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DEATH PENALTY INFORMATION CENTER

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Hon. Sam Brownback
Chairman
Subcommittee on the Constitution,
Civil Rights & Property Rights
613 Hart Senate Office Building
Washington, DC 20510

Hon. Russell D. Feingold
Ranking Member
Subcommittee on the Constitution,
Civil Rights & Property Rights
807 Hart Senate Office Building
Washington, DC 20510

Dear Senators Brownback, Feingold, and Members of the Committee:

Thank you for the opportunity to supplement the record of the recent hearing on the death penalty that was conducted by your Subcommittee on February 1, 2006. The hearing provided an excellent exploration of some of the key issues in the death penalty debate. In order for the record to accurately reflect the facts on this important matter, I would like to offer the following statement to clarify part of what was presented at the hearing:

SUPPLEMENTARY STATEMENT FOR THE RECORD

My name is Richard Dieter and I am the Executive Director of the Death Penalty Information Center (DPIC), a position I have held since 1992. The Center is a non-profit organization that conducts research and issues reports and analyses on capital punishment in the United States.

During the hearing on the death penalty before this Subcommittee, one of the witnesses, John McAdams of Marquette University, used much of his time in an effort to cast doubt on the importance of the innocence issue generally. A particular focus of his criticism was DPIC's list of innocent people who have been freed from death row. I believe that Prof. McAdams' criticism is based upon a fundamental misunderstanding of the nature and purpose of this list. Hence, his criticism was misdirected and may have been misleading to the Subcommittee.

DPIC'S INNOCENCE LIST

The origin of the Innocence List was a request that DPIC received from Rep. Don Edwards of California in 1993. Rep. Edwards was then the Chairman of the House Subcommittee on Civil and Constitutional Rights, and he asked DPIC to assess the risk that innocent people might be sentenced to death or executed under the death penalty system in the U.S. We prepared a draft report on this issue that resulted in the publication of a Staff Report of the Subcommittee later that year. As part of that report, we included a list of individuals who had been on death row and who subsequently had their convictions overturned. In almost all of 48 cases listed, the end result was a retrial in which the defendant was acquitted, or the dropping of all charges by the prosecution.

In preparing this list, we relied to some extent on the research of others, but we sought to apply a conservative and objective definition of innocence. We chose not to include cases in which researchers—or any other individuals who are not authorized by the justice system to make definitive *legal* judgments regarding guilt or innocence—had subjectively decided that the defendant was probably innocent. Rather, we elected to accept the judgments rendered by the official justice system itself, applying its traditional, legally prescribed procedures and criteria for determining *guilt or* innocence, and to restrict DPIC's role simply to recording the history of those judgments.

SUBSEQUENT YEARS

In the years since that initial report, DPIC has continued to maintain this list, which has now grown to 122 individuals. In the original Staff Report, a handful of cases were included that were outside the criteria that we deemed appropriate for this list. Those cases were clearly identified as exceptions in the Staff Report. In our continuation of the list, DPIC elected not to add cases that were outside our criteria, and eventually we dropped even the original exceptional cases in the Staff Report from our list. The criteria for inclusion on the list are clearly stated in our subsequent published reports on this issue (1997 and 2004) and on our Web site. Those criteria are:

Cases involving former death row inmates who have since 1973:

- a. Been acquitted of all charges related to the crime that placed them on death row, or
- b. Had all charges related to the crime that placed them on death row dismissed by the prosecution, or
- c. Been granted a complete pardon based on evidence of innocence.

In his testimony, Prof. McAdams chose to use another definition of innocence and then criticized our list for not meeting his definition. His definition is not stated with any clarity, but as I understand it, is premised on the notion that someone who has been charged with a crime, formally tried on the charges, and acquitted of each and every charge at trial is not thereby established to be "innocent." Instead, such a person must *additionally* pass some subjective test of

“actual innocence” set by his or her prosecutors or by special pleaders advocating this or that criminal-justice policy in the forum of public opinion. If these self-appointed judges determine that the person is *probably* guilty--despite an official determination that there is not enough legal proof to meet the time-honored standard of “beyond a reasonable doubt”--then that person is not “innocent” and should not be included on DPIC’s list.

This, of course, is a different criterion than we have used. It would, undoubtedly, produce a different list. Prof. McAdams is free to set out his criteria more clearly and assemble such a list. What he should not do is insist that our list conform to his definition. For DPIC to get involved in such subjective second-guessing and vague judgments would surely leave us open to claims of bias, and it would not have provided the kind of objectivity that we believed Rep. Edwards’ Subcommittee desired.¹

Further, we believe that it is a mistake to maintain that innocence (or guilt) can be established in some absolute sense through a re-evaluation of the facts surrounding a crime by a group of people with a vested interest in the outcome of this determination. Such “absolute judgments” have been proven wrong in many cases in recent years as a result of advances in DNA technology. But even where they have not been proven wrong, such an extra requirement to a person’s status of innocence is contrary to our long traditions and constitutional principles. The bedrock principle that a person is innocent until proven guilty beyond a reasonable doubt is the individual’s protection in our society against the unchecked power of the state to diminish a person’s status through mere suspicion. And when formal charges have been brought and have been definitively resolved by an acquittal, dismissal, or pardon based upon the application of that bedrock principle, neither DPIC nor Prof. McAdams can properly insist that the person is “really” guilty notwithstanding.

Thus, I believe Prof. McAdams’ criticism of DPIC’s list is misdirected. If there are people on our list that do not meet *our* criteria, he, or others, should inform us and, if appropriate, we will remove them. We do not claim infallibility.

THE RISK OF WRONGFUL EXECUTIONS

I believe that Prof. McAdams’ testimony was also potentially misleading in that he implies that our justice system’s traditional way of determining guilt and innocence is irrelevant in evaluating the risks associated with the death penalty. Can anyone doubt that our justice system should forbid the execution of the 122 people on DPIC’s list? These are people who were originally convicted and sentenced to die but who were later found not guilty of the crimes in question when all of the available evidence was reexamined by the authorities authorized to pass final judgment on the matter. And because their cases illustrate the risk

¹ . In a subsequent letter, Chairman Edwards thanked DPIC on behalf of his Subcommittee for this objectivity: “This document and the Center’s other reports serve as the basic reference materials for objective, relevant data on the death penalty.” Letter from Don Edwards, Subcommittee on Civil and Constitutional Rights, Oct. 22, 1993 (on file with DPIC).

that just such people could have been executed but for a variety of fortuitous circumstances, we must acknowledge the existence of that risk and of the profound challenges that it poses to the use of the death penalty. If we are to have the death penalty, the absolute minimum criterion for its use certainly should be that the defendant has been found guilty of the crime. These 122 cases since 1973 represent the most minimally stated risk of miscarriages of justice in these life and death decisions. The actual risk is probably far greater.

I believe that Prof. McAdams' testimony was misleading in a number of other regards as well. In criticizing the work of DPIC, he cited the case of *United States v. Quinones*, a federal death penalty case, implying that the judge in this case discounted the value of DPIC's list. Just the contrary is true.

In a pre-trial ruling, the District Judge declared the federal death penalty unconstitutional because it posed an unacceptable risk of executing the innocent.² The judge based his finding of risk to a large extent on the work and research of the Death Penalty Information Center. The prosecution had offered a similar critique to that proffered by Prof. McAdams in its attempt to dissuade the judge from reaching his conclusion.

With respect to DPIC's Innocence List, the court considered the arguments of both sides and noted:

This is not to say, however, that there is any basis for the Government's contention that the data and case summaries set forth in the DPIC website (as opposed to DPIC's interpretations of those data and summaries) are unreliable. See Govt. Mem. 34-35. Upon review of the substantial record provided by the parties, the Court is satisfied that the DPIC employs, as it attests (see Def. Mem. Ex. A), reasonably strict and objective standards in listing and describing the data and summaries that appear on its website.

United States v. Quinones, 205 F. Supp.2d 256, 265 n. 10 (D.C.N.Y. 2002).

In citing a smaller number of cases of innocence than appeared on DPIC's list, the judge was not rejecting any cases for inaccuracies. Rather he was restricting his analysis for the sake of argument to the past decade (DPIC's list runs from 1973), and to cases that the *Quinones* defendants, in a legal memorandum collecting non-DNA cases, "correctly intuited satisfy the Court's conservative criterion of prisoners who were 'released on grounds of factual innocence.'" *Id.* at n. 11.

THE FLORIDA COMMISSION

As another source for his criticism of DPIC's list, Prof. McAdams offered a review of Florida's innocence cases by the Florida Commission on Capital Cases. This Commission, like Prof. McAdams, viewed itself as gifted with the wisdom

² . This decision was later reversed on appeal on legal rather than factual grounds. See *United States v. Quinones*, 313 F.3d 39 (2d Cir. 2002).

to deny the innocence of individuals who had been acquitted at re-trial or where the prosecution had dropped all charges. But more to the point of its credibility of its review, this Commission, without consulting or obtaining permission from DPIC, copied our list, *added* cases that were never on our innocence list,³ and then proceeded to criticize the *inclusion of these very cases*. This is not only misleading, it calls into question the credibility of their entire endeavor.

Ironically, the chair of the commission claimed--while he was campaigning for Florida Attorney General--that DPIC's innocence list was politically motivated. Moreover, he came to an even more sweeping conclusion, unsubstantiated by the Commission's report, regarding all of those on Florida's current death row: "Number one, the system is not broken. Number two, there are no innocent people *on death row*. And Number three, the people who use these 23 cases as a reason to call for a moratorium are making a political statement."⁴ Following this, two more people were released from Florida's death row, their convictions reversed and all charges dismissed by the prosecution.

CONCLUSION

There are other areas, such as his discussion of the case of Roger Coleman, in which I believe Prof. McAdams inaccurately described the work of DPIC, and more importantly, distorted the problem that the cases of innocence present to our system of capital punishment. I would be happy to provide the Subcommittee with further information about these matters.

The many instances of wrongful convictions in capital cases raise profound questions for this Committee and for the American people. For every 8 people we have executed since the reinstatement of the death penalty, we have found 1 person who should not even have been convicted, much less executed. Any human system is fallible, but when it comes to life and death we must require a much higher level of reliability.

Thank you for this opportunity to supplement the record.

Richard C. Dieter
Executive Director

³ . See Florida Commission on Capital Cases: Case Histories, June 20, 2002, at Appendix (adding the cases of Sonia Jacobs and Joseph Spaziano under DPIC's logo as "Cases of Innocence," even though DPIC has never included these cases in its list.

⁴ . Associated Press, "State Senator Says Review of Cases Finds No Innocence," June 20, 2002 (emphasis added).