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OA/ID Number: 5873

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Folder Title:
Racial Justice Act

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Row:
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Q Ms. Reno, in recent days the Supreme Court justices have come out against the death penalty and a congressional report has indicated that it's applied unfairly against black men, and -- and it also cited your administration as having done that. I'm wondering if this gives you reason to reconsider the use of the death penalty for federal crimes.

ATTY GEN. RENO: Well, you know my personal opinion about the death penalty, and the one thing that I have done as I have served as attorney general is to make sure that it is not applied in a disparate way and that we take steps to develop procedures within the Department of Justice to ensure that there is no disparate application.

Q Then how do you account then for the fact that all of those subject to the death penalty now are black males?

ATTY GEN. RENO: We have -- I have tried to take information and develop information, and we're in the process of developing information to make sure that in all cases similarly situated the death penalty is applied evenly and without disparate treatment. And we will continue in that effort.

Q Congressman Edwards said that all 10 defendants approved for capital prosecution by you are black and that they are all approved for prosecution under the anti-drug abuse kingpin -- (inaudible) -- and they involved murder. He said on the face of it this showed a racial disparity. He wasn't blaming you or the Criminal Division, but he -- they were suggesting that there may be some inherent bias in U.S. attorneys' offices that may bring these cases.

ATTY GEN. RENO: What we're trying to do, because we're always concerned with that, in my experience as a prosecutor in Miami, and when I see figures like this, which we're very conscious of, is to look behind those figures to make sure that there is no basis for disparate treatment. You have 50 different states with 50 different state procedures. In some states the state will take action and in others it will be the federal government. What we're trying to do to address the very problem that you're talking about and to make sure that there is no disparate application on the part of the federal government is to look at each procedure, each state, understand what state courts are taking action, what federal courts are taking action and to try to develop appropriate guidelines that will prevent any disparate treatment whatsoever because we're as concerned as everybody else is that there be no disparate treatment whatsoever in the application of the penalty.

Q Would you favor suspending the death penalty until those guidelines are made available, until you're certain that there is no disparate treatment?

ATTY GEN. RENO: At this point, I have seen no cause to believe that there is disparate treatment, but we are going to continue to research it in every way we can to ensure it.

Q Do you support Congressman Edwards' and Congressman Scott's, I believe, Racial Justice Act, in which they're trying to introduce legislation that would allow a sentencing judge to take into account the race of the defendant and possible discrimination against a class or race of a defendant?

ATTY GEN. RENO: I explained to Congressman Edwards the other day that we would always like to work with him in terms of looking at federal prosecutions to make sure that there is no discrimination

Q Ms. Reno, the -- Congressman Edwards said the other day that he was not able to find out from the Justice Department the pool of applicants for the federal enforcement of the death penalty; in other words, how many of the original numbers were African-Americans or Hispanic, and he said that he was unable to get that information from the Justice Department.

ATTY GEN. RENO: As I explained to Congressman Edwards, one of the issues that you have to deal with as we look at what the pool is, in some states a state will be enforcing the particular homicide involved, it will be seeking the death penalty. In another situation, for whatever reason, either because of the procedures in the state, the federal government will be doing it. That's the reason it is so important that we research the whole effort and understand what the whole pool is to make sure that on relationship to all concerned, there is no disparate treatment.

NATIONAL
RAINBOW
COALITION

TO
Podesta

DETERMINED TO BE AN
ADMINISTRATIVE MARKING



INITIALS: JGP DATE: 5/23/16
2009-1305-F

PERSONAL & ~~CONFIDENTIAL~~

DATE 4-18-94

TO Mack McLarty

FAX # 202/456-1121

FROM Rev. Jesse L. Jackson

PHONE # 202/728-1180

OF PAGES (INCLUDING COVER PAGE): 3

I would appreciate it if you would see that the President gets this as soon as possible.

Thanks.

JLJ

Jacki Pickett, Office of the President

NATIONAL, 1700 K Street, NW, Suite 800, Washington, DC 20006, (202) 728-1180 Phone, (202) 785-2391 Fax

NATIONAL
RAINBOW
COALITION

April 15, 1994

The President
The White House
Washington, DC 20500

Dear Mr. President:

I am greatly disturbed by the recent reports describing your "quiet" opposition to the Racial Justice Act. If these reports are correct -- and I would like to assume they are not -- I would be very surprised. You have told the American people that you support the current crime bill because of its balance. A bill without protection against racial discrimination in the administration of the death penalty is not balanced.

You have called for tough, but smart, criminal justice legislation. The Racial Justice Act fits within your demand because it ensures fairness in the application of death penalty sentences. This is particularly important because this crime bill contains the largest expansion of the Federal death penalty.

The Racial Justice Act bars the execution of prisoners who demonstrate that their death sentence was imposed because of racial discrimination. The Act permits the use of neutral statistical evidence to demonstrate existing racial bias in death sentencing and allows the government entity involved to explain any statistical disparities. For example, the state of Georgia should explain, in court, why one prosecutor within a certain judicial circuit has sought the death penalty against 23 African American defendants since 1974 -- out of a total of 29 people charged with capital murder. The Department of Justice should explain, in court, why the death penalty has been sought against 28 "drug kingpins" who are African American -- and only 4 who are white.

The Racial Justice Act will not end capital punishment. The Racial Justice Act will be a large step toward ending the taint of racism that pervades capital punishment.

Reverend Jesse L. Jackson, President and Founder
Dennis Rivera, Chairman, Board of Directors

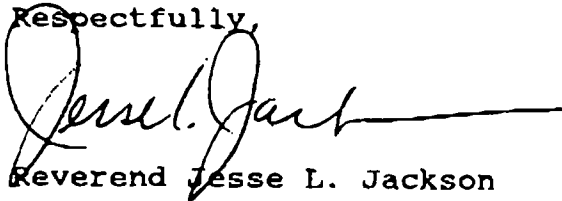
Francisco L. Borges, Treasurer
The Honorable Salima Siler Marriott, Secretary

PO Box 27385 • Washington, DC 20005 • (202) 728-1180 • fax (202) 728-1192

The President
April 15, 1994
Page Two

I hope that you clarify the Administration's position regarding the Racial Justice Act, and I dearly hope that you express your support for this critical provision immediately, to the Members of Congress and to the public at large.

Respectfully,

A handwritten signature in dark ink, appearing to read "Jesse L. Jackson", with a long horizontal stroke extending to the right.

Reverend Jesse L. Jackson

cc: Chairman Dan Rostenkowski
Rep. Charles Schumer
Rep. David Price

The President

NATIONAL
RAINBOW
COALITION

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DETERMINED TO BE AN
ADMINISTRATIVE MARKING

INITIALS:

JGP

DATE:

5/23/16

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PERSONAL & ~~CONFIDENTIAL~~

DATE 3-21-94

TO Mack McLarty (attention: Patty McHue)

FAX # 202/456-1121

FROM Rev. Jesse L. Jackson

PHONE # 202/728-1180

OF PAGES (INCLUDING COVER PAGE):

I would appreciate it if you would see that the
President gets this as soon as possible.

Thanks.

JLJ

Jacki Pickett, Office of the President

NATIONAL, 1700 K Street, NW, Suite 800, Washington, DC 20006, (202) 728-1180 Phone, (202) 785-2391 Fax

NATIONAL
RAINBOW
COALITION

March 21, 1994

President Bill Clinton
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C.

Dear President Clinton:

I am writing to express my grave concern about a number of current and proposed criminal laws and policies which have a clear discriminatory impact on African Americans, Latinos, Native Americans, and poor people. The impact of these laws and policies is so discriminatory that crime and criminal justice have become the preeminent civil rights issue of our time. As either victims or defendants, people of color are treated unjustly and inequitably in the American criminal justice system. It is my hope that you will join me in an effort to (1) inform the American public about these discriminatory laws and policies and their impact, and (2) recommend that the appropriate legislative bodies and agencies amend or repeal these laws and policies. In addition, I implore you not to sign any crime legislation that perpetuates racial discrimination.

In 1990, the Sentencing Project issued a report which revealed a startling fact to the American public: one of every four young black men are either in prison, on parole, or on probation. Statistics from the Justice Department support the findings of this report. Although only 12% of the American population is African American, almost half (48%) of the federal prison population is African American. The United States has the highest incarceration rate in the world and incarcerates Black men at a rate five times that of South Africa.

As we look at these startling statistics, we can reach one of two conclusions: (1) African Americans are committing more crimes than Whites, or (2) the laws and/or the criminal justice system are discriminatory. The first conclusion is definitely incorrect.

Statistics from the Bureau of Justice Statistics¹ reveal that Whites comprised 69% of all arrests in 1991. This percentage remained fairly constant even when geographical location and age groups were taken into account. For example, whites were arrested for 65.7% of the crimes in cities. 69.5% of persons under age 18 arrested in cities were White, as were 64.9% of persons over age 18. In suburban and rural areas, the percentage of white arrests increased. Whites comprised 78.7% of all suburban arrests, 80.1% of suburban arrests under 18, and 78.4% of suburban arrests over 18. In rural counties, whites comprised 83.9% of all arrests, 86.9% of arrests under age 18, and 83.6% of arrests over age 18.

These statistics clearly show that African Americans are arrested for a relatively small percentage of crimes in this country while comprising almost half of the federal prison population. The only plausible explanation for this injustice is that either the criminal laws and/or the criminal justice system are discriminatory. This conclusion is not particularly surprising and has been repeatedly documented by a number of federal government agencies. What is shocking and unconscionable is that this country's political leadership is doing nothing to end this blatant discrimination.

It is our responsibility to take up the moral charge against discrimination wherever it may exist -- including and especially in the criminal justice system. The criminal justice system shoulders the responsibility for meting out justice, including depriving individuals of their liberty when necessary to protect the public. It is because it involves freedom and justice at the most basic level that we must do everything possible to assure that the criminal justice system is free of racial and ethnic discrimination.

Discrimination in the Drug Laws

One of the most blatant examples of discrimination is the current penalty for possession of crack cocaine in the federal system. As you know, no one has been more outspoken against illegal drugs and their danger than me. I strongly believe in both preventing and punishing illegal drug distribution. However, I believe that the punishment should fit the crime and those guilty of the same crime should be punished equitably. None of these basis tenets apply to the penalties for crack and powder cocaine.

The current federal narcotics law provides that first offenders convicted of possession of 5 grams of crack cocaine (the weight of two pennies) must serve a mandatory 5 years in prison. First offenders convicted of possessing the same amount of powder

¹These statistics are from The Sourcebook of Criminal Justice Statistics 1992.

cocaine are eligible for probation. Those who possess powder cocaine serve a mandatory 5 year sentence only when they possess 100 times as much powder cocaine (500 grams). The discriminatory impact of this law becomes painfully clear when, according to a 1992 study by the U. S. Sentencing Commission, African Americans comprise 91.3% of those sentenced for federal crack offenses and Whites comprise only 3%. These statistics become even more significant considering the fact that Whites comprise 64.4% of all crack users.

These statistics lead to some disturbing conclusions:

- 1) Although most crack users are white, most of the people in federal prisons for crack use are African American.
- 2) The penalty for crack cocaine possession is 100 times greater than the penalty for powder cocaine, and the vast majority of powder cocaine users are white.

There is absolutely no justification for this stark disparity in punishment for two different forms of the same drug. Crack is relatively inexpensive, readily available in poor communities of color, and used more openly. Powder cocaine is expensive, primarily used in white, affluent communities, and used more privately. Both forms of the drug are dangerous and addictive, and there is no evidence that crack cocaine is any more dangerous or addictive than powder cocaine. In fact, scientific studies show that there is no molecular difference in the two forms of the drug, and that powder cocaine may be more addictive than crack. Defenders of the disparity attempt to blame crack for the violence associated with the drug trade in poor communities of color. However, the violence would exist whether the drug were crack, powder cocaine, heroin, or some other drug. The violence is associated with the nature of the drug trade, not the drug itself. In fact, there are numerous, complex causes for the violence in these communities, and many of the causes have nothing to do with the drug trade.

Mandatory Minimum Sentences

Sentencing laws which require the imposition of mandatory minimum sentences have had a devastating effect on our criminal justice system. These laws have turned our judges into data entry clerks, requiring them to impose a set number of years, regardless of the facts and circumstances of the case, or the character or life of the person standing before them. Mandatory minimum sentencing has been strongly and widely criticized by a diverse group of persons, agencies and organizations, including numerous

federal judges and Supreme Court Justices.² Studies conducted by both the U. S. Sentencing Commission and the Federal Judicial Center have recognized the unfairness of mandatory minimum sentencing.

A report released by the Federal Judicial Center in 1992 concluded that although it was the intent of the Sentencing Reform Act to reduce disparity and discrimination in sentencing, mandatory minimum provisions have actually increased these problems. This report revealed that African Americans were 21% more likely and Hispanics 28% more likely to receive at least the mandatory minimum term. The U. S. Sentencing Commission conducted a study in 1991 which found evidence of racial disparity in the imposition of mandatory minimums.

In addition, mandatory minimum sentences has resulted in our federal prisons being filled with "low-level" drug offenders. The Justice Department released a report just last month which revealed that 36% of all drug offenders in the federal prison system and 21% of all federal prisoners had no current or prior violence in their records and no involvement in sophisticated criminal activity. Because of mandatory minimum sentences, most of these nonviolent, first offenders will be required to serve almost six years at a cost of at least \$20,000 per year for each prisoner.

The Federal Death Penalty

Several federal government and independent studies have shown that the death penalty is applied in a racially discriminatory manner. A recent study by the General Accounting Office found that those who murder Whites are more likely to receive the death penalty than those who murder blacks. This same study found a pattern of racial disparity in the charging, sentencing, and imposition of the death penalty. Between 1988 and 1993, 73% of the prisoners targeted for the death penalty in federal courts were Black and 13% were Hispanic. As of September 1993, all of the death penalty prosecutions approved by the current administration were Black.

The crime bill proposes to expand the death penalty to 52 offenses, some of which include drug trafficking that does not involve murder. These provisions are being proposed even though the Supreme Court has ruled that it is unconstitutional to impose the death penalty for crimes that do not involve murder. And since one of proposals of the crime bill involves charging 13 year old children as adults for certain crimes, this bill presents the

²In fact, several federal judges have resigned because of the mandatory minimum sentencing in the Federal Sentencing Guidelines. Chief Justice Rehnquist and Justices Souter and Kennedy have denounced mandatory minimums.

frightening possibility of the execution of 13 year old children.

The Proposed Crime Bill

There are a number of provisions in the crime bill which will have a racially discriminatory effect. The "three strikes and you're out" law is one such provision. Because of racial bias in the criminal justice system, African Americans are arrested, prosecuted, and convicted more often than Whites who commit crimes. Therefore, young African American men are more likely to have a prior record and are more likely to be imprisoned for life than Whites. When one considers the fact that the so-called "violent" offenses in this provision include destruction of government property and breaking into a warehouse, the unfairness becomes even more stark. A twenty-five year old man with two convictions for destruction of property and one conviction for breaking into a warehouse will be sentenced to prison for the rest of his life under this law.

The "three strikes and you're out" provision is extremely troubling for a number of reasons. Not only is it excessive and unfair, but it will be extremely costly. The current cost of housing federal prisoners is approximately \$20,000 per prisoner each year. When the federal prisons are filled with elderly prisoners with all of the health problems associated with old age, the annual cost will skyrocket. Some estimate that the cost of housing geriatric prisoners will be \$40,000 to \$60,000 per year. Why should the American taxpayer pay these exorbitant costs to house and care for elderly prisoners who couldn't possibly be dangerous to anyone? These costs are particularly troubling when the annual investment in public education for our children is nowhere near this amount. Who knows what difference we could make in the crime problem if we invested even a small percentage of this wasted money addressing the root causes of crime.

"Three strikes and you're out" is also troubling because experts, criminal justice practitioners, law enforcement professionals, and corrections experts all agree that it will do nothing to deter crime. People who commit crimes, particularly the growing population of young people who commit violent crimes do not consider penalties and the possibility of prison before they act. Their actions are impulsive, and because they have very little to live for, the prospect of prison does not frighten them. In fact, the new condominium style prisons being constructed all over the country offer more than the homes and schools of many of these youth. The prisons offer heat in the winter, air conditioning in the summer, three meals a day, organized recreation, adult supervision, and some education programs -- much more than these young people are offered in their communities. It is no wonder that they are not afraid of the prospect of prison.

The bottom line is that this provision is costly, ineffective,

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unjust, and racially discriminatory. We must do all that we can to inform the public about its problems and encourage its defeat. I propose "Four balls and you're on." Ball one -- early childhood education and headstart; Ball two -- adequately funded public education; Ball three -- a college education or a marketable skill; and Ball four -- a job. If we invest in our young people on the front end, we will invest in the future of this country while avoiding the exorbitant cost of imprisonment on the back end.

Another provision of the crime bill which will have a racially discriminatory effect is the "anti-gang" provision. The Senate bill defines a gang as a group of 5 or more people who, either individually or group-wide, commit two defined crimes within ten years. Gangs include groups that have "formal membership with required rules for members; a recognized leader; common clothing, languages, tatoos, and turf where the group is known; and a group name." Any African American fraternity would qualify as a gang if two of its members committed a defined crime within a ten year period.

Both Hispanics and Native Americans are discriminated against by provisions in the proposed crime bill. One provision eliminates the requirement of a hearing prior to deportation for aliens convicted of certain crimes. This provision would certainly impact disproportionately on Hispanics. All of the criminal penalties in the Senate crime bill will disproportionately affect Native Americans because all Native lands are subject to federal criminal jurisdiction.

Conclusion

As someone who has always fought and spoken out against discrimination in any form, I hope that you will join me in an effort to eliminate race discrimination in the criminal justice system. This effort to eliminate discrimination should not be a movement to treat whites who commit crimes as unjustly as we have treated African Americans, but instead should involve addressing the causes of crime in a meaningful way and passing laws which will not destroy and eliminate our young people, but punish and rehabilitate them fairly and humanely. Those who commit violent, heinous crimes should be punished. But first time and nonviolent offenders should be given a chance to rehabilitate themselves and contribute to society. Too many young African American and Hispanic men have been deprived of a childhood, an education, and any chance of a life other than crime and prison. When you add the discriminatory effect of the laws and practices of the criminal justice system, the results are quite predictable -- an entire generation of young men of color are destroyed. We shouldn't discard and contain these young men. We must invest in them and involve them in the rebuilding of America.

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I welcome the opportunity to discuss the contents of this letter with you at your earliest convenience. I hope that the President of the United States will lead the fight against race discrimination wherever it may exist, including in the criminal justice system.

Sincerely,


Rev. Jesse L. Jackson

cc: Vice President Al Gore
Attorney General Janet Reno
Senator George Mitchell
Congressman Kwesi Mfume
Congressman Thomas Foley
Congressman Jose Serrano



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 18, 1994

Administratively Confidential

Honorable Janet Reno
Attorney General of the United States
Department of Justice
Tenth & Constitution Avenues, N.W.
Washington, D.C. 20530

Re: The Racial Justice Act

Dear Madam Attorney General:

We write to convey our strong, personal plea that the Department of Justice develop and strongly advocate an effective version of the Racial Justice Act for the Crime Bill conference.

There has been only limited interagency discussion of the substance of the issue, but each of us is familiar with the literature and caselaw on the subject, and believe the fact of racially discriminatory imposition of capital punishment in some jurisdictions has been established to at least a level of reasonable certainty, if not beyond. This is inconvenient for some in the law enforcement community, but the social reality is there. To many, this racial unfairness compromises the moral authority of the criminal justice system, and of its leaders.

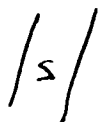
We have heard suggestions in some quarters that the concerns of those who support strong Racial Justice provisions can be dismissed politically because those same individuals oppose the death penalty itself, and cite evidence of disparate consequences as mere pretext. It is only natural that there is some correlation between those who question the death penalty and those who, like us, are deeply troubled by the evaluations of its application. That evidence must give one pause, and the recent House and Senate votes demonstrate that many who support the death penalty believe that its application must be scrupulously fair. Like you, we loyally support the President's policy on the criminal penalties. We believe that fairness, too, is his policy.

One point of substance deserves special attention. Opponents of the Racial Justice provisions argue that it is a usurpation to apply the proposed protections to state convictions. Nothing could be further from the truth. As professors of law at New York University and Harvard University, we are familiar with the doctrinal and policy arguments concerning federal-state relations. Suffice it to say that this week, as we celebrate *Brown*, it would be painfully ironic to ignore the grant of authority in Section 5 of the Fourteenth Amendment.

This Administration -- and your Department of Justice -- have on many matters been willing to focus with compelling clarity on the principle, rather than the vote count. We urge you to make a bold recommendation to the White House, the Congress and the American people. If Congress in its wisdom chooses to do less, so be it. But if we choose to ask for less, it will be said with some justification that we have mortgaged our moral leadership for the sake of some evanescent political expediency in the conference.

We look forward to supporting your continuing leadership on this and other matters.

Sincerely,

Handwritten signature of Ronald K. Noble, consisting of the letters 'R' and 'N' with a stylized flourish.

Ronald K. Noble
Assistant Secretary for Enforcement
Department of the Treasury

Handwritten signature of Christopher Edley, Jr., in a cursive script.

Christopher Edley, Jr.
Associate Director for General
Government and Finance
Office of Management and Budget

cc: Jamie Gorelick
Ron Klain



OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF LOS ANGELES

FACSIMILE COVER SHEET

Date: 6/29/94

Fax No.: 213-628-8352

Time: 3:05pm

Location: 210 West Temple Street
18-109 Criminal Courts Building
Los Angeles, California 90012

No. of Pages: 4
(Including cover sheet)

TO:

NAME: The Honorable Bill Clincon- c/6
Jose Cerda

AGENCY: Domestic Policy Council

PHONE #:

FAX #: (202) 456-7028

FROM:

NAME: Gil Garcetti

DIVISION: District Attorney of LA County

PHONE #: (213) 974-3501

SUBJECT: RE: "RACIAL JUSTICE ACT"

MESSAGE:

Please call (213) 974-3505 if the telecopy you receive is either incomplete or illegible.



GIL GARCETTI
LOS ANGELES COUNTY DISTRICT ATTORNEY

18000 CRIMINAL COURTS BUILDING 210 WEST TEMPLE STREET LOS ANGELES, CA 90012-3210 (213) 974-3501

BY FAX

June 29, 1994

The Honorable Bill Clinton
President of the United States
c/o Mr. Jose Cerda
Senior Domestic Policy Analyst
Domestic Policy Council
The White House
Washington, D.C. 20515

Dear President Clinton:

"RACIAL JUSTICE ACT"

Enclosed are copies of my op-ed piece on the "Racial Justice Act" printed in the Daily News on June 6 and letter to the editor of the Los Angeles Daily Journal printed on June 20.

As I indicated in my letter of April 29, I am in strong opposition to the "Racial Justice Act" and respectfully urge you to use your influence to have the Senate-House conference committee totally reject the "Racial Justice Act" provision contained in the crime bill passed by the House of Representatives on April 21.

As you evaluate the position you will take on this matter, please consider the comments I have made in these publications.

Thank you for your consideration of this most important issue.

Very truly yours,

GIL GARCETTI
District Attorney

mbm

Enclosures

my son, Eric, very much enjoyed the short opportunity to meet you on your trip to Oxford

Bill seeks racial quotas on Death Row

By Gil Garcetti

The Omnibus Crime Bill before Congress contains a grossly misleading provision that is about to be voted upon by House and Senate conferees.

That provision should either be called the "Abolish the Death Penalty Act" or the "Racial Injustice Act." Instead, its authors cloaked it in the misnomer — "Racial Justice Act." In reality, the act will bring about racial injustice because it effectively imposes quotas on the death penalty. Rather than consider capital punishment on a case by case basis, the act would bog down the criminal justice system with impossible and inappropriate statistical comparisons that would result in the elimination of the death penalty.

In the Los Angeles County District Attorney's Office, which is the largest district attorney's office in the country, we are color blind when we consider whether to seek the death penalty. In each case, we make a conscientious effort to eliminate all knowledge of and references to the race of the defendant and the victim, unless it is relevant, as in hate crimes.

The Racial Justice Act would force prosecutors to collect racial data and to establish "de facto" quota systems which would bring the race of the defendant and victim into every decision. The act allows any capital case defendant to raise an "inference" based on "statistical evidence" that, in his jurisdiction, death sentences are being sought or imposed more fre-

quently upon people of one race than another. The legislation is extremely vague about what type of statistical showing may be sufficient.

This statistical approach to the death penalty was rejected by the U.S. Supreme Court in 1987 in the case of *McCleskey vs. Kemp*. The court ruled that defendants are required to prove that racial bias was a factor in their individual cases, rather than relying on statistical discrepancies. This law must be maintained.

Statistical comparisons should not have any function in the critical decision of whether a prosecutor should seek the death penalty. It is impossible for statistical data to reflect the variables considered in any given crime or any given defendant's personality and upbringing.

While a computer can list "robbery-murder," for example, as an objective category, how can it fairly compare one defendant's act with another? How can it quantify whether a person is remorseful over an impulsive act or a calculating or callous murderer? What if the statistics indicated that to racially balance the population of prisoners on Death Row, the death penalty should not be sought in a case of a callous murderer but should be imposed on the remorseful, impulsive killer?

The proposed law would put prosecutors in the impossible position of explaining why, at any given point in time, there are more Caucasians than African-Americans on Death Row or vice versa. It would substitute racial comparison statistics for the current individual review of death penalty cases mandated by the U.S. Supreme Court. This review includes objec-

tive factors such as the defendant's prior record or belief in moral justification for the murder.

Rather than serving the cause of racial justice, this act could well result in applications of the death penalty in seeking to "even out" racial numbers. Potentially, the 381 prisoners already on Death Row in California could all reopen their cases to present discrimination claims, regardless of whether such claims had been previously rejected.

The California Department of Corrections indicates that in March 1994, 45.9 percent of those presently under sentence of death in the state are Caucasian, 37.8 percent are African-American, 12.6 percent are Mexican-American, and 3.7 percent fall into other racial categories. Most of these individuals have been on Death Row for many years, during which times the demographics of the state have changed.

If there is any discrepancy between the ethnicity of those on Death Row in the general population, the solution is not to nullify the death penalty, which is painstakingly considered by prosecutors, juries, judges and appellate courts in every case.

We need to work to remedy the problems that plague our communities, create the atmosphere of hopelessness, humiliation, pain and desperation where much crime takes root. We need to ensure that capital case defendants nationwide receive competent legal representation. It is wrong to impose or reject the death penalty because of statistics. That is not racial justice.

Gil Garcetti is the Los Angeles County District Attorney.

June 6, 1994

Daily News, Los Angeles

Racial Justice Act Poses Impossible Burden

The misnamed "Racial Justice Act" is almost universally opposed by prosecutors across the country. In their support of the RJA, former U.S. Attorneys General Elliot L. Richardson and Nicholas deB. Katzenbach do not seem to understand why the RJA creates an insurmountable practical burden of proof which will effectively end the death penalty ("Race and Criminal Justice: Capital Punishment Must Be Free of the Taint of Bias," June 6, Page 6).

In the Los Angeles County district attorney's office, the largest district attorney's office in the country, we are color-blind when we consider whether to seek the death penalty.

In each case, we make a conscientious effort to eliminate all knowledge of and reference to race of the defendant and victim unless it is directly relevant, as in hate crimes. The RJA would force us instead to collect racial data and to bring the race of the defendant and victim into every decision, inviting a de facto quota system.

Richardson and Katzenbach must know that a defendant is already allowed to challenge any death sentence he feels was imposed due to racial bias. In *McCleskey v. Kemp*, a decision handed down in 1987, the U.S. Supreme Court simply required a defendant to show that racial bias was a factor in his individual case, rather than relying on mere statistical discrepancies.

The RJA would, by contrast, require the government to rebut any "inference" raised by numbers alone.

Richardson and Katzenbach seem to say, "If there are more whites than blacks on death row, what's wrong with making the government explain?"

Richardson and Katzenbach do not seem to appreciate the impossibility faced by states in "proving a negative" that there was no racial bias involved in any penalty decisions. This does not involve one person making the decision in each case, that "[a]ll he(sic) has to do is show that he had non-racial reasons ..." In fact, proof that the decisions were not racially motivated could come only from involving many decision-makers in the real world — the prosecutors, the 12 jurors, the trial court judge and the appellate judges, any

of whom may be long-dead themselves or impossible to locate.

To my knowledge, there are no databases in existence which contain the variables of each crime and the race of each defendant and victim, as Richardson and Katzenbach seem to assume.

In an informal survey conducted by my staff in February of this year, we discovered that not one of the eight largest counties in California keeps racial statistics on the defendants or the victims of special circumstance crimes. Moreover, no statistical database could reflect the enormous number of variables in any given crime, or predict the weight to be given the positive and negative factors in any defendant's personal history by those numerous decision-makers.

Richardson and Katzenbach do not point out that the RJA prohibits states from defending against statistical charges of discrimination by showing that the defendant fits statutory criteria for the death penalty.

In California, these criteria include not only the type of crime but other considerations such as age, prior history of violence, and the mental or emotional state of the defendant. If we cannot use these criteria to show why the death penalty is imposed in a particular case, what can we use to counter superficial statistics which may imply "overrepresentation" of a particular ethnic group on Death Row?

If there is any discrepancy between the ethnicity of those on Death Row and that of the general population, the solution is not to establish quotas or to nullify the death penalty.

We need to work to remedy the problems that plague our communities, that create the atmosphere of hopelessness, pain and desperation where so much crime takes root. Most immediately, we need to ensure that capital-case defendants nationwide receive competent legal representation at the trial level.

We cannot solve discrimination and racial bias by imposing or rejecting the death penalty based on statistics. That is not racial justice.

—Gil Garcetti
Los Angeles

Garcetti is the district attorney of Los Angeles County.

NATIONAL
RAINBOW
COALITION

April 15, 1994

The President
The White House
Washington, DC 20500

Dear Mr. President:

I am greatly disturbed by the recent reports describing your "quiet" opposition to the Racial Justice Act. If these reports are correct -- and I would like to assume they are not -- I would be very surprised. You have told the American people that you support the current crime bill because of its balance. A bill without protection against racial discrimination in the administration of the death penalty is not balanced.

You have called for tough, but smart, criminal justice legislation. The Racial Justice Act fits within your demand because it ensures fairness in the application of death penalty sentences. This is particularly important because this crime bill contains the largest expansion of the Federal death penalty.

The Racial Justice Act bars the execution of prisoners who demonstrate that their death sentence was imposed because of racial discrimination. The Act permits the use of neutral statistical evidence to demonstrate existing racial bias in death sentencing and allows the government entity involved to explain any statistical disparities. For example, the state of Georgia should explain, in court, why one prosecutor within a certain judicial circuit has sought the death penalty against 23 African American defendants since 1974 -- out of a total of 29 people charged with capital murder. The Department of Justice should explain, in court, why the death penalty has been sought against 28 "drug kingpins" who are African American -- and only 4 who are white.

The Racial Justice Act will not end capital punishment. The Racial Justice Act will be a large step toward ending the taint of racism that pervades capital punishment.

Reverend Jesse L. Jackson, President and Founder
Dennis Rivera, Chairman, Board of Directors

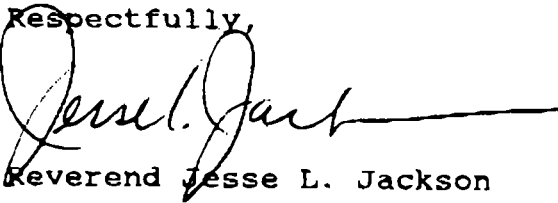
Francisco L. Borges, Treasurer
The Honorable Salima Siler Marriott, Secretary

PO Box 27385 • Washington, DC 20005 • (202) 728-1180 • fax (202) 728-1192

The President
April 15, 1994
Page Two

I hope that you clarify the Administration's position regarding the Racial Justice Act, and I dearly hope that you express your support for this critical provision immediately, to the Members of Congress and to the public at large.

Respectfully,

A handwritten signature in dark ink, appearing to read "Jesse L. Jackson", with a long horizontal stroke extending to the right.

Reverend Jesse L. Jackson

cc: Chairman Dan Rostenkowski
Rep. Charles Schumer
Rep. David Price

SUBSTITUTE GRAPHS FOR PAGE 3 OF "MARK" LETTER:

"Finally, the Mark contains no provision regarding fairness in the imposition of the death penalty. No person should be punished more severely because of the color of their skin -- nor should any person be punished less severely because of the color of their victim's skin.

"For some weeks, my administration has worked to develop a way to attack discrimination where it exists without impacting generally on the fair and effective imposition of the death penalty. In extensive discussions on this issue -- with interested Conferees, other members of Congress, civil rights leaders, the criminal defense and prosecutorial bars, and the law enforcement community -- we have been unable to find common ground on a way that in their collective judgment would satisfactorily address these two concerns. Given the urgent need for this Crime Bill, and the many important and beneficial provisions in it, I believe that we cannot delay action further on account of this issue. Thus, I call on the Conferees to move ahead now, and adopt a final bill, without any such provision.

"In an effort to continue this dialogue, I will appoint a "blue-ribbon" Commission to further study this issue and make recommendations in this area. At the same time, I will direct the Attorney General to ensure that as we expand the federal penalty in implementing this legislation, we develop and promulgate procedures to guard against discrimination."

N T
N T

E X E C U T I V E O F F I C E O F T H E P R E S I D E
E X E C U T I V E O F F I C E O F T H E P R E S I D E

15-Jul-1994 11:31am

TO: Jose Cerda, III

FROM: Bruce N. Reed
 Domestic Policy Council

SUBJECT: la justicia racial

MEMORANDUM FOR THE PRESIDENT

FROM: RAHM EMANUEL
 BRUCE REED
 RON KLAIN

SUBJECT: Q&A on Racial Justice Act

Q. Mr. President, where does the administration stand on the Racial Justice Act?

A. We want to pass a crime bill. The American people have been waiting six years for it. We can't keep them waiting any longer. We've talked extensively on this particular issue with people who work in the criminal justice system -- prosecutors, defense lawyers, the law enforcement community, as well as members of Congress, Conferees, the CBC, civil rights leaders, and victims groups. They have been unable to find common ground on a way that in their collective judgment would address discrimination where it exists without impacting generally on the fair and effective imposition of the death penalty.

Q. Didn't Leon Panetta tell Rep. Mfume that the Racial Justice provision had to go?

A. We've had many discussions with the Congressional leadership in recent days urging them to move as quickly as possible to pass the crime bill. Don't just listen to me -- listen to the people who are out there at the front lines. Yesterday, 10 black mayors from major cities around the country sent Congress a letter saying don't let anything stand in the way of passing this bill now. The country is crying out for this.

Q. Will the CBC support the crime bill without the Racial Justice Act?

A. Some of them support this crime bill, some oppose it -- and I respect their views. I hope every member of Congress will support this crime bill. It's the most comprehensive crime bill any Congress has ever considered, and it includes many provisions we desperately need: 100,000 cops, an assault weapons ban, more money for boot camps and prisons, and some terrific prevention programs that will give our young people something to say yes to --all of it fully paid for by cutting the federal bureaucracy.

Q. Are you for the Racial Justice Act or against it?

A. What I'm for is a crime bill on my desk as soon as possible. We pay a terrible price for waiting. A few months ago, I received a letter from a 9-year-old boy from New Orleans who begged me to stop the violence or "somebody might kill me." Ten days later, he was shot dead in a drive-by shooting as he walked home from a Mother's Day picnic. A dozen kids like him are shot and killed every day. That's why we can't wait any longer.



FAX TRANSMISSION COVER SHEET

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DATE: May 2, 1994
TIME: 3:50 p.m.

NUMBER OF PAGES: 22
(INCLUDING COVER SHEET)

TO:

NAME: Jose Cerda, Senior Domestic Policy Analyst

OFFICE: The White House

LOCATION: Washington, D.C.

FAX NO. (202) 456-7929

PHONE NO. (202) 456-6777

FROM:

NAME: Attorney General Daniel E. Lungren

PHONE NO. (916) 324-5437

OFFICE: California Attorney General

LOCATION: Sacramento, CA

FAX NO. (916) 324-6734

COMMENTS:

PLEASE DELIVER AS SOON AS POSSIBLE!
IF YOU NEED ASSISTANCE REGARDING THIS TRANSMITTAL, CALL THE SENDER.



State of California
Office of the Attorney General
Daniel E. Lungren
Attorney General

May 2, 1994

Honorable Bill Clinton
The President of the United States
The White House
Washington, D.C. 20500

Dear President Clinton:

I wish to congratulate you on your eloquent remarks during President Richard Nixon's funeral yesterday. As I listened to you deliver your speech, I was impressed with how its conciliatory tone captured the mood of the nation during this important hour.

As you may recall, we had an opportunity to discuss briefly the omnibus crime bill during the National Attorneys General Association meeting at the White House. At that time, I indicated how federal habeas reform and the Racial Justice Act would likely create two stumbling blocks to enactment of other meaningful reforms contained in the omnibus crime bill. In fact, both of these issues have held up crime reform legislation in the past. Subsequent to our meeting, a bipartisan group of 32 Attorneys General signed a letter to senior members of the House Judiciary requesting that both the habeas provisions and Racial Justice Act be dropped from the crime bill. A copy of this letter is attached for your review.

As you know, the U.S. House of Representatives agreed to strike the habeas reforms from the crime bill. This was consistent with a bipartisan motion to strike the habeas portion of the Senate crime bill, which was adopted last fall.

Regrettably, on a narrow vote, the House failed to eliminate the controversial Racial Justice Act from the crime bill. Because the Senate crime bill does not contain a similar provision, a joint House-Senate Conference Committee must now reconcile this issue. Each time the Senate has considered the Racial Justice Act it has rejected it. See 137 Cong. Rec. S 8300 (daily ed. June 20, 1991) (motion to strike the Racial Justice

Honorable Bill Clinton
May 2, 1994
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Act adopted 55 to 41); 136 Cong. Rec. S 6910 (daily ed. May 24, 1990) (motion to strike the Racial Justice Act adopted 58 to 38); 134 Cong. Rec. S 15,755-56 (daily ed. Oct. 13, 1988) (amendment to add Racial Justice Act defeated 35 to 52).

For two reasons it is important that the Racial Justice Act must be dropped from the conference report on the omnibus crime bill. First, prosecutors are uniformly opposed to any version of the Racial Justice Act. In addition to State Attorneys General who already oppose this legislation, last Friday, all 58 District Attorneys in California adopted a Resolution indicating their strong opposition to any version of the Racial Justice Act. The reasons are explained in the enclosed Resolution. I also join with many other prosecutors who have concluded it is unacceptable to limit the Racial Justice Act to federal capital cases. We reject the unsound premise that statistics in unrelated cases have a legitimate role in the prosecution of any specific criminal case at the federal or state level. Second, in light of this united opposition at the local and State level, the failure to remove the Racial Justice Act from the crime bill may likely delay the enactment of other needed reforms contained in the crime bill.

Two examples from California demonstrate the tremendous cost and burden which would be imposed on the States if the Racial Justice Act were enacted. A claim similar to the Racial Justice Act was raised in 1984 in the *In re Earl Lloyd Jackson* case, as is explained more fully in the attachment. Jackson was convicted and sentenced to death for his involvement in the brutal beatings and murders of two elderly widows (an 81-year-old and a 90-year-old) during two robberies in Long Beach in 1977. Jackson ultimately confessed to the crimes and boasted to others about his role in the murders. With regard to the Racial Justice Act-type claim, it took three years for both sides to prepare for the court-ordered evidentiary hearing. The state taxpayers were required to pay for more than \$1,000,000 in costs solely for the preparation for the hearing, which ultimately was never held as a result of the subsequent U.S. Supreme Court ruling in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

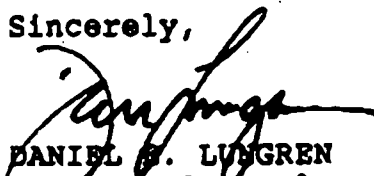
Additionally, the *Robert Alton Harris* case shows the broad potential application of the Racial Justice Act. Harris, who was executed in April, 1992, murdered two teenage boys near San Diego on July 5, 1978. Harris, who confessed at least seven times to murdering the teenagers and who was white, had asserted that the California death penalty was administered in a discriminatory manner because his victims were white. This statistical showing was ultimately rejected in federal court in light of U.S. Supreme

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Court precedent. *Harris v. Pulley*, 885 F.2d 1354, 1373-77 (9th Cir. 1988), cert. denied, 110 S.Ct. 854 (1990). There is nothing in the legislation which would preclude similar individuals such as Harris from bringing similar claims.

For these reasons, on behalf of law enforcement in California, I strongly urge you to exercise your authority to ensure that any form of the so-called Racial Justice Act will not be included in the conference report on the crime bill. Please advise if my office may be of any assistance to you on this important matter.

Sincerely,



DANIEL B. LUNGREN
Attorney General

Attachments

April 12, 1994

Honorable Jack Brooks
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Honorable Hamilton Fish, Jr.
Ranking Minority Member
House Judiciary Committee
2269 Rayburn House Office Building
Washington, D.C. 20515-3221

Dear Congressmen:

We are a bipartisan group of chief law enforcement officers of our respective States who are responsible for overseeing federal capital and non-capital habeas litigation and for enforcing state criminal law in death penalty and non-death penalty jurisdictions.

We wish to express our views on the need to strike habeas corpus as part of the House omnibus crime bill, and on some of the amendments which have been offered. Specifically, we write in strong support of the Hyde Amendment (to strike the habeas provisions contained in the crime bill, H.R. 4092, Title VIII) and strong support for the McCollum Amendment (to substitute the Equal Justice Act for legislation in Title IX of H.R. 4092 which provides relief based on mere statistical showings from unrelated cases). This is consistent with the recently adopted Resolution of the National Association of Attorneys General (NAAG), a copy of which is attached.

Support the Hyde Amendment to Strike Title VIII and Oppose Any Other Habeas Amendments to Title VIII (Including the Derrick Amendment)

Several reasons compel our strong support for the Hyde Amendment to strike the habeas provisions from the omnibus crime bill:

First, the Hyde Amendment is consistent with a similar bipartisan amendment, which was offered by Senator Dianne Feinstein and Senator Orrin Hatch, and which was unanimously agreed to last year in the Senate.

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Honorable Hamilton Fish, Jr.
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Second, we believe that the habeas provisions contained in Title VIII of H.R. 4092 may once again hold up consideration and enactment of other important crime reform issues. Habeas corpus reform has proven to be a contentious issue in prior Congresses and in fact was in large part responsible for the deadlock on the omnibus crime bill in the last Congress. The need to address violent crime is too urgent to delay deliberation on other measures to combat crime. Similarly, we believe there is a danger that the other provisions of the crime bill may be viewed as so important that habeas provisions will be swept into the omnibus package without sufficient review and analysis of their long term impact and legal significance, as discussed below.

Third, there are other precedents for severing certain specific crime reform issues from omnibus crime bills. They include, for example, the Brady bill (five-day waiting period for handgun purchases).

We believe stronger reasons support the severance of the habeas provisions from the crime bill. Such a severance would allow the provisions of any habeas reform bill to be considered on their own merits. Habeas corpus, while an important part of our criminal justice system, is a specialized and arcane area of the law. Any reforms adopted by the Congress in this area will have tremendous ramifications on the operations of the criminal justice system, law enforcement, and victims of crime, and therefore warrant independent consideration.

We have previously expressed a commitment to obtaining meaningful reform of the federal habeas corpus process, along the lines of the Powell Committee Report. This Report endorses the so-called "one bite at the habeas apple" approach, enabling state prisoners one fair and complete round of habeas litigation in federal court. We need effective reforms to curb unnecessary delay and repetitious litigation which has become all too common under the current federal habeas corpus process. Such reforms should, however, be considered in separate legislation.

Fourth, the legislation reported out by the House Judiciary Committee, and now included in Title VIII of H.R. 4092, would, according to the recent NAAG Resolution, "adversely affect all capital and non-capital habeas litigation in the States and effectively stop all state capital case prosecutions and executions under valid state capital sentencing schemes." The legislation would overturn or modify numerous key U.S. Supreme Court precedents which promote finality in our criminal justice process. This includes the *Teague* doctrine, which is essential for capital and non-capital cases.

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Instead of streamlining the process, this legislation will provide convicted criminals with more opportunities to challenge their conviction and sentence than under current law. The legislation also fails to respect the state trial as the "main event" in our criminal justice process, and is inconsistent with established comity doctrines respecting the role of state court proceedings in the enforcement of state criminal law.

Fifth, the last-minute efforts of some to offer new habeas amendments to the crime bill on the House floor deprive members of Congress and the public from a full and fair opportunity to study and comment on the legislation. In congressional committee hearings or mark-up concerning specific bill language, law enforcement and victim rights groups normally are given a chance to apprise the Congress of their views concerning the impact of new language or standards. When amendments are patched together at the last minute, this opportunity is denied.

These concerns are especially true for habeas corpus reform. New proposals, which have not been subject to public review, may also have drastic ramifications on the operations and costs of our departments and the criminal justice system and have serious consequences on finality, the enforcement of state laws, and victims. Any habeas reforms included in the crime bill would constitute the first major change to the federal habeas statute since 1966. Because of the tremendous changes to current law which would result under any last-minute amendments, we believe Congress should proceed carefully and deliberately before considering any new habeas reform proposals.

For example, over the last several years, the U.S. Supreme Court has rendered many opinions which have clarified the role of federal court review of state court judgments; promoted the interest in finality and closure for surviving victims; and respected the interests of states and the enforcement of state laws in our federalism system. We fear that if Congress does not fully and fairly consider the import of proposed new language, these and other precedents will be cast aside and more delay and litigation will result. In addition, concerns have been noted over the impact of new amendments on the deterrent objective of the death penalty. All of these consequences should be carefully studied before Congress considers Amendments offered on the floor of the House for the first time. We believe the public would best be served by complete congressional hearings before any new Amendments are debated in the House.

Honorable Jack Brooks
Honorable Hamilton Fish, Jr.
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We understand that a new habeas amendment is also expected to be offered by Congressman Butler Derrick of South Carolina. Preliminary review shows that this amendment is also worse than current law and would overturn numerous key U.S. Supreme Court cases governing habeas corpus. For these reasons, we therefore oppose the Derrick Amendment or any other amendments which may be offered at the last minute to Title VIII of H.R. 4092. Any habeas reform measure should be considered in a separate bill, after the public has had a full and fair opportunity to comment on the proposed legislation.

In sum, while we strongly support habeas corpus reform, we believe it should be accomplished in a deliberative, studied and independent manner. For these reasons, we wholeheartedly support the Hyde Amendment to strike the habeas provisions (Title VIII) from H.R. 4092.

Support the McCollum Amendment (and Any Other Efforts to Strike Title IX): Oppose All Other Amendments to Title IX (Including the Edwards or Washington Amendments)

With regard to Title IX of H.R. 4092, concerning racially discriminatory capital sentencing, we strongly support the McCollum Amendment, and any other efforts to strike Title IX of H.R. 4092, as discussed below. The McCollum Amendment, which passed the House in the last Congress, would (1) strike Title IX (which provides relief based on mere statistical showings from unrelated cases), and (2) substitute the Equal Justice Act.

Significantly, the McCollum Amendment would apply to all penalties, not merely capital punishment, and would codify existing case law protections against racial bias. The Equal Justice Act expressly prohibits racially discriminatory policies. The legislation states that any penalty "shall be administered . . . without regard to the race or color of the defendant or the victim" and prohibits "any racial quota or statistical test" for any penalties. Finally, the Equal Justice Act provides safeguards during the trial, not after-the-fact like statistical showings legislation.

As the recent NAAG Resolution noted, NAAG opposes "any measure that would allow a capital defendant to make a statistical showing from unrelated cases as the basis for appellate or collateral relief." Such statistical showings legislation

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Honorable Hamilton Fish, Jr.
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seriously undermines enforcement of the death penalty.

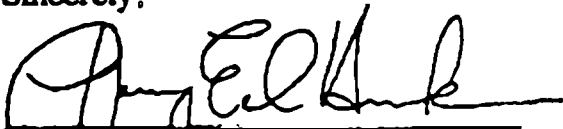
In *McCleskey v. Kemp*, the U.S. Supreme Court rejected a claim which would allow capital defendants to make a statistical showing of potential race discrimination from unrelated cases as a basis for collateral relief. The Court correctly held that a defendant who contests his capital sentence on the basis of racial discrimination is required to prove that the decision makers in his or her own case acted with a discriminatory purpose.

For these reasons, we strongly oppose Title IX of H.R. 4092, or any amendment (including the Edwards and Washington Amendments) which would overturn *McCleskey v. Kemp* or provide appellate or collateral relief based on mere statistical showings from unrelated cases.

Conclusion

In sum, we strongly urge the U.S. House of Representatives to: (1) support the Hyde Amendment and oppose all other amendments which may be offered on Title VIII; and (2) support the McCollum Amendment and oppose Title IX or any other amendments which may be offered on Title IX. We oppose any amendments or legislation which would weaken current law or provide convicted individuals with greater opportunities to challenge their conviction or sentence. We remain available to work with you to accomplish meaningful federal habeas corpus reform through separate legislation.

Sincerely,



LARRY ECHOHAWK
Attorney General of Idaho



DAN MORALES
Attorney General of Texas



FRANKIE SUE DEL PAPA
Attorney General of Nevada



DANIEL E. LUNGREN
Attorney General of California

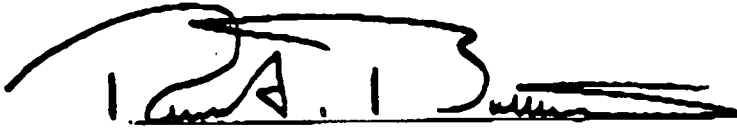
Honorable Jack Brooks
Honorable Hamilton Fish, Jr.
April 12, 1994
Page 6



JOSEPH P. MAZUREK
Attorney General of Montana



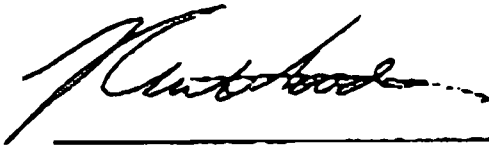
JAMES S. GILMORE
Attorney General of Virginia



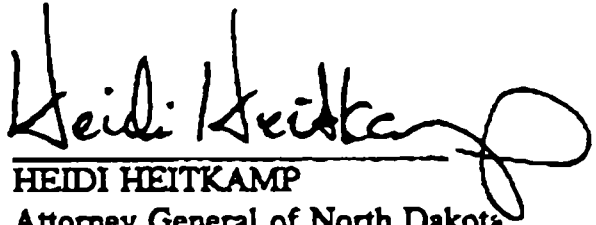
ROBERT A. BUTTERWORTH
Attorney General of Florida



ERNEST D. PREATE, JR.
Attorney General of Pennsylvania



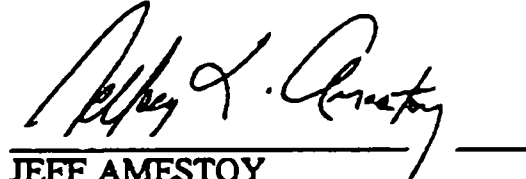
GRANT WOODS
Attorney General of Arizona



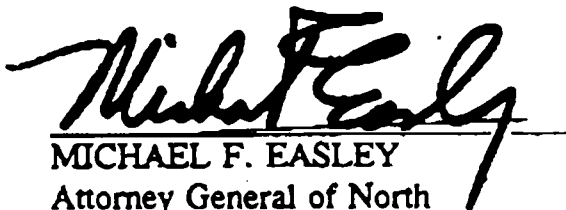
HEIDI HEITKAMP
Attorney General of North Dakota



MARK BARNETT
Attorney General of South Dakota



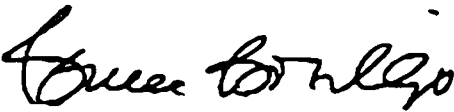
JEFF AMESTOY
Attorney General of Vermont



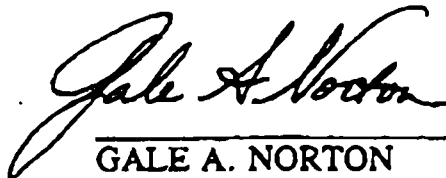
MICHAEL F. EASLEY
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Carolina



JIMMY EVANS
Attorney General of Alabama



BRUCE BOTELHO
Attorney General of Alaska



GALE A. NORTON
Attorney General of Colorado

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ROBERT A. MARKS
Attorney General of Hawaii



DON STENBERG
Attorney General of Nebraska



DEBORAH T. PORITZ
Attorney General of New Jersey



JEFFREY B. PINE
Attorney General of Rhode Island



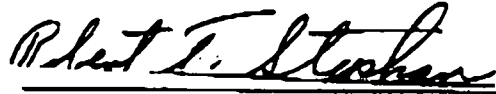
JOSEPH B. MEYER
Attorney General of Wyoming



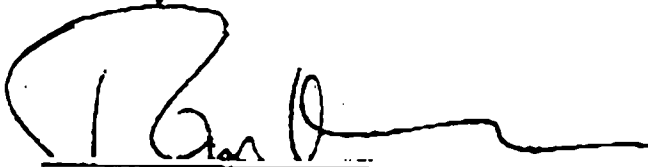
T. TRAVIS MEDLOCK
Attorney General of South Carolina



JAN GRAHAM
Attorney General of Utah



ROBERT T. STEPHAN
Attorney General of Kansas



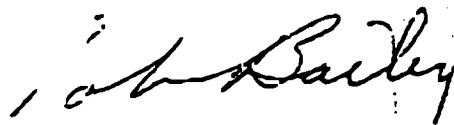
TOM UDALL
Attorney General of New Mexico



PAMELA CARTER
Attorney General of Indiana



JEFFREY R. HOWARD
Attorney General of New Hampshire



JOHN M. BAILEY
Chief State's Attorney of Connecticut

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ELIZABETH BARRETT-ANDERSON
Attorney General of Guam



JEREMIAH W. (JAY) NIXON
Attorney General of Missouri



SUSAN B. LOVING
Attorney General of Oklahoma



FRANK J. KELLEY
Attorney General of Michigan

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Honorable Hamilton Fish, Jr.
April 12, 1994
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Enclosure:

NAAG Resolution (adopted Mar. 21, 1994)

cc: Honorable Henry J. Hyde
Honorable Bill McCollum
Honorable Butler Derrick

ATTACHMENT CONCERNING
*In Re Earl Lloyd Jackson*¹

The experience of the California Attorney General's Office with the case of In re Earl Lloyd Jackson, California Supreme Court No. 22165, sheds important light on what some of the anticipated impact on California would be in the event the Racial Justice Act became law. Based upon the California experience in this case, as well as upon other independent analyses, the California Attorney General's Office has concluded that the Racial Justice Act [Hereinafter "the Act"] is flawed and would constitute one of the greatest possible impediments to meaningful capital punishment reform. We have also concluded that for those States which wished to retain the death penalty, the Act risks influencing capital charging decisions to the extent that it encourages a racial "balance" to be sought which conforms with statistical showings which are unrelated to the individual case.

In 1984, the California Supreme Court ordered that an evidentiary hearing should be held on the habeas claim of post-affirmance capital litigant Earl Lloyd Jackson that the death penalty in California was being discriminatorily imposed on the basis of the defendant's race, the victim's race and the gender of the defendant. This is similar to the type of claim encouraged by the the Act.

It took three years for both sides to prepare for the court-ordered evidentiary hearing in this case. As discussed below, this hearing was never held as a result of the U.S. Supreme Court ruling in McCleskey v. Kemp.² Ultimately, the State taxpayers were required to pay for more than \$1,000,000 in costs solely for the prosecution's preparation for the discrimination claim in the case. The costs to the taxpayers for the defense are unknown.

By ordering an evidentiary hearing into Mr. Jackson's claim, the California Supreme Court in effect found he had made a prima facie case of discrimination with his rudimentary statistical analysis of the State's homicides. Mr. Jackson's statistician had compared, for example, the races of homicide victims in all robbery murder crimes to the races of the victims of robbery murder cases where the

¹ Excerpted from a written response to the U. S. Senate Judiciary Committee (May 22, 1991).

² 481 U.S. 279 (1987).

defendants were tried, convicted, and sentenced to death. Taking into consideration only the race of the victim and no other circumstance of the crime when he analyzed the data, Mr. Jackson's statistician concluded that killers of white robbery murder victims are three times more likely to receive the death penalty in California than killers of non-white robbery murder victims.

Under the Act standards, capital defendants will argue this statistic alone constitutes a prima facie showing of a racially discriminatory pattern in every one of California's capital cases. Under the Act, all a defendant has to do is to make a prima facie case; the State then bears the burden of proving that nonracial factors explain the racial disparities. In Mr. Jackson's case, however, the prima facie showing was merely the first step for him. He then had the burden of proving that it was more likely than not that the death penalty was being imposed discriminatorily.

Upon issuance of the order for an evidentiary hearing, Mr. Jackson requested a virtual mountain of statewide homicide data from the State. Much of the data had never been collected before and hundreds of homicide files in California were reviewed by county clerks to obtain it. The accuracy of the data collected became suspect, however, when a recheck of 250 case files in Los Angeles County revealed a 50% plus error rate. There is no assurance under the Act the data collected will be accurate. The problem cannot be underestimated, since the persons who would be providing the information to the central agency will inevitably treat the task as having a low priority. Errors and omissions will result.

The California Attorney General's Office and the Los Angeles County District Attorney's Office created a task force to marshall the State's efforts in Jackson. Three statistical experts were hired. Each had a different specialty, and we found each was absolutely essential. While Mr. Jackson's statisticians poured over the data, so did ours. What became evident was that the same information could be treated in a number of different ways, all correct but which would lead to different statistical conclusions. Both sides aimed to present their "best" numbers. Both sides prepared to attack the reliability of the other side's figures. Under the provisions of the Act, however, the only figures likely to be attacked would be the State's since the State carries the burden of proof once the prima facie showing is made. The more errors and omissions the defendant can find in the collected data, the more the defendant can attack the statistics based on that data.

The Jackson evidentiary hearing never took place. When the

United States Supreme Court ruled in McCleskey v. Kemp that an extensive statistical study of Georgia's homicide cases had failed to demonstrate a constitutionally significant risk of racial bias, we were able to convince the California Supreme Court it should reconsider its order of an evidentiary hearing. As already noted, we had spent three years and over \$1,000,000 in preparation for a hearing that did not occur and for which we still had much to do. While a portion of that time and cost was related to gathering the data, and might not be repeated in each case under the provisions of the the Act, an unavoidable conclusion from our experience in In re Earl Lloyd Jackson is that the overall cost to the public of the required ongoing collection of data and of the litigation of the Act claims in every capital case would be astronomical, effectively abolishing capital punishment. What is also clear is that the State taxpayers would have to bear the cost of the Act at two levels: (1) at the state central agency and (2) at the local prosecutor and law enforcement level.

There are also other impacts which would likely be felt by California's compliance with the statute.

First, my department's opposition to the Act is primarily based upon its flawed premise. While we are also concerned about the significant burden and impact the Act would have on the States, this is only a secondary concern. However, even if the burden and impact problems could be solved, we would still oppose the Act since we do not believe it will actually affect any problems of racial bias that might exist in our criminal justice system.

The initial analysis of statisticians and others within the California Attorney General's Office has highlighted several areas of significant impact and concern if the Act is enacted.

A. Abolishment of Capital Punishment

The greatest impact from enactment of the Act would be the effective abolishment of capital punishment. In order to meet the flawed statistical premise of the the Act, any State would have a mammoth litigation burden to respond to the mere threshold statistical showing of a capital defendant which triggers the Act. Consequently, the Act would essentially veto the decisions of those thirty-six states, including California, which have chosen to adopt constitutional death penalty procedures.

B. Retroactivity Burden

The retroactive application of the Act would result in a tremendous record gathering burden. In California, this retroactive application could apply to the approximately 300 persons currently under sentence of death. For example, if a discrimination claim arose in 1977, when California enacted new death penalty procedures, the California Attorney General's Office would potentially have to acquire case information over the last fourteen years. The total pool of potential death-eligible cases for this time period for California is estimated to be around 8,000.

It may not be possible to reconstruct the data for each case during the applicable retroactive period since the police and investigative reports and other information may no longer be available. This burden is magnified by the potential number of reporting entities in California which may need to be contacted. This includes 58 District Attorneys and about 800 law enforcement agencies (sheriffs, police agencies, highway patrol departments, etc.).

C. Harsh Penalty for Non-Compliance

As currently written, anything less than absolute state compliance with the requirements imposed under the Act allow a federal habeas court to disregard state court findings of fact. In other words, the traditional presumption of correctness would not apply to state court findings of fact if the State failed to (1) collect adequate records and make them publicly available or (2) furnish sufficient funds for the defendant's presentation of a discrimination claim.

This is a harsh and inappropriate penalty to impose upon the State as any showing of any error in the record keeping obligation may result in the elimination of deference to state-court findings of fact on matters potentially unrelated to the basic discrimination claim. Thus, even good faith compliance (resulting from technical human error) could void state court findings. Several examples illustrate the potential scope of this severe penalty. Because the Act does not specify or limit geographic areas for the statistical showing, incomplete compliance in one county could be used against another county which seeks to impose the death penalty in a particular case.

The Act also does not specify how race designations are

to be made for defendants and victims. Would the penalty attach for an incorrect race designation? By comparison, the U.S. Census Bureau permits self-declarations on the race of the individual. The Act makes it unclear who would make this potentially subjective determination.

In order to attempt to avoid the penalty for non-compliance, the central state agency would have to incorporate strict internal auditing procedures. Given the nature of human error and the numerous reporting entities involved, there is no guarantee of absolute compliance even after the inclusion of stringent internal controls.

D. Other Issues

The federal district court which reviewed the claim of racial discrimination in McCleskey found after an extensive evidentiary hearing that the data base upon which McCleskey's experts relied upon to reach their conclusions contained "substantial flaws" and was essentially untrustworthy, as evidence.³ What is acceptable in the social science field may not be acceptable in a court of law. Concerns about the reporting procedures will only magnify the problems identified in McCleskey, and further illustrates the enormous burden placed upon the States and federal courts by the Act.

The premise of the Act have been called into question by a recent Rand Corporation report which found that race or ethnicity does not play a role in the conviction and incarceration rates for criminal defendants. While the criminal offenses studied were for non-capital cases, the findings of this report call into question the rationale for the Act.

³ McCleskey v. Zant, 580 F. Supp 338, 360 (N.D.Ga. 1984).



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CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Adopted

April 29, 1994

CONCERNING THE RACIAL JUSTICE ACT

WHEREAS, the California District Attorneys Association is an organization composed of the elected District Attorneys of California's fifty-eight counties and 3,000 deputy district attorneys and city prosecutors;

WHEREAS, on April 21, 1994, the U.S. House of Representatives adopted the omnibus crime bill, H.R. 4092, which included in Title IX legislation, referred to, and known as, the Racial Justice Act (or the Racially Discriminatory Capital Sentencing Act);

WHEREAS, on April 20, 1994, the U.S. House of Representatives narrowly defeated the McCollum Amendment to strike the Racial Justice Act from the House crime bill and substitute in its place the Equal Justice Act. [The vote was an effective 212 to 212 tie, after the votes of the five Delegate members were excluded under recent House Rules.];

WHEREAS, the Racial Justice Act would, first, permit a capital case defendant to make a statistical showing that death sentences are being imposed or administered in a disproportionate manner upon (1) persons of one race or (2) as punishment for capital offenses against persons of one race, and, second, require the prosecutor to rebut this statistical showing "by a preponderance of the evidence";

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WHEREAS, in the 102d Congress, on June 20, 1991, the U.S. Senate voted to strike a similar measure entitled the Racial Justice Act out of the omnibus crime measure by a bipartisan vote of 55 to 41 (this was the third successive Congress in which the U.S. Senate rejected the Racial Justice Act), and on October 22, 1991, the U.S. House of Representatives voted to strike a similar measure by a bipartisan vote of 223 to 191;

WHEREAS, the U.S. Supreme Court rejected a discrimination claim founded solely upon statistics, in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

NOW, THEREFORE, BE IT RESOLVED THAT IN LIGHT OF THE URGENCY AND IMPORTANCE OF THIS MATTER, ALL 58 CALIFORNIA DISTRICT ATTORNEYS, HAVING BEEN POLLED, UNANIMOUSLY:

- 1) oppose any version of the Racial Justice Act, for the following reasons:
 - a) the Racial Justice Act would result in the effective abolition of capital punishment.

This would result because of the inherent evidentiary difficulties and inevitable vast expenditures of time and money in litigation in every post-conviction capital case, to prove by at least a preponderance of the evidence a negative, to wit, that race was not the basis for any of the prosecutor's, jury's, or judge's decisions. [The Racial Justice Act contains a virtually impossible rebuttal burden: "Unless [the prosecutor or State] can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty, the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty.];

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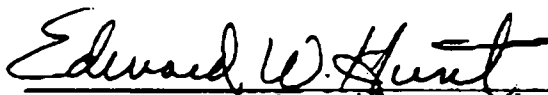
- b) moreover, as to adjudicated cases, the retroactive application of the Racial Justice Act would permit convicted capital defendants to reopen their cases by presenting discrimination claims (regardless of whether such claims had previously been rejected). In California, there are currently 376 individuals on death row. The retroactive provision in the Racial Justice Act as passed by the House would potentially affect these cases as well as others around the nation;
- c) the statistical premise of any version of the Racial Justice Act is unsound, for several reasons, including:
 - i) it disregards the fundamental precept of our criminal justice system that an individual is tried on the facts of his or her case, not on the facts or circumstances or statistics from unrelated cases;
 - ii) it overturns the U.S. Supreme Court's rejection of such a statistical premise, where the Court noted with regard to the Baldus study: "Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions." *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (emphasis in original); and
 - iii) its statistical showing fails to establish that the imposition of capital punishment in a particular case is predicated on any bias; and
- d) the Racial Justice Act would permit the "second-guessing" of capital case decisions by prosecutors, defense counsel, judges and juries based upon the information and statistics required to be maintained under the Act;
- e) the Racial Justice Act eliminates the traditional deference to state-court findings of fact, 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981), if the state fails to collect or maintain adequate records required under the Act, and causes the individual conviction, though lawfully and justifiably imposed, to be unduly placed in jeopardy;

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- f) the potential cost of compliance on states and local entities would be exorbitant, as demonstrated by one California case (*In re Earl Jackson*) which took three years to prepare for an evidentiary hearing and cost more than \$1,000,000. The evidentiary hearing was never held, after the *McCleskey v. Kemp* ruling was rendered;
 - g) the Racial Justice Act encourages a quota system for capital punishment cases by in effect introducing "race consciousness" into capital case decisions.
- 2) opposes any legislation which would undermine or otherwise modify the holding in *McCleskey v. Kemp*, 481 U.S. 279 (1987);
 - 3) calls upon the U.S. House of Representatives and U.S. Senate to reject any version of the Racial Justice Act as part of any package of federal habeas corpus reform or any crime bill;
 - 4) opposes any legislation, including the omnibus crime bill to be reported by the conference committee, which includes any version of the Racial Justice Act. Any meaningful provisions contained in the crime bill are completely undermined by inclusion of the Racial Justice Act, which is antithetical to fundamental notions under our criminal justice system. If the omnibus crime bill contains any version of the Racial Justice Act, we recommend it be voted down until this legislation is removed.

BE IT FURTHER RESOLVED by the California District Attorneys Association that its Executive Director shall transmit a copy of this resolution to the U.S. Senators and Representatives in the California delegation and to members of the Senate and House Committees on the Judiciary.

CALIFORNIA DISTRICT ATTORNEYS
ASSOCIATION



EDWARD HUNT, President and District
Attorney, Fresno County