AMERICAN BAR ASSOCIATION

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TESTIMONY OF

MICHAEL S. GRECO

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

for the hearing on

"The Adequacy of Representation in Capital Cases"

April 8, 2008

Mr. Chairman and Members of the Subcommittee:

Good morning. Thank you for the opportunity to appear today and share our views with the Subcommittee. I am Michael S. Greco, a partner in the law firm of Kirkpatrick & Lockhart Preston Gates Ellis, LLP, and former President of the American Bar Association (2005-2006).

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William H. Neukom to share with you our findings and concerns about the current state of representation in death penalty cases.

The over-arching theme of my term as ABA President was renaissance – a rebirth and reaffirmation of the legal profession's core values and America's constitutional principles. My priorities as President included protecting the rights and freedoms of American citizens, safeguarding the independence of the judiciary and other institutions of America's democracy, addressing the legal needs of lower-income citizens, advancement of women, people of color and persons with disabilities in the legal profession, and improvements to the Association and the legal profession.

The subject of today's hearing, the competency of defense counsel in capital cases and how that impacts the administration of the death penalty in our county, relates directly to a reaffirmation of America's constitutional principles; to protecting the rights and freedoms of citizens; and to ensuring that justice is done for all.

The public often assesses the value of our legal system by its perception of how well it functions. Capital cases are the most visible and complicated of all criminal cases, and the consequences of making mistakes in these cases are the most extreme. Despite this knowledge, state governments have failed for many years to take the steps they must to address long-standing and systemic problems in our death penalty counsel systems. As a consequence, I fear that too many poor defendants do not receive fair trials, and that mistakes and errors occur too often. A system that wrongly sentences people to death is not a system that is functioning well, and our entire legal system suffers as a consequence.

Let me be clear at the outset about where the American Bar Association stands on this issue. Except for its opposition to imposing the death penalty on individuals who committed their crimes while juveniles, individuals with mental retardation, and individuals with serious mental illness, the ABA has not taken a position on the constitutionality or appropriateness of the death penalty. However, in the decades since the death penalty was reinstated in 1976, the Association has adopted a series of policies concerning the administration of capital punishment, and the ABA has made the right to effective assistance of counsel for all defendants and at all stages of a capital case a priority.

The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. In 1989, for example, the Association first adopted ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines). These Guidelines were greatly expanded and updated in 2003 to detail the minimal effort

required by defense counsel and death penalty jurisdictions to ensure competent legal representation. They are now the accepted standard of care for the defense of death penalty cases, are cited by state and federal courts, including the US Supreme Court, and have been adopted in a number of death penalty jurisdictions.

The Association also undertakes to help provide volunteer legal representation for indigent death row inmates through its Death Penalty Representation Project. Over the years, the Representation Project has worked with state governments to improve funding, training and standards for defense counsel and to implement and train judges and lawyers about the ABA Guidelines. It currently is the only organization working on a nationwide basis to recruit and train volunteer pro bono lawyers for the hundreds of indigent death row prisoners who lack counsel.

In 1997, the House of Delegates of the Association voted overwhelmingly to call for a halt to executions in the jurisdictions that have the death penalty until each such state and the federal government implement procedures that (a) eliminate discrimination in capital sentencing and (b) guarantee fundamental fairness and due process to those facing capital punishment. The Association was prompted to take this important step in part because of two important and devastating developments.

First, Congress passed the Antiterrorism and Effective Death Penalty Reform Act of 1996 (AEDPA) (P.L. 104-132), which imposed statutes of limitations on death row appeals for the first time and sharply curtailed the availability of appellate review. At the same time, Congress also eliminated all federal funding from the Post-Conviction Defender Organizations that had represented many death row prisoners and had advised appointed and pro bono lawyers who handled capital habeas corpus cases in state and

federal courts. Because many state governments failed to replace this critical funding, public resources to provide effective and experienced legal assistance to capital defendants and death row prisoners all but disappeared, just at the time when the law became more complicated than ever before. These two steps taken by Congress, in our view, have had disastrous consequences on the quality and availability of legal representation for persons facing a possible death sentence and have significantly and regrettably heightened the risk that an innocent person may be executed.

Since the reinstatement of capital punishment, the ABA has studied the administration of the death penalty throughout the nation. The ABA has developed and advocated policies for capital cases that urge the appointment of competent and adequately funded counsel, the elimination of racial discrimination, and a guarantee that individuals who have been sentenced to death have their convictions and sentences fully reviewed on the merits by state and federal courts.

In its most ambitious effort to study the administration of the death penalty in the United States, the Association recently concluded a four-year assessment of the death penalty systems in eight states: Alabama, Arizona, Florida, Georgia, Indiana, Pennsylvania, Ohio, and Tennessee.

Overview of State Death Penalty Assessments

The ABA Death Penalty Moratorium Implementation Project (the Moratorium Project) determined in February 2003 to examine eight state death penalty systems to preliminarily determine the extent to which they achieve fairness and accuracy and provide due process. The assessments were not designed to replace the comprehensive

state-funded studies necessary in capital jurisdictions, but instead were intended to highlight individual state systems' successes and inadequacies.

In conducting the assessments, the Moratorium Project began by recruiting local state-based assessment teams composed of experienced and respected individuals in each of the eight states surveyed. Each team was chaired by a law school professor and included or had access to current or former defense attorneys, current or former prosecutors, individuals active in the state bar association, current or former judges, state legislators, and others who the Moratorium Project and/or team leaders felt should be included to complete the assessment in a timely, comprehensive manner. Team members were recruited without regard to their position on the death penalty or on a moratorium on executions and were asked only to approach the issue with an open mind. Once recruited, Assessment Team members provided guidance during the research process and served as reviewers as the report was drafted. Each team leader hired law students to collect the data, review the case law, and conduct any necessary interviews.

The Moratorium Project collected researched and collected data in twelve important areas: (1) preservation and testing of DNA evidence; (2) identification and interrogation procedures; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services; (6) the direct appeal process; (7) procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings; (8) clemency proceedings; (9) jury instructions; (10) an independent judiciary; (11) racial and ethnic minorities; and (12) mental retardation and mental illness. Once the data had been collected, it was sent to the Moratorium Project. The attorneys at the Moratorium Project then worked with the team members to draft the report.

Overview of Assessment Findings on Defense Lawyering

After completion of eight state assessments, it is beyond dispute that each state system studied has grave problems that call into question its fairness and whether justice is being done. While the scope and detail of the problems differ among states, some of the identified problems are disturbingly universal. The largest and most problematic of these is the quality and availability of competent legal representation for capital defendants and death row prisoners.

The effectiveness of defense counsel is the most critical factor that determines whether an individual will receive a fair trial, and the death penalty. Although anecdotes about inadequate defenses long have been reported throughout the United States, a comprehensive study[1] in 2000 shows definitively that ineffective legal representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective representation in any aspect of a capital proceeding requires, at the least: a) lawyers who have substantial specialized training and experience in the complex laws and procedures that govern a death penalty case; b) full and fair compensation to the lawyers who undertake these cases; and c) adequate funding for engaging necessary investigators and experts. The ABA Guidelines speak of a "defense team" approach, which reflects the necessary "pool" of expertise that is required for the delivery of high quality legal representation in all capital cases.

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[1] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www.thejusticeproject.org/press/reports/broken-system-studies.html (last visited on Aug. 4, 2006).

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—that is, there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.[2] The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.[3] In many of those cases, competent and adequately funded trial counsel might have helped avert the constitutional errors that infected the trial and that led to a miscarriage of justice.

In the majority of capital trials, however, a defendant lacks the means to hire a lawyer with sufficient knowledge and resources to provide adequate representation. Consequently, they must rely on the lawyers that the state provides – often newly admitted, inexperienced, or incompetent court-appointed lawyers, or overburdened public defenders.

Although lawyers and the organized bar long have provided, and will continue to provide, *pro bono* representation in capital cases, most such *pro bono* representation is limited to post-conviction proceedings—after avoidable injustice has occurred. Jurisdictions that have the death penalty also have the primary—and constitutionally required—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and adequate funding for experts, resources and fees.

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2 Strickland v. Washington, 466 U.S. 668 (1984).

3 *Supra* n.1.

Unfortunately, in too many death penalty cases, and in too many states, the responsibility is being ignored. The ABA assessment criteria included five separate recommendations regarding competency of defense counsel. Not one of the eight states surveyed fully complies with any of them.

The quality of defense representation therefore is problematic in every state studied by the ABA, leaving no doubt that states are failing to ensure that all—or even most—capital defendants receive qualified lawyers at trial, on appeal, and through state post-conviction proceedings. One reason for this situation is the failure of many states to fund and staff a statewide indigent capital defense system, instead of the county-by-county system now in place.

Statewide organization is the best means for the effective provision of defense services, because jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation, and insulate the administration of defense services from local political pressures. Of the eight states studied, however, not one fully complies with this recommendation, despite the fact that some states have recognized the benefits of a true statewide defender system. For example, in Arizona, the state's Capital Case Commission unanimously stated that "establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona." Nevertheless, with the exception of post-conviction proceedings, Arizona has not shifted from its county-by-county system to a statewide system.

Regardless of whether indigent defense is provided on a statewide or county-by-county basis, the disturbing fact is that at this time in the United States, states are failing

to ensure that capital defendants and death row inmates receive competent, well trained and adequately funded counsel at all stages of the capital proceedings. And it is vital that effective representation be provided at *every* stage of the proceedings— because each level of appellate review plays a unique role in death penalty proceedings, because evidence of innocence and/or constitutional errors are not always immediately available, and because the law may change over the years as legal and social norms evolve (for example, the law now excludes the mentally retarded and juveniles from death penalty eligibility). .

Most egregiously, two of the states surveyed by the ABA —Georgia and Alabama— fail to provide for the appointment of counsel in post-conviction proceedings at all, leaving death row defendants desperate for legal assistance. In Alabama, of the 130 death row inmates in state post-conviction or federal *habeas corpus* proceedings pending in June 2003, 92 of them were represented by out-of state law firms or public interest groups, 18 were represented by the Equal Justice Initiative of Alabama, 17 were represented by in-state private counsel, and three were unrepresented. In April 2006, approximately fifteen of Alabama's death row inmates in the final round of state post-conviction appeals had no lawyers at all to represent them.

Even in states that do appoint counsel in state post-conviction proceedings, serious problems abound. For example, district public defender offices in Tennessee are burdened by some of the highest caseloads in the country and presently are short a shocking 123 attorneys. The Office of the Post-Conviction Defender in Tennessee must contend with a crushing caseload and has only five assistant post-conviction defenders, each of whom must handle twelve to fourteen capital cases at any one time.

Another factor contributing to the sorry state of defense lawyering in capital cases is the failure of many states to provide for the appointment of two lawyers at every stage of a capital case, and for adequate funding for investigators and mitigation specialists to be retained, as the ABA Guidelines require.

In addition, many states do not enforce meaningful standards for the defense attorneys handling death penalty cases. The ABA Guidelines emphasize the importance of *qualitative* skills and experiences that attorneys must have before being appointed to handle a case rather than simply requiring a specific number of years of practice or number of trials. In Florida, registry attorneys (private attorneys who meet Florida's training and experience requirements and may represent capital defendants and/or death row inmates) need only minimal trial experience to qualify for appointment and their performance is not monitored once they have been appointed. The failure to ensure that only qualified counsel are appointed has negatively affected the quality of legal representation that defendants are receiving. Florida legislators and Supreme Court justices have publicly criticized the performance of registry attorneys on a number of occasions, including Florida Supreme Court Justice Raoul Cantero's testimony that the representation provided by registry attorneys is "[s]ome of the worst lawyering" he has ever seen.

States that have moderately more robust qualification requirements also have serious problems. For example, in Ohio, the state requires some, but not enough, quantitative measures of training and experience, but unqualified lawyers are still appointed to represent capital defendants. In fact, of the 239 Ohio Supreme Court capital case decisions between 1984 and 2004, ineffective assistance of counsel claims were

raised in 150. While only two cases were successfully appealed on these grounds, the court criticized defense counsel for his/her performance in an additional 10 cases. Dissenting judges would have granted relief based on ineffective assistance of counsel in two other cases, and the court found that counsel's representation was deficient, but that the deficiency was harmless error in a final two cases. In Hamblin v. Mitchell, 354 F.3d 482, 485 (6th Cir. 2003), for example, one of Hamblin's appointed trial defense counsel had no experience with death penalty cases, later was disbarred, and "admitted...that he did essentially nothing by way of preparation for the penalty phase of this trial."

Another serious problem in the eight states surveyed was inadequate compensation of defense counsel. The compensation paid to appointed capital defense attorneys is often woefully inadequate, dipping to well under $50 per hour in some cases. Poor compensation inevitably means that the only lawyers who are available to handle capital cases are often inexperienced, ill-prepared, and unskilled. The few competent lawyers who agree to represent capital defendants are generally financially unable to handle more than one capital case because of the time involved and the low fees. In Ohio, the Office of the Ohio Public Defender sets *maximum* hourly rates and total expenditures, but counties are able – and do – pay fees that are much lower. So while the Office of the Ohio Public Defender will reimburse counties for up to $95/hour in capital trials and appeals, to a total of $75,000 at trial and $25,000 on appeal and in state post-conviction proceedings, Cuyahoga County, for instance, only pays appointed attorneys an hourly rate of $45 an hour, up to $25,000 at trial, up to $5,000 for capital appeals, and up to $170 in state post-conviction proceedings.

A number of Ohio private attorneys with experience in capital cases have commented publicly that they will no longer handle death penalty cases due to the low pay. In Pennsylvania, compensation rates for private appointed counsel are set on a county-by-county basis: in Philadelphia County, lead counsel in death penalty cases are provided $400 per day after the first-half day or $60 per hour for in-court work and $50 per hour for out-of-court work, while in Dauphin County capital attorneys receive a flat fee of $6,000, and in York County, capital attorneys receive $55 per hour.

Conclusion

Providing effective legal representation is an essential component of a legal system that is fair and accurate. Through the process of conducting state death penalty assessments, the ABA has confirmed that the problem of ineffective defense representation is a consistent and systemic problem throughout the states surveyed, regardless of jurisdiction. Because the ABA has assessed a critical number of death penalty states, and based on our long-standing work and experience in this area, we can reasonably conclude that the same problems exist in jurisdictions that were not assessed.

The fundamental principle of fairness that we cherish in America requires that justice must be done before a person is put to death. Effective defense representation at every stage of the proceedings in death penalty cases is a *sine qua non* of that principle.

In view of the findings in the ABA's eight state death penalty assessments, it can fairly but lamentably be said that the administration of the death penalty in America is woeful. Much work needs to be done, and significantly more resources – financial and

human -- must be committed in death penalty jurisdictions if this sorry situation is to be improved, and the right of all citizens to a fair trial is to be achieved.

Appointing, training, and funding qualified and experienced defense counsel in all capital cases is the only way we can meet these expectations. The ABA's work confirms that all members of the legal system must commit to reform and change so that we can make good on the promise of justice for all, including capital defendants.

On behalf of the American Bar Association, I appreciate this opportunity to appear before the Committee to address this important issue.

Michael S. Greco, a partner in the Boston office of **Kirkpatrick & Lockhart LLP** (K&L), recently served as President of the American Bar Association (2005-2006).

A major focus of Greco's presidency was to ensure that the legal profession and federal government meet the legal needs of the underserved in America, a cause he has championed throughout his 30-year legal career.

Greco has a long and productive history with the ABA. For example, Greco has served in ABA's House of Delegates since 1985 and as State Delegate from Massachusetts since 1993. He has chaired the association's Standing Committee on Federal Judiciary and Section of Individual Rights and Responsibilities. After the terrorist attacks on September 11, 2001, Greco was appointed to the ABA Task Force on Terrorism and the Law, which provided analysis of legislation that resulted in the US Patriot Act, and he helped develop ABA policy regarding the use of military tribunals to try suspected terrorists. He also served on the ABA Standing Committee on Law and National Security.

Greco is a trial lawyer with more than 30 years of litigation experience in business, employment and real estate law. He has also served as mediator and arbitrator in complex business and other disputes on both the state and national levels. He joined Kirkpatrick & Lockhart in 2003, after 30 years as partner with Hill & Barlow of Boston.

Greco earned his J.D. from Boston College Law School in 1972, and his B.A. in English from Princeton University in 1965. Raised in Hinsdale, Ill., Greco and his family have resided in Wellesley Hills, Mass., for the past 30 years.