Testimony of

The Honorable Orrin Hatch

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Statement of Senator Orrin G. Hatch
Ranking Republican Member
Before the United States Senate Committee on the Judiciary
Executive Business Meeting

on the "Leahy-Feinstein-Biden-Specter Substitute Amendment to S. 486"

Thank you, Mr. Chairman. Before I begin, I wanted to take a moment and again say how much I appreciate your leadership on this important issue. I also want to commend my colleagues, Senators Feinstein, Biden and Specter, for your thoughtful substitute amendment and attempts to develop a consensus on this important issue.

The issue of the death penalty in our country continues to spark significant debate. The recent Supreme Court decisions addressing capital punishment underscore the importance of this issue to the American people. It is an issue that engenders great passion. The American people believe in the death penalty, especially for terrorists who have killed thousands of Americans. And all of us agree that the death penalty must be imposed fairly and accurately. When it comes to this issue, there is - and should be - no room for error. We all share this goal.

Everyone agrees on the need to ensure that the death penalty system in our country works fairly and accurately. We agree on the need to provide post-conviction DNA testing for certain defendants. We agree on the need to ensure that every defendant is represented by competent counsel as required by the Sixth Amendment of our Constitution and numerous Supreme Court decisions enforcing this requirement.

But we disagree on the means to those common ends. In my view, the substitute amendment is significantly flawed. First, I have several objections to the manner in which the substitute amendment provides DNA testing to convicted defendants. Specifically, the substitute amendment: includes no time limit on the filing of such requests by convicted federal and state defendants; allows defendants who plead guilty to obtain a DNA test; limits the government's ability to use and prosecute defendants where the DNA sample matches DNA recovered from the scene of an unsolved crime; allows federal defendants to obtain DNA testing in federal court relating to prior state convictions used to enhance their federal sentence, even though the federal judge knows nothing about the state case, has no access to the trial record or the evidence.

Second, the substitute amendment threatens the foundation of federalism and separation of powers in our country.

For example, with respect to DNA testing, the substitute amendment stretches the 14th

Amendment and its remedial purposes to impose a DNA testing requirement on the states. This is an unconstitutional extension of the 14th Amendment, and more importantly, is unnecessary. Many states already have enacted DNA testing programs - in fact 25 of the 38 states which have capital punishment already have enacted DNA testing programs, and 6 currently have pending legislation to create such programs. Further, several states already provide DNA testing on an informal basis, and even where there is a statutory requirement, testing may be conducted on an informal basis, short of any litigation requirement.

In the absence of a true factual basis and need for remedial purposes, extending the 14th Amendment into this area is plainly unconstitutional. The Supreme Court's decision in Boerne v. Flores, 117 S.Ct. 2157, made clear that the 14th Amendment can only be used to address for remedial purposes to respond to an existing problem. That burden cannot be met here when the states are already addressing the issue of post-conviction DNA testing.

Equally troubling to me is the manner in which the proposal seeks to ensure competent counsel for indigent defendants. Once again, the proposal tramples on state sovereignty and burdens states with unfunded federal mandates.

First, the proposal would strip the traditional power of states and state courts to establish a system for appointing counsel to represent indigent defendants. States and state courts have established systems for ensuring competency and appointment of competent counsel. Specifically, 34 out of the 38 states with capital punishment have established standards or practices to ensure that competent counsel are assigned. This is a province legitimately reserved to the states and the state courts.

The substitute amendment rests on an unsupported assumption that the system is broken. I disagree. The Sixth Amendment to the Constitution provides sufficient protection for each and every defendant and ensures competent counsel. Death penalty opponents claim the system is broken and blame ineffective assistance of counsel. Their own evidence, however, indicates that the system is not broken. To the contrary, a recent Justice Department study concluded that "[i]n both Federal and large State courts, conviction rates were the same for defendants represented by publicly financed and private attorneys." (Caroline Wolf Harlow, Defense Counsel in Criminal Cases, Bureau of Justice Statistics, November 2000).

We have all heard the horror stories of the attorney who fell asleep during his client's trial and the attorney who showed up for trial intoxicated. Some opponents of the death penalty have portrayed these stories as "par for the course." This view ignores the hundreds of capital cases in which no flaw was found in the quality of legal representation. It also ignores the hundreds of capital cases in which defendants were either acquitted, or sentenced to a penalty less than death, many times the result of outstanding representation by defense counsel. The truth is that in many cases state and local prosecutors handling a capital case are out-manned and outgunned by defense teams funded by a combination of public and private sources.

Second, the proposal presents the states with a Hobson's choice: either accept federal grants, which diminish over time, establish "independent" agencies (separate from the executive, legislative and judicial branches) responsible for complying with federally-mandated competency and appointment standards, agree to allow private civil suits against state officers

responsible for this program, or grant money will be sent to private capital defender organizations. States will be required over time to fund more and more of the financial burden as federal grants diminish over time. This Hobson's choice is nothing more than a veiled attempt to resuscitate the private capital litigation resource centers that Congress defunded in the middle 1990s after a series of abuses and irregularities.

Third, the substitute amendment will burden the states in defending civil enforcement suits which will be churned by a cottage industry fueled by private death penalty opposition groups, prisoners and other interested parties. Again, states will have to devote more and more money to defend these suits, leading to settlements and more and more state funds allocated to creating and maintaining the new agency and system for appointment of counsel. More importantly, I question this provision's constitutionality given the sovereign immunity of states under the 11th Amendment and recent Supreme Court cases on the issue.

Fourth, the substitute amendment threatens to reduce critical Byrne grant money to state and local law enforcement agencies if Congress fails to appropriate authorized funding levels. This makes no sense. While many are concerned about the FBI's need to focus on terrorism and its ability to continue to investigate local crimes, this is not the time to be reducing federal funding to support state and local law enforcement. Again, the proposal places more and more burdens on the states.

I would note that several significant and credible organizations are opposed to all or parts of S. 486. These organizations include : The National Center for State Courts; the Administrative Office of the United States Courts; National District Attorney Association; International Association of Chiefs of Police; Fraternal Order of Police; Law Enforcement Alliance of America; Justice for All; Justice Against Crimes; and the Office of the District Attorney, 258th Judicial District of Texas.

For all of the above-stated reasons, I respectfully oppose the substitute amendment, and would urge adoption of my substitute.

I again want to reiterate my commitment to the common goals that we all share - a fair and just death penalty system which provides for post-conviction DNA testing where such testing will determine whether or not the defendant is actually innocent, and a death penalty system in which all capital defendants are represented by competent counsel and receive a fair trial.

My proposal will provide for post-conviction DNA testing, and will improve the competence and performance of prosecutors, defense counsel and trial judges handling state capital criminal cases. In stark contrast to Senator Leahy's amendment, my proposal will accomplish these objectives within our constitutional framework and without burdening states with unfunded mandates.

First, my bill authorizes post-conviction DNA testing where a federal defendant can show that the DNA test will establish his or her "actual innocence." Under my proposal, when a defendant demonstrates that a favorable result would show that he or she is actually innocent of the crime, the defendant will be given access to DNA testing. Thus, DNA testing will not be permitted where such a test would only muddy the waters and be used by the defendant to fuel a new and

frivolous series of appeals. When a DNA test shows that the defendant is actually innocent, then the Act authorizes the defendant to file a motion for a new trial. Under the Act, DNA testing in capital cases will be prioritized and conducted on a "fast track,"so that these important cases are handled quickly.

Second, when DNA testing reveals that the defendant's claim of innocence was actually false, the defendant can then be prosecuted for perjury, contempt or false statements. Further, the Act allows DNA test results to be entered into the CODIS database and compared against unsolved crimes. If the test result shows that the defendant committed another crime, the defendant may then be prosecuted for the other crime.

Third, with respect to state defendants, the Act encourages states to create similar DNA testing procedures, and provides funding assistance to those states that implement DNA testing programs. As I mentioned before, 25 of 38 states which have capital punishment already have enacted post-conviction DNA testing programs, and 6 states have pending legislation to create such a program. With the new source of funding, more states will enact DNA testing programs, and will provide such testing on an expedited basis.

Fourth, in order to improve the fairness and accuracy of state capital trials, the Act creates grant programs to train defense counsel, prosecutors and trial judges to ensure fair capital trials. While I do not believe that the system is broken, I do believe that our justice system can always be improved. The grants proposed under the Act will enable states to send prosecutors, defense counsel and trial judges to conduct training programs to ensure that capital cases are handled more efficiently and effectively, and that every capital defendant will receive a fair trial under our justice system.

I respectfully urge my colleagues to support my substitute amendment.

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