

Testimony of  
**André de Gruy**

Director of the Mississippi Office of Capital Defense Counsel  
Jackson, Mississippi  
November 10, 2009

Testimony of André de Gruy  
Director Mississippi Office of Capital Defense Counsel

"Strengthening Our Criminal Justice System: Extending the Innocence Protection Act."  
United States Senate  
Committee on the Judiciary

November 10, 2009

Thank you Mr. Chairman and members of this committee for the opportunity to tell you of the past successes of the Innocence Protection Act and hopefully to help you understand the important need we have in places like Mississippi for the extension of the Act.

I am André de Gruy, director of the Mississippi Office of Capital Defense Counsel. The Office was created by the Capital Defense Litigation Act of 2000 with the dual purpose of reducing the cost of capital defense on the counties of Mississippi and to improve the quality of defense in death penalty eligible cases.

I opened the Office in 2001 with two staff attorneys and a small support staff. In 2005 we increased to a staff of four attorneys. Working as co-counsel with locally appointed and funded public defenders, my office opens 15-20 death eligible cases per year but across Mississippi there are approximately 60 indigent defendants charged with death penalty eligible offenses.

My office is the only state funded public defender office handling cases at the trial level. Two-thirds of the indigent death penalty cases and all other indigent felony prosecutions are handled by county funded public defenders. Four of our 82 counties have full-time defender offices staffed with lawyers and investigators. The remaining 78 counties either use ad hoc appointment or flat-fee contract defenders to provide representation.

The "systems" vary greatly in funding and quality of representation across the state. Our felony courts are state funded as are our felony prosecutors. The most recent study by the Mississippi Public Defender Task Force found that funding for the prosecution function was approximately twice the funding level for the defense function.

This funding disparity is also present in the training provided prosecutors and defenders. Prior to 2008 we had no defender training program and no more than \$50,000 per year was spend on defender training by the Judicial College. We now have a defender training division in the state

funded Office of Indigent Appeals but it is funded at 50% of a similar unit for prosecutor training in the state Attorney General's Office.

These funding shortages coupled with a lack of caseload limitations and no standards for the appointment of counsel particularly in death penalty cases call in to question the constitutionality of the criminal justice system in Mississippi and risk the conviction and execution of innocent people.

Since reinstatement of the death penalty Mississippi has imposed just over 200 death sentences. Today we have 60 people on death row. In this era we have executed 10 people yet 11 convictions or sentences have been reversed because of ineffective assistance of counsel.

Those 11 are just the cases that were able to meet the high standard required for reversal based on ineffective assistance of counsel. At least 3 Mississippi lawyers were disbarred or suspended from practice between the time they tried a death penalty case and the direct appeal was filed. One lawyer was involuntarily committed for drug treatment before the direct appeal was decided. On post-conviction review the state supreme court observed that the apparent drug abuse explained some of his behavior but did not result in prejudice warranting a finding of ineffective assistance of counsel. Another lawyer who had previously been found to have provided deficient performance in a death penalty case was appointed on another death case and in that case had to be ordered to appear and argue the only issue he raised in the direct appeal brief.

In the Eddie Howard case the state supreme court took the extraordinary step of remanding a case after the brief of appellant was filed. The court directed the lower court to determine if new counsel should be appointed where the brief filed "may not have represent[ed] counsel's best efforts." This attorney represented Kennedy Brewer in another case. Mr. Brewer received a new trial after six years on death row and was eventually fully exonerated.

There have been a total of 3 former Death Row inmates cleared of the charges that sent them to Death Row. Two were acquitted in retrials and Mr. Brewer had all charges dismissed after an investigation by the defense team identified actual killer. I had the privilege of working with a local defender and The Innocence Project on Mr. Brewer's case. Our efforts not only freed Kenny we also solved a related killing that led to the exoneration of Levon Brooks who was serving a life sentence. In addition to these cases my office has had 2 acquittals in capital trials and charges dropped on a third client facing the death penalty.

I believe we have had more defense lawyers found ineffective than people executed because of the funding shortages and inadequate training and support available to the lawyers appointed in death penalty cases. I believe the successes we've had in exonerating the innocent are what can and will happen with better funding and training for public defenders.

In the first 18 years I did capital defense there were 2 death penalty training programs for trial defenders in Mississippi. Very few Mississippi public defenders could afford to attend programs in other states. In 2005-06 through funding provided by the Innocence Protection Act 18 Mississippi defenders were able to attend training programs sponsored by the National Consortium for Capital Defender Training.

In 2007 we received our first grant under the Act and have now conducted 2 training programs attended by almost 38 Mississippi lawyers and investigators. We have received a second grant and are hoping to conduct 2 more programs, one focusing on mental health problems present in so many of these cases. Problems the average public defender never faces in his practice.

These training opportunities have allowed us to expose these lawyers to the standard of practice expected in capital defense and introduce them to experienced capital lawyers from around our state and other parts of the country who attended as trainers. Because of the federal funding that allowed for the intensive training format and the long-term mentoring that followed the programs we have been able to improve the quality of representation in far more than the 15 cases we directly handle each year.

Unfortunately we have been unable to apply for the 2009 training grant. Because of funding shortages in my office Mississippi is far from having "an effective system for providing competent legal representation" as defined by the Act. Meeting this definition was required to apply this round.

I fully support the standards for appointment of counsel found in the Act. I continue to encourage my Supreme Court to adopt strong standards as they have in post-conviction cases and encourage my legislature to adequately fund the Act they passed in 2000 to assure competent counsel.

I'm not suggesting watering down standards but am requesting training funds be made available to states like Mississippi that can demonstrate progress towards the Act's goal. I'm also asking that funding of capital defense improvement grants go beyond training. In a state like Mississippi, that prior to 2000 provided no state funding for death penalty defense but now provides about \$2,000,000 for trial and post-conviction cases, could be enticed to go further and meet its constitutional obligation if the investment were matched with federal funds.

Again I thank you for your time and interest in this important issue. I thank you for the support your past funding has provided the state of Mississippi, my fellow public defenders and our clients. And I encourage you to re-authorize the Innocence Protection Act.