**"The Adequacy of Representation in Capital Cases," April 8, 2008**

**From Testimony of Bryan A. Stevenson, Equal Justice Initiative of Alabama, Executive Director and NYU School of Law, Professor of Clinical Law before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on**

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Bryan A. Stevenson expresses concern over the death penalty because the risk of innocent, unfairly convicted prisoners is too great. He believes this is due in large part to inadequate representation.

There remains considerable doubt about America's system of capital punishment. Although we have now executed 1,100 people in this country during the last 30 years there are fundamental problems with the fairness, reliability, and propriety of the death penalty in state and federal courts. In the last few years, we have uncovered a shocking rate of error in death penalty cases. Nearly 130 death row prisoners have been released from death row after being proved innocent or exonerated. Hundreds of other death row prisoners have had their convictions and death sentences overturned after it was established that they were illegally convicted or sentenced. Most disturbingly, there has been evidence that innocent people may have been executed. These problems with capital punishment have led to a decline in the rate of executions and a decrease in the death sentencing rate in recent years. A few months ago, New Jersey became the first state since the 1960s to completely abolish capital punishment. However, capital punishment remains a costly and dominant feature of the state and federal criminal justice system.

Many jurisdictions have implemented no reforms or review of their death penalty schemes and the practice of executing prisoners and imposing death sentences goes on without much reflection or review. Perhaps the single most significant problem with the administration of capital punishment is the inadequacy of indigent defense for capital defendants. Without competent and skilled counsel in death penalty cases, there can be no reliability or fairness in the outcomes of these proceedings.

Last month, I testified as an expert in a death penalty case in Oklahoma where a court was examining whether James Fisher had received adequate legal assistance at his capital trial. It was my second trip to Oklahoma on this case. Ten years ago, a federal appeals court reversed Mr. Fisher's capital murder conviction and death sentence because his appointed counsel maintained a trial schedule "so heavy he sometimes would finish one case in the morning and begin trying a new case in the afternoon while the jury was still deliberating." He was completely unfamiliar with the State's evidence and witnesses, conducted no investigation for Mr. Fisher, and called no witnesses. At the penalty phase, counsel called no witnesses and waived opening and closing arguments. Not surprisingly, Mr. Fisher was sentenced to death.

At his new trial in 2005, Mr. Fisher was represented by counsel who was abusing alcohol and suffering from drug addiction. This attorney was suspended from the practice of law and entered a rehab facility three months after Mr. Fisher's trial. At trial, the lawyer presented none of the available evidence or witnesses who could have assisted Mr. Fisher. Prior to trial, the lawyer got angry at Mr. Fisher, called him derogatory names and asked the guards to remove Mr. Fisher's handcuffs so he could "kick his ass." When Mr. Fisher complained to the court and insisted he would rather represent himself than be represented by his new counsel, he was barred from court during the trial. Mr. Fisher was therefore not present during his trial, when his impaired lawyer presented almost none of the available evidence, and he was found guilty and sentenced to death. [*Editor's note*: In April 2009 the Oklahoma Court of Criminal Appeals granted Fisher a new trial based on the inadequacy of his former legal representation.]

Unfortunately, examples of inadequate representation are not exceptional. Alabama has no state public defender offices, and trial judges appoint counsel, many of whom have little training or experience in capital litigation. Of the 203 people currently on Alabama's death row, more than half (59%) were represented by appointed lawyers whose compensation for preparing the case was capped at $1,000 by state statute. There are very few mitigation experts or investigative services available, and even though compensation has improved in recent years, compliance with the ABA Guidelines on Adequate Representation in Capital Cases is almost never accomplished. There are people on death row in Texas who were defended by attorneys who had investigative and expert expenses capped at $500. In some rural areas in Texas, lawyers have received no more than $800 to handle a capital case. People still on Virginia's death row were provided lawyers who were effectively paid an hourly rate of less than $20 an hour. In Pennsylvania, there are currently death row prisoners who were sentenced to death in Philadelphia in the 1980s and 1990s when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1,700 plus $400 for each day in court. Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.

Underfunded indigent defense has predictably caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. Indigent accused facing execution have been represented by sleeping attorneys, 15 drunk attorneys, attorneys who are almost completely unfamiliar with trial advocacy, criminal defense generally, or death penalty law and procedure in particular, and attorneys who otherwise cannot provide the assurance of reliability or fairness in the client's conviction and death sentence.

Even in states where there are public defender systems, funding and compensation for attorneys remains low and resources for investigation and experts is scarce. Lawyers who are appointed to capital cases often do not have the resources, training and experience necessary to defend such a case. Capital cases involve different and complex investigative, preparation, and trial methods than other criminal cases. Lawyers who are not aware of these differences cannot be as effective. This becomes especially important during the penalty phase when defense counsel should present mitigating evidence. Lawyers with insufficient time, resources, or training will not know the best way to proceed in the penalty phase, denying indigent capital defendants an effective and compelling mitigation presentation.

The states with the most active death rows are those that have historically poor records of providing competent counsel to people accused of capital crimes. In such a system, the risk of wrongful convictions and error is unacceptably high.

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