him from death row, the Fifth Circuit found that “actual innocence was a close question” and “[t]he state paid defense counsel $11.84 per hour. Unfortunately, the justice system only got what it paid for.” Following this decision, a grand jury, provided with the evidence developed by the PCDO-aided counsel, refused to indict Macias, and he was freed.

Jon Wood of San Antonio, Texas represented Jesus Romero in a death penalty trial in 1985. After Romero was found guilty of mur-

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210. *Id.*
211. *Id.*
212. *Innocence, supra* note 87, at 10.
213. *Id.*
217. *Innocence, supra* note 87, at 10.
218. Romero v. Lynaugh, 884 F.2d 871, 875 (5th Cir. 1989).
der, at the penalty phase of the trial, Wood offered the following closing argument:

[Wood]: Ladies and Gentlemen, I appreciate the time you took deliberating during the guilt phase of the trial and the thought you put into this. I’m going to be extremely brief. I have a reputation for not being brief. Jesse, stand up. Jesse?
[Romero]: Sir?
[Wood]: Stand up. You are an extremely intelligent jury. You’ve got that man’s life in your hands. You can take it or not. That’s all I have to say.219

The Fifth Circuit, noting that Wood had presented no evidence in the penalty phase of the trial, but had presented some mitigating factors in the guilt phase of the trial, held that “[h]ad the jury returned a life sentence the strategy might well have been seen as a brilliant move.”220 Romero was found to have effective assistance of counsel221 and was executed in 1992.222 Wood was suspended from the practice of law in 1993 for reasons unrelated to Romero’s trial.223

From 1984 when Strickland v. Washington was handed down to 1990, the Florida Supreme Court found ineffective assistance of counsel only nine times, Mississippi’s Supreme Court twice, the Supreme Courts of Alabama, Louisiana and Georgia once each, while the Supreme Court of Texas never made a finding of ineffective assistance of counsel.224 “The standard [for effective assistance of counsel] has come down, down, down to meet these people.”225

219. Id.
220. Id. at 877.
221. Id. at 879.
222. Christopher Hanson, Death Row Will Speed Up, but Injustices May, Too: Federal Court’s Ability to Review Convict’s Legal Representation Has Been Restricted, ROCKY MOUNTAIN NEWS, Nov. 19, 1995, at 14A.
224. Coyle et al., supra note 57, at 42.
225. Id. (quoting Stephen B. Bright, Director of the Southern Prisoners’ Defense Committee in Atlanta).
I. Habeas Corpus Representation is a Guaranteed Right but Difficult to Provide

The death row prison population in this country is growing at a rapid rate, thus the need for competent post-conviction representation is growing. These inmates are usually indigent, thus the government must find and pay counsel to assist them. In 1981, there were 848 death row inmates in the United States. By 1988, the number of death row prisoners had grown to 2,151, and by 1994 there were 2,976 death row inmates sitting in state and federal cells. The death row population is now over 3,000 individuals. Each of these death row inmates have the right to a direct appeal of their cases within the state judicial system, and state post-conviction or collateral review following their direct appeal. However, the right to court-appointed counsel is only constitutionally required for the trial and direct appellate review. There is a gap for the state post-conviction collateral review where counsel need not be provided by the government.

The present system of review is a “multi-layered state and federal appeal and collateral review.” Following the exhaustion of the state appeals, the death row inmate has the right to seek review in the federal district court in the jurisdiction of the convicting authority to determine if the conviction or the death sentence itself violates the United States Constitution or federal law. The review system is “piecemeal” with “repetitious litigation” and years of delay between the trial and the appellate resolution. The inapplicability of res judicata

234. By 1989, the shortest time between trial and appellate conclusion had been 2 years.
allows the inmates to petition federal courts two, three and four times for relief, and the present rules allow for at least three original petitions: after state direct review, after state collateral proceedings, and after federal collateral proceedings, to the United States Supreme Court.235

The focus of death penalty appellate review is usually on collateral matters, since the inmates’ guilt is usually sufficiently established, and their petitions debate the constitutional adequacy of their trials or the appropriateness of their death sentences, thus “the lack of adequate counsel creates severe problems.”236 Pro se the death row inmates, unable to afford attorneys to help them through the morass of the review process, can do themselves harm.

Capital inmates almost uniformly are indigent, and often illiterate and uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.237

Because the nature of the appellate reviews often involve hearings in federal court and this jurisprudence can be “complex” and rapidly changing,238 “the ‘learning curve’ for attorneys unfamiliar with this field of law increases the cost of counsel. When attorneys decline to accept more than one capital case, the cost of the ‘learning curve’ is multiplied because the proverbial wheel is constantly re-invented.”239 Frequently the attorney who handles this post-conviction litigation is the same attorney who mishandled the trial or is a new attorney with little experience to handle the applicable body of law and proce-

and nine months, while the longest time was 14 years and six months, with an average time of 8 years and six months. THE POWELL REPORT, supra note 3, at 1.
235. Id. at 3.
236. Id. at 4.
237. Id.
238. DEFENDER SERVICES REPORT, supra note 229, at 5.
239. Id.
dure. Thus, the result is often no more effective than that of the pro se death row inmate’s.

The 3,046 death row inmates who are known today are entitled to representation in a federal habeas corpus appeal. Although the growing number of inmates makes adequate representation difficult to find, the federal government is mandated to provide such representation. Moreover, competent representation is “necessary to a fair and orderly review.”

Federal courts have three options in meeting the obligations mandated by statute. First, the courts may appoint attorneys from the private bar. These attorneys submit vouchers and are paid by the Administrative Office of the United States Courts from funds provided pursuant to the Criminal Justice Act. These attorneys are compensated at rates that are determined by the courts to be reasonably necessary to obtain qualified counsel, with no set rate in death penalty cases.

As a second option, the courts may appoint federal public defender organizations. These organizations are funded through grants approved by the Judicial Conference of the United States. Although twelve federal public defenders have represented twenty-two death-sentenced inmates since 1977, their primary mission is to represent criminal defendants in federal courts, not death row petitioners in habeas corpus appeals. These first two options do not offer representation in death penalty cases and post-conviction appeals of those cases as a specialty.

240. Robbins, supra note 71, at 71.
243. DEFENDER SERVICES REPORT, supra note 229, at 5.
245. VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 2.22 (discussing appointment of counsel in criminal cases); 21 U.S.C. § 848(q)(10) (1994).
247. DEFENDER SERVICES REPORT, supra note 229, at 3-4.
IV. PCDOs as a Solution

The third method of providing counsel available to the federal courts is by the Post-Conviction Defender Organizations. These organizations deal only with death penalty cases and related post-conviction matters. PCDOs employ full-time, salaried attorneys, investigators and support staff in twenty of the thirty-eight states that have the death penalty.248 The PCDOs receive grants from the Judicial Conference249 that are contingent upon each PCDO receiving state funds to support the state court work that it intends to perform.250 In fiscal year 1994, the twenty PCDOs received a total of $19,589,740 for their capital defense work.251 The primary function of PCDOs are to recruit and train private attorneys to represent death row inmates, to serve as consultants to these attorneys and to provide expertise in death row litigation.252

The training provided by PCDOs is pivotal to effective and cost-efficient representation of death row inmates.

When the same attorney represents the inmate in both state and federal post-conviction proceedings, both time and money is [sic] saved. Assuming that the state system had provided adequate resources for the investigation, preparation, and litigation of the case, the attorney representing the inmate in the state proceeding is in the best position expeditiously to prepare the case for federal court. On the contrary, when the federal court must appoint new counsel, time and money are wasted while the new attorney rereads the record, re-investigates the case, and redrafts the pleadings.253

The PCDOs may also, and do, directly act as counsel for death row inmates.254 However, one of the greatest services they provide to the

248. Id. at 3. Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas and Virginia are the jurisdictions with PCDOs. Id. (app. B).
250. DEFENDER REPORT SERVICES, supra note 229, at 4.
251. Id.
252. Id. at 3.
253. Id.
254. Id.
administration of justice and the expenditure of reasonable costs in the inmates' representation is to ensure that the inmates' cases have smooth and orderly transitions from state court to federal court with competent, knowledgeable counsel. The transitions from death penalty trial to the state and federal review can be critical to fair determination. One of the critical problems of the review system prior to the establishment of the PCDOs was that prisoners often could not obtain qualified counsel until their executions were imminent — when the execution dates had been set.

"The resulting last-minute rushed litigation" that races against the state-imposed execution dates "disserves the inmates, and saps the strength of the judiciary." Often the last minute habeas corpus petitions result from the unavailability of qualified counsel at earlier times, and on other occasions it appears that the delays are intentional and are used as a tactic; nevertheless, the petitions usually do not get the "careful and deliberate" review that should be received without the pressure of an imminent execution. Robert Streetman, executed in Texas in 1988, was assigned an appellate attorney six days before his execution. "By that time it was too late for the attorney to do anything." PCDOs can ensure a continuity of representation and combat the injustice of a state-imposed death penalty sanction without time for a full review.

255. States that impose deadlines for post-conviction filings by setting execution dates contribute to the cost of representation of death row inmates. These dates compress the time that attorneys have to prepare pleadings and lead to resources being expended on hastened expert review, travel to file petitions, and transportation of documents. The setting of execution dates also results in hastily prepared filings that often call for amending and frequently require the attorneys to prepare state and federal petitions simultaneously. DEFENDER SERVICES REPORT, supra note 229, at 3.

256. THE POWELL REPORT, supra note 3, at 1, 5.
257. Id. at 1.
258. Id. at 5.
260. Id. (quoting University of Texas Law Professor, Scott Howe).
261. Even then the sheer volume of death penalty cases sometimes overwhelms the PCDOs. In Texas, petitioner Frank McFarland was given an execution date of September 27, 1993, and later had it modified to October 27, to allow the Texas PCDO to recruit a volunteer attorney. On October 16, the PCDO asked the court to appoint an attorney because it had been unable to recruit volunteer counsel. The trial court refused. McFarland filed a pro
PCDOs fill the gap existing between the death row inmates’ direct state reviews and their federal habeas corpus petitions. Death row inmates were left on their own to exhaust their state collateral appeals by the Supreme Court’s decision in Murray v. Giarratano.\textsuperscript{262} PCDOs recruit attorneys who handle the inmates’ cases from trial through all appeal levels, helping to alleviate the piecemeal nature of the practice and giving the death row inmates adequate representation at all stages of the case. An attorney who handles a case in the state system is the “best positioned to expeditiously prepare the case for federal court.”\textsuperscript{263} Indeed, PCDOs have saved money and time by saving federal courts from appointing new counsel who have to reread the record, re-investigate the case, and redraft pleadings.\textsuperscript{264} They further assist the system by assuring that issues are not inadvertently waived because of the inadequacy of representation. They also assure that the sentences, whatever they are, are appropriate.

A. The Background of PCDOs

PCDOs, originally known as “Death Penalty Resource Centers,”\textsuperscript{265} had their birth in the judicial habeas corpus quagmire of 1987, when the ever-increasing numbers of death row prisoners and their capital cases were coming to federal court for habeas corpus review through “hastily [drafted emergency motions] for [stays] of

\begin{footnotesize}
264. \textit{Id.}
265. In January 1995, the Death Penalty Resource Centers were renamed Post Conviction Defender Organizations by the Defender Services Committee of the Judicial Conference to reflect the recommendation of the Subcommittee on Death Penalty Representation’s recommendation that the Centers increase their direct representation of death row inmates and not limit themselves to consultation services. \textit{Id.} at 2 n.4.
\end{footnotesize}
execution filed by volunteer counsel recruited serendipitously only days before.266 Federal courts were swamped and found themselves putting aside caseloads to review these emergency filings because many of the states had “ill-funded defense systems [that] failed to provide sufficient numbers of seasoned defense attorneys for trial and subsequent state appeal.”267 As a result, cases were improperly handled, and often counsel were difficult to find for any proceeding following the direct appeal.268 States simply had no mechanism for matching qualified counsel with indigent death row inmates, so the task of recruiting volunteer counsel fell to “small, non-profit legal services organizations, national civil rights groups, the American Bar Association and lone citizens.”269 The American Bar Association noted in 1988 that “there simply are not, and will not be, enough [qualified attorney] volunteers” to handle the death row cases generated by the states.270

In 1988, Congress responded to the chaos of the system and the complaints from the bench and the bar by mandating the right to counsel for death row inmates in habeas corpus proceedings.271 The death row inmates were also provided the right to investigative and expert services to aid in their petitions.272 This provision set minimum standards for the counsel appointed273 and allowed the courts to set fees for the counsel, experts and investigators at any rate “the court determines to be reasonable to carry out [this requirement to appoint counsel, experts and investigators].”274 This provision had the effect of stimulating interest in the bar in handling habeas corpus petitions by

268. Id.
269. Id. (footnotes omitted).
adequately compensating attorneys for their time and providing the resources needed to do the job.\textsuperscript{275}

Congress then created a center to aid those who do not practice death penalty litigation regularly.\textsuperscript{276} Congress recognized that the "complexity and demanding" nature of the practice called for litigation resources to encourage participation in this type of litigation, and sought to ultimately improve the quality of cases being reviewed by state as well as federal courts by recruiting attorneys for the cases in the state system who would continue with the cases when they went over to the federal system on habeas review.\textsuperscript{277} "Congress thus understood that the quality of [the trial and] review afforded in the state system had a direct bearing upon the cost, speed, and integrity of subsequent federal review."\textsuperscript{278} The PCDOs were encouraged to seek state funding so they could assist volunteer death penalty counsel in state trials and post-conviction proceedings.\textsuperscript{279} This coordination of the state and federal process was crucial to the success of an operable and sensible system of review.

B. Leveling the Playing Field

The presence of the PCDOs has encouraged private attorneys, recruited by the Resource Centers, to handle death penalty cases. Gary Nelson had the benefit of an Atlanta law firm assuming his case after eleven years on death row and having his conviction reversed; Nelson was freed from death row when the prosecution's case was shown to have been "impeached and contradicted" on every material fact.\textsuperscript{280} That law firm, Bondurant, Mixon & Elmore, was recruited to Mr. Nelson's cause by a PCDO.\textsuperscript{281}

The Alabama Capital Resource Center, a PCDO, was instrumental in recruiting the Philadelphia law firm of Drinker, Biddle & Reath to
handle a death penalty case in Alabama in 1990. The law firm’s attorney who took on the case noted that “I had never handled a capital case before. Without the center there to provide some comfort level that we could go forward with their expert assistance, I’m not sure, from a quality standpoint, that Drinker, Biddle would have been willing to allow me to take the case.”

George Daniels, convicted of murder in Alabama, was on death row in the state for six years until the Alabama Capital Representation Resource Center took on his case in 1989, won a new trial for him and got him off of death row.

Douglas Robinson, the post-conviction attorney for Frederico Martinez-Macias, responded to an appeal by the American Bar Association, but relied heavily on the Texas PCDO. Robinson, of Skadden, Arps, Slate, Meagher & Flom’s Washington, D.C. office, stated that “[t]he Texas PCDO was ‘invaluable’ because it has the benefit of knowing all of the cases in Texas, which was helpful in telling us what happened in another case that could be useful to us.”

Macias spent nearly 10 years on Texas’ death row and almost forfeited his life for a crime he could not later be shown to have committed, but is now free because of the help of a PCDO. Curtis Lee Kyles was convicted in Louisiana of the shooting death of a New Orleans woman during a robbery on September 20, 1984. After the trial, it was learned that the prosecution had suppressed evidence that would have demonstrated to the jury that two of the eyewitnesses were unreliable, that “damning physical evidence” was “subject to suspicion,” and that the principal witness gave inconsistent information that undermined his credibility.

The evidence withheld by the prosecution caused the Supreme Court to “have serious reservations about whether the State has sentenced the right man.” The defendant had been denied relief until

283. Id.
285. Coyle, supra note 266.
286. Id.
288. Id.
289. Id. at 1565 (citing Kyles v. Whitley, 5 F.3d 806, 820 (5th Cir. 1993) (King, J., dissenting)).
the Louisiana Resource Center stepped in and helped convince the Supreme Court that the state’s actions violated due process; Kyles’ conviction was reversed and remanded by the Court.290

On February 3, 1984, a black inmate of the Missouri State Penitentiary was stabbed to death. Three white inmates, including Lloyd Schlup were charged with the murder. Schlup’s court-appointed attorney was paid a total of $2,000 for fees and expenses in Schlup’s 1985 trial.291 The attorney spent forty hours on pre-trial investigation and preparation and failed to spend significant time with his client in trial preparation.292 Schlup was convicted and sentenced to death.293 His post-conviction appeals lasted for eight years, and during this period his court-appointed appellate counsel never visited him for interviews, and like his trial counsel, failed to privately interview key witnesses to the murder.294 Schlup’s habeas corpus court-appointed attorney never interviewed or visited Schlup, “didn’t do any real investigation on the case,” and pointed out that being assigned to handle a death row appeal “means you can’t take cases that will pay you money until you complete your death penalty case . . . ."295 Sean O’Brien of the Missouri Capital Punishment Resource Center entered the case in December of 1991.296 He interviewed numerous inmates and guards who exonerated Schlup, and found the key witness who established that a videotape conclusively demonstrated that Schlup was in the prison cafeteria at the time of killing.297 On November 15, 1993, the Eighth Circuit Court of Appeals denied the Resource Center’s habeas corpus petition on Schlup’s behalf.298 In dissent, Judge Gerald Heaney observed that “Schlup has presented a strong case of actual innocence,” nevertheless, “this court tells Lloyd Schlup in regard to his conviction: [y]ou may indeed be innocent, but you are not innocent enough early

290. Id.; Coyle, supra note 266, at A1.
292. Id.
294. Taylor, supra note 291, at 73-75.
295. Id. at 75.
296. Id. at 76.
297. Id. at 74-77.
298. Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993).
enough." Schlup was scheduled to die on November 19, 1993. He came within eight hours of execution for this killing, before Missouri Governor Mel Carnahan granted a stay of execution to allow a hearing into the mounting evidence of Schlup’s innocence gathered by the Resource Center. On January 23, 1995, the Resource Center convinced the Supreme Court that the evidence of Schlup’s innocence needed to be considered, thus they vacated his death sentence and remanded the case for hearings.

In Monroeville, Alabama, the site of Harper Lee’s novel *To Kill A Mockingbird*, Walter McMillian was charged with the killing of an 18-year-old white female store clerk in 1987. McMillian was not a popular figure in the town, because he was a black man who had been dating a white woman. At the time of the crime, McMillian was with friends and relatives, a fact discounted by the jury at trial. Upon his arrest, McMillian was held on death row. No physical evidence linked McMillian to the killing; however, there were three people who linked him to the murder. At trial, he was convicted and sentenced to death by the presiding judge, who overruled the recommendation of life imprisonment by the jury. A year after McMillian’s conviction, while McMillian was awaiting his execution, Bryan A. Stevenson of the Alabama Capital Resource Center entered the case. All three witnesses recanted their testimony and one stated that he was pressured by prosecutors to implicate McMillian. Stevenson demonstrated that key exculpatory information was suppressed by the state, casting serious doubt on McMillian’s guilt, and convinced the Alabama Court of Criminal Appeals to vacate

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299. *Id.* at 752, 754 (Heaney, J., dissenting).
300. Taylor, *supra* note 291, at 70.
301. Schlup, 115 S. Ct. at 869.
304. *Id.*
305. *Id.*
306. *Id.*
308. *Id.*
309. *Id.*
McMillan's death sentence, reverse his conviction, and remand the case for a new trial.\textsuperscript{310} On November 22, 1992, the case appeared as a story on the CBS television show \textit{60 Minutes} and the state agreed to investigate its handling of the case.\textsuperscript{311} One week after the court's decision, the state of Alabama decided not to pursue a new trial, admitting that it had made a mistake, and McMillian was set free.\textsuperscript{312}

The PCDOs have made death penalty litigation significantly different than it was prior to 1988. They have "made prosecutor's jobs tougher . . . . For the first time in many cases you have a highly specialized lawyer up against a highly specialized prosecutor, both of whom do this work all the time. It's a level playing field that some prosecutors are not used to."\textsuperscript{313} The former attorney general for the state of Texas, Jim Mattox, noted that the PCDOs, which operated on "a shoestring," costing less than half of the cost of private attorneys appointed by the court, were "steeped in the complex and specialized law of death penalty" cases and were able to handle emergency appointments promptly, and therefore, should have conservatives love them "because they make the death penalty faster and cheaper" and liberals love them "because decent lawyers . . . help guard against the execution of innocent people and the violation of constitutional liberties."\textsuperscript{314} Mr. Mattox felt that funding PCDOs was a "no-brainer."\textsuperscript{315} Despite their seeming effectiveness, Congress did not "love" what PCDOs were doing for the criminal justice system.

C. The Elimination of PCDOs

Supporting the death penalty to gain political mileage has been a staple of American politics for some time now. For example, state gubernatorial races in Texas and Florida in 1990 featured candidates who supported the death penalty as the centerpiece of their campaigns

\textsuperscript{311} Innocence, supra note 87, at 9-10.
\textsuperscript{312} Id. at 10; Lewis, supra note 302.
\textsuperscript{313} Coyle, supra note 266, at A1.
\textsuperscript{314} Jim Mattox, \textit{Want to Execute Killers? Then Pay Their Lawyers}, USA TODAY, Sept. 14, 1995, at 11A.
\textsuperscript{315} Id.
to show they were tough on crime.\textsuperscript{316} The attorneys who help thwart the efforts of death penalty proponents by vigorous and zealous representation of the politically unendowed death row inmates become targets for the political backlash. "This is an easy one for the politicians who want to look tough on crime."\textsuperscript{317} The backlash has been effective.

The effectiveness of the PCDOs has earned a harsh reaction from death penalty proponents.\textsuperscript{318} Congress has paid heed. South Carolina Attorney General Charles Condon, testifying for the National Association of Attorneys General, urged Congress in the spring of 1995 not to fund PCDOs unless state prosecutors got equal funding.\textsuperscript{319} Condon argued that "[t]hese lawyers have become lobbyists whose only goal is to stop executions at any cost."\textsuperscript{320} The Texas PCDO has been criticized for obstructionist goals, but director Mandy Welch noted such charges "generally represent the reaction to a vigorous defense bar in capital cases."\textsuperscript{321} Nick Trenticosta of the Louisiana PCDO noted "[t]he [Lloyd] Schulp and Curtis Kyles cases are not cases 'where somebody is hanging onto so-called technicalities to stay alive. It took a lot of lawyer time and resources to show the court just what was going on in these cases.'"\textsuperscript{322} Welch observed that:

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  \item \textsuperscript{317} Wiehl, supra note 284, at A13. The political problems for death row inmates are not limited to career politicians. In thirty-two of the states that have the death penalty, state judges run, campaign and are elected to the bench. Their willingness to implement the death penalty is often key to retaining their positions. In recent years, sitting judges in California, Mississippi and Texas have lost reelection bids to opponents who have come out for harsher use of the death penalty. With Justice for Few, supra note 69, at 9; Bright & Keenan, supra note 20 at 760-65; see Lavelle, supra note 173, at 34.
  \item \textsuperscript{318} PCDOs have never had universal support. The Subcommittee on Death Penalty Representation of the Judicial Conference of the United States heard complaints that PCDO staff worked to abolish the death penalty rather than recruit attorneys or represent inmates. In Texas, as an example, it was common to hear that PCDO representation was too zealous, that they raised meritless claims, and that their aim was simply to delay the proceedings. Defender Services Report, supra note 229, at 6 n.12.
  \item \textsuperscript{319} Coyle, supra note 266, at A1.
  \item \textsuperscript{320} Wiehl, supra note 284, at A13.
  \item \textsuperscript{321} Coyle, supra note 266, at A1.
  \item \textsuperscript{322} Id.
\end{itemize}
Initially, district attorneys were not accustomed to someone interfering in their handling of death penalty cases after trial and direct appeal. To them, our lawyers represented undue interference and delay. It made their work a lot more difficult, and because our lawyers were not in the local community, it was easy to demonize them. If anything, that has decreased.\textsuperscript{323}

A call from Condon to Representative Bob Inglis in April of 1995 prompted a bill in Congress to eliminate the PCDOs.\textsuperscript{324} Representative Inglis, a Republican from South Carolina, and Representative Charles Stenholm, a Republican from Texas, persuaded the Subcommittee of the Departments of Commerce, Justice and State, of the Committee on Appropriations of the House of Representatives, to eliminate funding for PCDOs.\textsuperscript{325} The two congressmen, in an open letter to their congressional colleagues in June 1995, assailed the PCDOs as “one of the major reasons that justice is being frustrated in capital cases around the country” and blamed “the flow of federal money [to the PCDOs] that goes to finance endless and fruitless appeals.”\textsuperscript{326}

On January 5, 1996, Congress passed HR-1358, which was signed into law on January 6, 1996, and called for a budget of $262,217,000 for the Federal Judiciary’s Defender Services, so long as none of the funds are expended on Death Penalty Resource Centers or PCDOs after April 1, 1996, to allow for an orderly termination of this program.\textsuperscript{327} This appropriations bill is for the fiscal year 1996, which ends September 30, 1996. After that date, funding for the PCDOs will end.

Assistant Attorney General of North Carolina, Joan Byers, stated that with the elimination of PCDOs, “[o]ur state courts would appoint counsel as they are required to do and the federal courts would appoint members of the private bar . . . [to handle death penalty cases and post-conviction appeals].”\textsuperscript{328} Interestingly, with the defunding of PCDOs and the dismantling of their offices, there has not been a cor-

\textsuperscript{323} Id. (quoting Mandy Welch).
\textsuperscript{324} Wiehl, \textit{supra} note 284, at A13.
\textsuperscript{325} Coyle, \textit{supra} note 266, at A1.
\textsuperscript{326} Id.
\textsuperscript{328} Coyle, \textit{supra} note 266, at A25.
responding dismantling of the specialized and trained habeas corpus units of state attorney generals' offices in the belief that these death penalty appeals can be handled by any attorney on staff. Representative Inglis has stated "we should not be spending federal dollars to subsidize think tanks run by people whose sole purpose is to concoct theories to frustrate the implementation of the death penalty," and he noted that eliminating the centers and PCDOs would save the government $20 million per year. However, the economy he cites is a false one.

D. The False Economy of Eliminating PCDOs

Judge Richard Arnold, Chief Judge for United States Court of Appeals for the Eighth Circuit, has predicted that elimination of the PCDOs will significantly increase delays in handling an ever-increasing death penalty caseload by creating an insufficient pool of qualified and experienced attorneys to handle the petitions. Chief Judge Arnold estimated that the cost of representing death row inmates would rise from the current expenditure of $21.2 million to "between $37 million and $51.1 million" with the elimination of the PCDOs. The predicted increase for the taxpayers is substantial, making the apparent savings gained by the elimination of the PCDOs illusory.

Chief Judge Arnold has noted that:

[The courts] are required by law to appoint and pay counsel in death penalty cases . . . and we think [PCDOs and Death Penalty Resource Centers] are the cheapest and best way to deliver service. If these centers are eliminated the cost to the taxpayer will go up because we will have to pay private attorneys $75 to $100 per hour, as compared to the $55 per hour we pay the centers' lawyers.

331. Letter from the Honorable Richard S. Arnold, Chief Judge, United States Court of Appeals for the Eighth Circuit, to The Honorable Harold Rogers, Chairman, Subcommittee on the Departments of Commerce, Justice and State, the Judiciary and Related Agencies, Committee on Appropriations, U.S. House of Representatives 1 (July 18, 1995) (on file with author) [hereinafter Arnold Letter].
332. Id.
About half of the 3,000 plus prisoners on death row are represented or assisted by PCDOs, at a cost to the government of about $17,200 per inmate, versus an average cost of $37,000 for appointment of private counsel. Bryan Stevenson, the director of the Alabama Capital Representation Resource Center who saved Walter McMillian from an undeserved death, received an annual salary of $28,000 in his position after eleven years of handling death penalty appeals and receiving a MacArthur Foundation award for his work in 1995. Stevenson is an attorney with a wealth of experience and talent working for a fraction of what he could command otherwise; he makes it evident that Judge Arnold is correct that the PCDOs were cost-effective. Further, the presence of the PCDOs and their efforts in recruiting private firms to take on representation, frequently secure representation of death row inmates at no charge to the state or federal governments.

There is no question that the bill the state taxpayers foot for death penalty trials is substantial. In California, it has been estimated that administering six death penalty sentences per year would cost $15 million per execution. While it costs approximately $930,240 to imprison an inmate for “life” in California, the state spends approximately $10 million per year reimbursing its counties for expert witnesses, investigators and other costs of death penalty trials. Death penalty trials last longer and cost more than murder trials, and in 1988 it was estimated that the people of California would spend more than $78 million on death penalty trials — before state appeals and habeas corpus petitions — than if the trials had been murder trials.

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334. Carol J. Castaneda, Death Penalty Centers Losing Support, Funds, USA TODAY, Oct. 24, 1995, at 3A.
336. DEFENDER SERVICES REPORT, supra note 229, at 7 (stating that in fiscal years 1993 and 1994, only 29 lawyers in the state of Florida representing death row inmates on habeas corpus petitions submitted vouchers to the government requesting reimbursement).
337. This includes fees paid to the prosecutor and defense counsel, court costs and incarceration on death row. Magagnini, supra note 192, at A1.
338. This estimate uses an average life expectancy of forty years in prison. Id.
339. Id.
340. Id.
death penalty appeals case in California routinely takes five years from trial to appellate decision in the state’s supreme court and typically takes about one thousand hours of attorney time per year on behalf of a death row defendant, at a cost of approximately $162,000. Since most death row inmates are indigent, the taxpayers of California bear this cost and the high court in California reviews about thirty new death penalty cases per year.

In Texas, the trial and appeals of a death row inmate, which take an average seven and one-half years to complete, cost the taxpayers an average of $2.3 million per case, versus $750,000 for the non-death penalty case. By contrast, imprisoning a Texas inmate in a single cell at the highest security for forty years is estimated to cost approximately $750,000. Maryland will spend approximately $36,000 more per death penalty trial than it does on a murder trial. The state of North Carolina has estimated it spends $2 million per execution, versus $300,000 to house a prisoner for life. Maryland will spend approximately $36,000 more per death penalty trial than it does on a murder trial. The state of Florida can anticipate that its taxpayers will pay approximately $3.2 million per execution.

Judge Arnold predicted that closing the PCDOs will not help reduce the federal budget but will cost more. Estimations per case skyrocket when it is taken into account that the poor quality of defense attorneys appointed to a case almost guarantees that on appeal, the trial

341. Id.
343. Christy Hoppe, Executions Cost Texas Millions, DALLAS MORNING NEWS, Mar. 8, 1992, at 1A.
344. Id.
345. Dave Von Drehle, Bottom Line: Life in Prison One-Sixth As Expensive, MIAMI HERALD, July 10, 1988, at 12A.
346. Monk, supra note 88, at 11A.
347. Id.
349. Von Drehle, supra note 345, at 12A.
will be ordered retried. The second trial will require a second series of state and federal post-conviction reviews. The taxpayers again will be saddled with the burden of covering this expenditure of resources, while also covering the expenses of a backlogged court system and prosecutors who perform the same function twice. The PCDOs helped recruit, provide, and back competent trial counsel which helped ensure that ineffective assistance of trial counsel issues did not undermine death penalty verdicts.

States have been required to provide counsel to death penalty inmates since 1932. As a result, the money has to be paid to secure counsel for capital defendants. Spending it cheaply, so as not to adequately compensate or attract qualified counsel, and unadvisedly on counsel who are ill-prepared or poorly trained for capital litigation, simply means having to do the trial and appeals again. "A ‘totally inadequate indigent defense system early in the process’ is responsible for the trial errors that create delay in the process . . . , ‘[t]he tragedy is [members of Congress] know this is a terrible problem and what do they do? They make the remedy more complicated and withdraw from the field the first real lawyers these people often get.” Indeed, some members of the prosecution side agree. The Attorney General for the state of Maryland stated, “‘[t]he scales of justice demand a level playing field, with highly qualified counsel for both the state and the accused, . . . [w]e’re not talking about a shoplifting case where there might be a $100 fine.”

Justice Blackmun opined in his dissenting opinion in *McFarland v. Scott*:

Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this

Court curtails federal oversight of state court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.\(^\text{354}\)

The elimination of PCDOs returns the system to the day where qualified death penalty counsel were difficult to obtain. Congress had neither the courage nor conviction envisioned by Justice Blackmun. Our society is worse off for this lack of moral fortitude.

\textit{E. The Aftermath of the Defunding Decision}

The closing of the PCDOs has taken some of the country's most notable and experienced death penalty and habeas corpus attorneys and staff out of the trial arenas. The result is fewer competent death penalty attorneys at a time when more death penalty inmates than ever need appointed representation. The NAACP Legal Defense & Educational Fund (LD & EF) has noticed a reluctance on the part of the private bar to become involved in death penalty post-conviction proceedings because the PCDOs are not there as a resource to help them through the increasingly complex practice.\(^\text{355}\) The LD & EF also noticed that in states where the PCDOs had already closed their doors, there has been no one to step into the breech to identify qualified counsel for indigent death penalty prisoners in state direct appeals.\(^\text{356}\) In the state of California, the state Supreme Court took over recruitment of capital defense lawyers from the state's PCDO, the California Appellate Project, before the defunding decision because it felt the center was delaying recruitment of attorneys to delay litigation.\(^\text{357}\) However, the court has had difficulty finding qualified counsel to represent their death row

\begin{itemize}
  \item[354.] 114 S. Ct. at 2790.
  \item[355.] Kendall Letter, supra note 266, at 5.
  \item[356.] Id.
  \item[357.] Coyle, supra note 266, at A1.
\end{itemize}
inmates. Congress is making habeas corpus practice more complex with a series of amendments that would quicken the review process, but there is no group out there mastering the body of law for the benefit of death row inmates and those who volunteer to help them in their appeals.  

Congress has created a climate to return to the chaos found in the court systems prior to 1988. It has also taken away the one real opportunity that indigent death penalty inmates had to secure competent counsel.

V. CONCLUSION

Anthony Lewis, in an opinion piece for the New York Times, noted:

The right to a competent lawyer is the mark of a civilized society. I know of no action by the radical Republicans as uncivilized, as indecent as [closing the PCDOs]. It reminds me of what Joseph N. Welch said to Senator Joseph McCarthy: “Until this moment, Senator, I think I never really gauged your cruelty or your recklessness.”

The defunding of the PCDOs, in effect, denies death penalty inmates their right to counsel. Most states have not implemented a system, equivalent to their prosecutorial units, capable of providing death penalty defense counsel that match, or even come close to, the experience and the resources of the prosecution.

The statistics on who is chosen to die indicate that those who are chosen for the death penalty do not appear to be “one of us.” Imposition of the death penalty today is reminiscent of a time when this country used vigilante law and lynching to express moral outrage. The community feels it is making an example of “someone else” as to what will be tolerated in its jurisdiction. The concern is not to make sure that the proper person is executed or that his punishment is “fair.”

358. Id.
359. Id.
Justice Brennan made the point that to separate "ourselves" from those who suffer the death penalty is moral folly:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined . . . and the way in which we choose those who will die reveals the depth of moral commitment among the living.361

A country that expresses social outrage by imposing the death penalty must summon the moral character to mete out the punishment in a manner that is fair and equitable. Society must treat these defendants as if they are innocent, as if they are one of their own, as each of us would want to be treated if charged with a capital offense. Legislatures must provide competent counsel to make sure the trial is the event that reveals the truth and that post-conviction review is meaningful. This article has cited numerous instances where defendants were wrongly accused and wrongly convicted. There are many instances where the defendants have committed the horrible crimes of which they are accused, but many are innocent — just like us. Legislatures must provide a service like the PCDOs or find some other means to train and fund those who will take on the necessary representation to ensure that death penalty trials are, in practice, a search for the truth.
