

# VOLUNTEER LAWYERS AND THEIR EXTRAORDINARY ROLE IN THE DELIVERY OF JUSTICE TO DEATH ROW PRISONERS

*Robin M. Maher\**

Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society .... It is fundamental that justice should be the same, in substance and availability, without regard to economic status.

U.S. Supreme Court Justice Lewis Powell, Jr.<sup>1</sup>

**F**EW things worth doing are easy. This is especially true for volunteer death penalty lawyers. Representing a death-sentenced prisoner is intellectually challenging work, requiring a significant commitment of time and resources. It is high-stakes, politically-charged litigation that may last for years in a state far from home and family. It is too daunting a concept for many.

That's why it is something of a small miracle when we find the exceptional individuals whose belief in justice moves them past the obstacles that stop others. These are lawyers whose sensibilities are offended at the idea of an execution without judicial review or due process, to whom the concepts of a fair trial and the effective assistance of counsel are more than distant echoes of a constitutional law class. They see what doesn't make sense to them and they do not look away. They extend themselves to invest in the worth of another human being, even one who has been convicted of a terrible crime. These are the lawyers whose stories are told in this special edition of the Toledo Law Review.

## *The Need*

My job is to find volunteer lawyers to represent death row prisoners who lack counsel. I fail far more often than I succeed. But recruiting is not the most difficult part of my job. That is nothing compared with telling a death-sentenced prisoner that I cannot help him. Every week I receive phone calls from frantic mothers and letters from prisoners and their families. They are often supplemented with pages and pages of painstaking, hand-written notes about their trial and potential issues for appeal. Many prisoners protest their innocence, expressing bewilderment at finding themselves on Death Row. Too many tell me how their trial lawyers failed them. They all ask the same thing: please, find a lawyer for my case. I reply that I will do

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1. Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) (citing Report of the Pennsylvania Bar Association Task Force for Legal Services at 3 (1990)).

my best but my heart is heavy with the unspoken truth. I cannot come close to finding enough lawyers for those who need them.

There are hundreds without legal representation on Death Rows around the country. That is because there is no guarantee that a prisoner will be appointed counsel in post-conviction proceedings.<sup>2</sup> Federal funding was discontinued in 1995, and many states fail to provide adequate resources to the post-conviction public defender offices that represent poor people.<sup>3</sup> Consequently, these offices are underfunded, poorly staffed, lacking resources, and overwhelmed with too many cases.

At trial, some states rely on appointed counsel instead of funding and training public defenders. But an absence of meaningful standards for defense counsel and grossly inadequate compensation<sup>4</sup> almost guarantees that many capital defendants receive terrible representation.<sup>5</sup> Volunteer lawyers are astounded to find that drunk, incompetent, or inexperienced trial counsel represented their clients at trial. The continuing taint of racial prejudice, human error, and government misconduct contribute to a capital punishment system that is increasingly viewed as inaccurate and unreliable.<sup>6</sup>

In an attempt to address these profound failures of the criminal justice system, the American Bar Association recently adopted revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>7</sup> The Guidelines set forth a national standard of care for the defense of capital cases.<sup>8</sup> Among other things, the Guidelines call for an independent appointing authority,<sup>9</sup> performance standards for counsel,<sup>10</sup> and a defense team adequately funded and staffed with expert assistance.<sup>11</sup> ABA President Dennis Archer recently called upon all death penalty jurisdictions to adopt and enforce the Guidelines and bring about badly needed reform to capital defender systems.

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2. In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Court rejected the claim of a Death Row prisoner who argued that he was constitutionally entitled to the appointment of counsel to pursue his state post-conviction remedies.

3. For example, the state of Alabama provides no funds for post-conviction representation of Death Row prisoners. See also Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

4. Compensation for Alabama capital trial counsel is a meager \$60/hour in court and \$40/hour out of court. See ALA. CODE § 15-12-21 (2003); compensation for Mississippi capital trial counsel is capped at \$1,000 (or \$2,000 if 2 attorneys are appointed), plus reimbursement of actual expenses. See MISS. CODE ANN. § 99-15-17 (2003); in Florida, compensation for capital trial counsel is capped at \$3,500. See FLA. STAT. ANN. § 925.036 (West 2003).

5. See Stephen B. Bright, *Counsel for the Poor: the Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

6. A Gallup poll taken in May of 2003 found that 73% of Americans believe an innocent person has been executed in the last five years. A Pew Research poll from July 2003 found that public support for the death penalty had dropped to 64%, compared to 78% in 1996. See Death Penalty Information Center, *Resources, Public Opinion*, available at <http://www.deathpenaltyinfo.org> (last visited Jan. 28, 2004).

7. ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed., ABA 2003) (adopted Feb. 10, 2003), reprinted in 31 HOFSTRA L. REV. 913 (2003).

8. *Id.* at 919.

9. *Id.* at 944.

10. *Id.* at 961.

11. *Id.* at 952.

Only a dramatic transformation of capital defender systems will end the injustice of the wrongfully convicted on Death Row. Since 1973, one hundred and thirteen persons have been released from Death Row with evidence of their innocence.<sup>12</sup> Some came within hours of being executed for crimes they did not commit.<sup>13</sup> United States Supreme Court Justice Sandra Day O'Connor has warned, "Given the statistics, the system may well be executing innocent people."<sup>14</sup> This, I fear, is the inevitable result if we do not commit ourselves to improving the quality and availability of legal representation for poor people.

Recruiting civil lawyers for volunteer capital defense work is an inadequate answer to the problems caused by a criminal justice system that repeatedly fails poor people. But without significant and meaningful reform of capital defender systems, it is the only answer. Simply put, there is no one else to do this work.

### *The Rewards*

The 3500 people on Death Row<sup>15</sup> are often described with words that invite us to deny their status as human beings. The truth is harder to hear. All are poor. Some are innocent. Many are mentally retarded, mentally ill, and uneducated. Most have experienced lives of profound abuse and neglect. These damaged and vulnerable people are unable to deal with the criminal justice system on their own. Their crimes horrify us. But they are no less deserving of the rights we want for ourselves—the right to a fair trial, to due process, and to competent legal advocacy. Justice belongs to all of us, not just those who can afford it.

This principle is recognized by the volunteer lawyers who represent death-sentenced prisoners. They prove that even those without criminal law experience can do this work and do it well. There is an abundance of resources available to assist volunteer lawyers with their cases, from on-line practice areas with sample pleadings and briefs to training programs and counseling from experienced capital defenders. Volunteer lawyers demonstrate the difference that an effective, adequately funded lawyer can make in a capital case. Some have even had the privilege of walking their wrongfully convicted client off Death Row to freedom. Without exception, each describes their experience as among the most rewarding and fulfilling of their career.

Of course, the real value of this work cannot be measured by examining the outcome of the case, the number of hours recorded, or amount of money spent. The significance is seen in the faces of the condemned, when they learn that they have a competent lawyer to advocate for them, many for the very first time. At that moment, hope for justice replaces fear and abandonment, and the dignity of a human being is restored. That is the true meaning and reward of this work.

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12. Death Penalty Information Center, *Innocence*, available at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org) (last visited Mar. 5, 2004).

13. Cindy Richards, *No Escaping the Ryan Challenge*, CHI. SUN TIMES, Jan. 15, 2003, at 45.

14. Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1.

15. Death Penalty Information Center, *Facts*, available at <http://www.deathpenaltyinfo.org> (last visited Jan. 28, 2004).

To learn more about representing someone on Death Row who needs a lawyer or the law firms that represent death-sentenced prisoners, please contact the ABA Death Penalty Representation Project at 202-662-1738 or visit its website at [www.abanet.org/deathpenalty](http://www.abanet.org/deathpenalty).

# ESSAYS

## “DYING FOR REPRESENTATION”: PROMOTING JUSTICE THROUGH PRO BONO PARTICIPATION

*Kenneth C. Frazier\**

POLITICAL debate surrounding capital punishment in the United States predominantly concerns one question—should the death penalty be abolished? As a lawyer, I have come to regard the issue of “abolition” as secondary to what is, in my view, the more pertinent inquiry: can our system of justice fairly and consistently apply it *only* to those who, under the law, have been legitimately condemned to die?

In representing James Willie “Bo” Cochran, a former inmate on Alabama’s Death Row, I saw firsthand why there can be no fair and consistent application of the death penalty under the current system. Prosecutorial discretion to charge capital murder is too broad and often goes unchecked. Those who are charged, frequently the socio-economically disadvantaged who lack education, must place their fate in the hands of court-appointed lawyers who frequently lack the necessary experience or resources to provide an adequate defense. In post-conviction proceedings, those death row inmates who have valid constitutional claims face such daunting procedural hurdles that those claims too rarely garner review, much less relief. The “system,” I have learned, is seriously flawed. I make this assertion not from a scholarly perspective, but from that of a former trial lawyer. And, as proof, I do not offer statistics or irrefutable legal principles, but the story of Bo Cochran.<sup>1</sup>

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1. The story of Bo’s journey through the system began in 1977 in Jefferson Circuit Court when his first trial for the murder of Stephen Jerome Ganey ended in a mistrial [hereinafter *Cochran I*]. Bo was then retried in the Jefferson Circuit Court and convicted for Ganey’s murder [hereinafter *Cochran II*]. This conviction, however, was reversed and remanded for a new trial at *Cochran v. State*, 400 So. 2d 435 (Ala. Crim. App. 1981) [hereinafter *Cochran III*] after the United States Supreme Court overturned Alabama’s death penalty statute in *Beck v. Alabama*, 447 U.S. 625 (1980). Bo was again convicted in the Jefferson Circuit Court [hereinafter *Cochran IV*]. The Alabama Court of Criminal Appeals affirmed his conviction at *Cochran v. State*, 500 So. 2d 1161 (Ala. Crim. App. 1984) [hereinafter *Cochran V*]. However, the Alabama Supreme Court remanded the case for resentencing at *Ex parte Cochran*, 500 So. 2d 1179 (Ala. 1985) [hereinafter *Cochran VI*]. The circuit court resentenced Bo at *State v. Cochran*, No. CC77-02211 (Jefferson Cir. Ct. Feb. 25, 1986) [hereinafter *Cochran VII*]. The sentence was affirmed by the Court of Criminal Appeals in *Cochran v. State*, 500 So. 2d 1188 (Ala. Crim. App. 1986) [hereinafter *Cochran VIII*] and by the Alabama Supreme Court in *Ex parte Cochran*, 500 So. 2d 1064 (Ala. 1986) [hereinafter *Cochran IX*], *cert. denied*, 481 U.S. 1033 (1987) [hereinafter *Cochran X*].

Subsequently, Bo’s claim for post-conviction relief was denied at *Cochran v. State*, 548 So. 2d 1062 (Ala. Crim. App. 1989) [hereinafter *Cochran XI*], *cert. denied*, 493 U.S. 900 (1989) [hereinafter *Cochran XII*]. Bo sought federal habeas corpus relief, which was granted at *Cochran v. Herring*, 43

Bo's case serves as more than evidence of the system's troubling inconsistencies. It also demonstrates the extraordinary degree to which lawyers matter in capital litigation. They matter from start to finish, at every stage of the process. My principal objective in sharing my story—really Bo's story—is to encourage fellow lawyers to get involved in reforming the system for administering capital punishment, primarily by stepping forward to take on the defense of a single case. For people like Bo Cochran—those indigent and charged with a capital crime—the only real chance of obtaining justice rests with their lawyers.

### *On the Case*

I first learned of Bo Cochran's cause through a phone call from a friend and colleague, Esther Lardent. I was a litigation partner in a large Philadelphia law firm, consumed with the daily responsibilities of law firm life: providing quality representation to my clients, business development, billable hours, and administrative duties. Esther was heading up the Death Penalty Representation Project of the American Bar Association and was preoccupied with her own challenges: securing representation for scores of indigent death row inmates, fighting for justice, and trying to keep men and women alive in the process. Esther, in her highly persuasive style, asked if my firm would represent an Alabama death row inmate, an inmate whose direct state court appeals had been completely exhausted, whose only remaining avenue for redress was the institution of federal habeas proceedings, and who was facing the imminent issuance of a writ of execution. In all honesty, I was not immediately moved to act on Esther's impassioned plea for help.

Fortunately, two junior associates in our firm, Michael Holston and Seamus Duffy, recognized the opportunity to promote justice and urged the firm to accept the representation. They asked me to serve as the "partner" on the case, and, with more encouragement from Esther, I agreed.<sup>2</sup> Still, feelings of trepidation lingered—I had been trained to be a corporate litigator, not a criminal trial attorney. How, I asked Esther, could a lawyer like me responsibly undertake a representation of such gravity and complexity so far outside my area of expertise? Esther's answer was simple: either we were Bo's lawyers or he was his own lawyer. And so began one of the most challenging and rewarding cases I have ever handled.

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F.3d 1404 (11th Cir.) [hereinafter *Cochran XIII*], *modified and rehearing denied* by 61 F.3d 20 (11th Cir. 1995) [hereinafter *Cochran XIV*], and *cert. denied*, 516 U.S. 1073 (1996) [hereinafter *Cochran XV*]. As a result, Bo was granted a new trial in the Jefferson Circuit Court in which he was acquitted of the murder charge [hereinafter *Cochran XVI*].

2. While my recollections are offered in the first person, I am indebted to my colleagues and former partners at Drinker Biddle & Reath for supporting this cause over what turned into almost a decade of active litigation. In addition to Seamus Duffy and Mike Holston, both of whom are now successful partners at Drinker, our team included Brenda Holston (then Williams), who replaced Mike (before later marrying him). Brenda became an integral member of the team after Mike left the firm for a period to work as an Assistant United States Attorney. We were also joined by my former partner Larry Fox, then the senior and wisest member of the Cochran team and now the Chair of the ABA's Death Penalty Representation Project. These proceedings continued for several years after I joined Merck, and I am grateful that the Company supported my continued and active representation of Bo Cochran.

*Sentenced to Death*

My first visit to Death Row at the state penitentiary at Atmore, Alabama, is one that I will never forget. On meeting Bo, he proclaimed his innocence of the murder for which he had been convicted and shared his version of the events. At the meeting's conclusion, the steel doors clanged behind us, separating us from our new client. A prison guard whispered to us that Bo's extraordinary human qualities (his kind and even-tempered disposition and genuine concern for others) made him well-respected by his fellow death row inmates and their captors. He added that he hoped we could help Bo. Without even the vaguest hint of a strategy, we committed to do just that.

Though initially skeptical of Bo's protestations of innocence, I was determined to focus on what I perceived as the more germane issue—had the State proved my client guilty beyond a reasonable doubt?<sup>3</sup> Prior to making the trip, we had reviewed what record there was of the *three* trials conducted by the State of Alabama against Bo (the first ended in a mistrial, and the verdict in the second was reversed on appeal).<sup>4</sup> What was pretty clear from that record was that Bo had committed a robbery—he had “held up” a grocery store at gunpoint late in the evening and escaped on foot with about \$300. The store was in a predominantly white neighborhood south of Birmingham, Alabama. Witnesses from inside the store described the robber as a black man. They further testified that the store manager, the son of a local white minister, pursued the robber out of the store. Police, searching for the robbery suspect, converged on a trailer park just north of the store. About twenty minutes later, a gunshot was heard. Bo was arrested within an hour about a mile north of the trailer park with cash from the store and a gun. The store manager was found soon thereafter, fatally shot in the trailer park.

Now, on the basis of this circumstantial evidence alone, reasonable people might presume that the robber had shot and killed the store manager. Couple this circumstantial evidence with corroborating forensic evidence, and the prosecutor likely wins a murder conviction. In Bo's case, for example, one would expect to see confirmation that the fatal bullet matched the revolver Bo carried. One would also expect to see test results showing that his gun had indeed been fired that night, and, if so, that Bo had been the one to fire it—facts easily confirmed through the use of a paraffin test. Incredibly, as my colleagues and I discovered, substantiation in the form of physical or forensic evidence was totally nonexistent. No testing was done on Bo's gun or his hands to determine whether he shot the gun that night. The prosecution claimed the fatal bullet could not be found. The only bullet allegedly

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3. Long before we had the opportunity to present Bo's claims to the federal court, I became convinced that Bo was indeed innocent of murder. (I suppose it's noteworthy that my two younger colleagues on the case were immediately convinced of Bo's sincerity.) And, in these times of DNA and forensic science advances, we have grown somewhat accustomed to feeling outraged and disgusted by wrongful convictions. It's easy to feel this way when we can be sure, to a scientific certainty, that someone is actually innocent of the crime. But, even where incontrovertible evidence of innocence doesn't exist, my assertion remains the same: the State must meet its burden and prove its case. A person cannot be sent to prison, much less sentenced to die, unless the proof excludes reasonable doubt. It is the job of defense lawyers to push prosecutors to adhere to this standard.

4. See *Cochran I*; *Cochran II*; *Cochran IV*.

found near the scene of the shooting did not match the gun Bo was carrying. Finally, autopsy photos of the victim showed a highly irregular entry wound; it appeared that the fatal bullet had been cut out before the body was delivered to the coroner.

Bo Cochran had not just been convicted of capital murder solely on the basis of highly circumstantial evidence. He was convicted despite evidence suggesting an accidental police shooting and cover-up. And worse, he had been sentenced to die by a jury that was presented with none of the available mitigating evidence, that effectively heard no plea to spare Bo's life.

Through the course of representing Bo, I came to learn that his case was typical of many capital cases. In Alabama, there is no public defender system; the State appoints lawyers to defend a capital case. Bo met his court-appointed lawyers *on the day of his trial*. As is too often the case, they were under-equipped, under-trained, and under-compensated.<sup>5</sup> At the time of Bo's trial, court-appointed lawyers, paid by the State, were entitled to \$40 per hour for in-court time and \$20 per hour for time spent out of court, with a cap of \$7,500 for the entire representation.<sup>6</sup> Jury selection was really nothing more than a process of systematically weeding out African-American jurors from the panel. In short, Bo had been denied virtually all of the fundamental rights we associate with a criminal trial, including effective assistance of counsel and a fairly selected jury of his peers. He was "railroaded" in

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5. Notwithstanding this conclusion, I believe that, in the political debate surrounding the death penalty, the men and women on the "front lines" who defend these cases week in and week out are often unfairly criticized. True, there are numerous cases in which court-appointed counsel are woefully incompetent or irresponsible. But I believe that for every such case, there are many others in which these lawyers fight nobly and effectively to overcome the huge disadvantages they face due to lack of sufficient time and resources. I have asked myself whether I could consistently live up to the constitutional standard of "effective counsel" (or my own standards) were I asked to accept the equivalent of minimum wage, or even less, and spend a year trying capital cases back-to-back in a hostile environment with little or no resources at my disposal, expert or otherwise. Now having met some lawyers who do just that, let me say that I consider them heroes in our profession.

Our first visit to Alabama allowed us to consult with Richard Jaffe, who had served as Cochran's counsel on direct appeal and state post-conviction appeals as a then-rookie lawyer. Although he was paid almost nothing for these efforts, Jaffe had done an excellent job of asserting and preserving several constitutional issues, including the two that would later provide the basis upon which Cochran received habeas relief. Our system of justice relies on lawyers like Jaffe to represent defendants who face the ultimate punishment. They do so based on their deeply held conviction that all defendants are entitled to high-quality, effective representation—irrespective of their ability to pay. Richard Jaffe has gone on to become a premier criminal trial lawyer.

6. Consider that the Alabama Department of Corrections estimates the cost of housing an inmate on Death Row for one year to be more than \$10,000. Gail Ballantyne, *Is the Price of Justice Worth the Cost of Alabama's Death Row?* (CBS affiliate WHNT television broadcast, Feb. 17, 2003), available at <http://www.whnt19.com/global/story.asp?s=1135754&ClientType=Printable> (last visited Feb. 12, 2004). There are currently 192 men and women on Death Row with 300 in county jails awaiting trial. Jeffery Rieber, *The Fiscal Distress Caused by Capital Punishment*, at <http://www.phadp.org/fiscal.htm> (last visited Feb. 11, 2004). It is, at best, questionable economics and, at worst, cruel that so little money is allocated to those defending lives and so much to the temporary preservation of those condemned to die. The State recently spent \$166,000 to replace the electric chair with a lethal injection chamber. Ballantyne, *supra*.



the classic sense. The record showed it, and we were determined to prove it to the federal court.<sup>7</sup>

### *A Second Chance*

To win relief on an ineffective assistance of counsel claim, *Strickland v. Washington*<sup>8</sup> required us to prove counsels' performance had fallen below an objectively unreasonable standard, and that Bo had been prejudiced by that performance. Prejudice, in the context of habeas relief, implies more than its everyday meaning. Bo would have to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different. Our review of the record showed serious lapses in performance, none more glaring than his counsels' failure to investigate or offer any proof of mitigating circumstances at the sentencing phase of Bo's trial. Long hours spent poring over the trial record eventually persuaded us that we had a second winning claim—one based on the seminal case of *Batson v. Kentucky*.<sup>9</sup>

Under *Batson*, a defendant belonging to a cognizable racial group may establish a prima facie equal protection violation by showing, first, that the prosecution exercised its peremptory challenges against venirepersons of a cognizable racial group and, second, that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."<sup>10</sup> In establishing a prima facie case, the defendant may rely on any relevant circumstances that demonstrate a discriminatory motive. In Bo's case, the record contained overwhelming evidence to support a prima facie case that the prosecution exercised its peremptory challenges in a racially discriminatory manner. It became obvious that one of the major factors contributing to Bo's conviction centered around the fact that each of his jury trials was distorted when viewed through the lens of race. On each jury that had convicted Bo, minorities were severely underrepresented, a product not of mere chance, but of purposeful planning to use peremptory challenges in a racially

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7. That first trip to Alabama was also eventful because we had the good fortune to meet and consult with Bryan Stevenson, then Director of the Alabama Capital Representation Resource Center and now the Executive Director of the Equal Justice Initiative in Montgomery, Alabama. Bryan was well-acquainted with nearly all the individuals comprising Alabama's considerable death row population, and he knew a great deal about the specifics of their individual cases. He and his Resource Center colleagues represented as many death row inmates in their state post-conviction and federal habeas cases as was humanly possible. When Bryan's direct representation was not possible, as in Cochran's case, he was willing to mentor volunteer counsel. Bryan's considerable insights, knowledge and experience were indispensable to three novice lawyers from Philadelphia. Our frequent consultations with him would prove pivotal in Bo's defense.

In 1995-1996, Congress eliminated the funding of the Alabama Capital Representation Resource Center and similar organizations in other states. Laura Lafay, *Resource Centers Lose Funding; Congress Hoped to Speed Cases of Justice but May Have Slowed It*, VIRGINIAN-PILOT, Oct. 7, 1995, at B1. Thus, many of these centers are no longer in existence. Those that still function do so with minimal resources and owe their existence largely to the dedication of lawyers, like Bryan, who have made securing justice for those on Death Row their life's work.

8. 466 U.S. 668 (1984).

9. 476 U.S. 79 (1986).

10. *Id.* at 96.

discriminatory manner. The prosecution utilized its challenges to squelch even the possibility that Bo's circumstances would be evaluated by persons with varying experiences, ethnicities, and backgrounds.

The prosecutor exercised twenty-four of twenty-six peremptory strikes in Cochran's first two trials to exclude virtually all black members of the venire. In all, thirty-one of the thirty-five black venirepersons were struck over the three trials. At the trial from which we were seeking relief, the prosecution used 50% of its peremptory challenges (7 of 14) to strike 78% of the black jurors (7 of 9), even though black jurors represented only 21% of the venire panel (9 of 42). The strategic pattern and sequence of the prosecution's strikes clearly demonstrated that exclusion of black jurors was a primary objective of the prosecutor in the selection process. Indeed, the only black juror to participate in deliberations at Bo's third trial had personal ties to the District Attorney, and was, in all respects, an ideal juror for the prosecution.<sup>11</sup>

We would later come to learn through the testimony of former prosecutors in the district attorney's office that the belief in their office was "that prospective black jurors at that time were anti-police, anti-establishment, and should not be left on juries, if at all possible."<sup>12</sup> One former prosecutor testified that race *was* taken into consideration in striking jurors, particularly in cases where there was a white victim and a black defendant. He candidly admitted that black jurors were routinely struck solely on the basis of race. Indeed, at the time of Bo's trial, the courts of Alabama had actually misread the pre-*Batson* standard of proof to mean that prosecutors were free to discriminate in individual cases.<sup>13</sup>

Finally, I had the opportunity to depose, and then to cross examine, the very prosecutor that exercised the peremptory strikes at issue in all three of Bo's trials. I had met the man early in the case on one of our first investigatory trips to Alabama. My impression was that he was a man of sufficient integrity to not lie or shade the facts under oath. For this reason, I made the decision to simply ask him in his deposition about his feelings regarding African-American jurors. His testimony—which would be shocking to many—was that he viewed black jurors as less "reliable" for the prosecution than white jurors, more likely to identify with a black defendant than white jurors, and more likely to acquit a black defendant than white jurors. When I asked him if he had put these feelings out of his mind in selecting the juries in our case, he testified that he "couldn't say" that he did.

Although some maintain the criminal justice system is color-blind, the reality is that race plays a substantial role in the judicial process. Trial lawyers know this, and Bo is living proof of this fact. Jurors' backgrounds, personal experiences, and prejudices tend to frame the way they analyze facts and perceive defendants, ultimately affecting the outcome of every trial. For this reason, "the ease with which a prosecutor can offer pretextual, race-neutral explanations for what in reality are

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11. Specifically, this "good" juror stated during voir dire that he and the district attorney were friendly and that they played golf together.

12. Transcript at 16, *Cochran XIII*, 43 F.3d 1404 (11th Cir. 1995).

13. See *Lynn v. State*, 477 So.2d 1365, 1376-77 (Ala. Crim. App. 1984) ("Alabama courts have consistently held that it is not error for the prosecuting attorney to strike a jury on the basis of race.").

discriminatory strikes” often serves as the basis for harsh criticism of *Batson*.<sup>14</sup> It is easy to target a minority juror and explain the decision to strike based on some arbitrary distinction that does not enjoy legal protection. Bo was lucky the use of strikes by the prosecutors in his case was so flagrant that there was only one plausible explanation. And, he was lucky, as well, that his prosecutor was unwilling to shade his testimony just to prevent the possibility of a retrial.

### *Hitting the Wall*

Armed with record excerpts and deposition transcripts, we had proof that Bo’s trial had not been constitutionally sound and were confident that proof would provide the necessary ammunition to secure his release. The law, we believed, was on our side; however, our journey was far from complete.

As it turned out, the law with which we had to contend, that of federal habeas corpus, would not act as our sentinel against further injustice, but rather, our principal antagonist. And, no doctrine erects a greater barrier to relief than “procedural default.” First, I will briefly explain how “procedural default” works, and to a lesser degree, why it exists. Next, and more importantly, I will describe how the doctrine of procedural default could have functioned, and almost did function, to seal Bo’s fate in the electric chair.

Procedural default seems simple enough: when a state prisoner seeking relief from his conviction presents evidence of a federal constitutional claim to a state court, the court can refuse to review that claim on procedural grounds. For example, the state court might conclude that it should refrain from reviewing the claim because counsel failed to lodge a contemporaneous objection at trial or because the claim itself was presented out of time under the state’s post-conviction statute. However, the implications of such procedural default extend beyond the confines of any one state courthouse.

Ordinarily, where a state court has declared a federal claim procedurally defaulted, federal courts also are bound by that determination, and *no matter how meritorious it appears on its face*, the claim may not be reviewed. Certain requirements do exist. The state procedural rule relied on must be “adequate and independent”—the rule must be independent of federal law, and adequately provide the state court with grounds to bypass review of federal issues.<sup>15</sup> Adequacy is concerned with the clarity, and consistency in application, of the state procedural rule.<sup>16</sup> In other words, “[w]hen a state court refuses to reach the merits of a federal constitutional challenge because that challenge did not satisfy a state procedural rule, a federal court will defer to that judgment so long as the state procedural rule is ‘consistently or regularly applied,’”<sup>17</sup> and is “‘firmly established and regularly followed.’”<sup>18</sup> If a state’s highest court “occasionally forgives procedural default, but

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14. Geoffrey Cockrell, Note, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 351, 358 (1997) (discussing the danger of minority underrepresentation in juries).

15. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

16. *Adams v. Kyler*, 2002 U.S. Dist. LEXIS 15424, at \*10-11 (E.D. Pa. 2002).

17. *Id.* at \*9 (quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988)).

18. *Id.* (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

applies it in the ‘vast majority’ of cases, then the federal habeas court ordinarily should give the state rule preclusive effect.”<sup>19</sup>

Finally, even where a procedural default is both independent and adequate, a federal habeas court may still undertake merits-based review if the petitioner demonstrates “cause” for the default and resulting “prejudice,” or the petitioner shows that the federal court’s refusal to hear the claim would result in a miscarriage of justice.<sup>20</sup> “To show cause, a petitioner must show that a factor ‘external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.’”<sup>21</sup> “To show prejudice, the petitioner must prove that errors at trial ‘worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’”<sup>22</sup>

Though it might appear prisoners seeking federal habeas relief have various tools with which they are able to circumvent procedural default, just the opposite is true. A federal court considering independence, adequacy, cause, or prejudice does so within the statutory framework promulgated by Congress.<sup>23</sup> At the time of Bo’s conviction, the habeas corpus statute required, at a minimum, that federal courts presume the factual findings of state courts to be correct. Today, the relevant statute, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>24</sup> requires that even greater deference be accorded to state court determinations. It dictates that federal courts may review a state court’s determinations on the merits only to ascertain whether the state court had reached a decision that was “contrary to” or an “unreasonable application” of clearly established United States Supreme Court law, or if a decision was based on an “unreasonable determination” of the facts.<sup>25</sup>

Some commentators assert that underlying doctrines like procedural default, and mandates of deference under the AEDPA, are legitimate concerns regarding comity and federalism. A state must be given a chance to correct its own alleged mistakes before the federal habeas court is asked to do so; a federal court must respect a state court’s determinations regarding application of its own established procedural rules. Viewing procedural default from a practical perspective as I have, however, raises the question of what possible rationale, other than one rooted in judicial economy, exists for proscribing a federal district court from reviewing the federal claims of a man sentenced to die? I assert there is none; there is no conceivable danger or detriment to ensuring that someone sentenced to die received a fair trial and sentence. Short of employing questionable tactics, lawyers must work to prove that the decision to take a life cannot be undertaken lightly or made hastily, and above all, that it should not rest solely upon a court’s application of a time-saving doctrine like procedural default.

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19. *Id.* at \*10 (quoting *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989)).

20. *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977).

21. *Adams*, 2002 U.S. Dist. LEXIS 15424, at \*11 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

22. *Id.* at \*11-12 (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

23. 28 U.S.C. §§ 2241–2256 (2000).

24. 28 U.S.C. § 2254 (2000).

25. 28 U.S.C. § 2254(d) (2000).

As discussed above, our review of the record convinced us that constitutional violations, ineffective assistance of counsel (*Strickland*) and racial discrimination in the selection of jurors (*Batson*), had occurred at Bo's trial. But, in order to make a proper showing, we needed discovery. On hearing argument, the federal district court judge hearing the case granted us discovery on a sole issue, ineffective assistance of counsel. Ultimately, we did prove that trial counsel's failure to present mitigating evidence during the penalty phase warranted relief—the death sentence was overturned.<sup>26</sup> Bo's physical life would be spared, but he would still spend life in prison.

Bo's claim for relief under *Batson*, however, was mired down by the doctrine of procedural default. *Batson* was not decided until April 30, 1986,<sup>27</sup> so it is unsurprising that Cochran failed to raise the claim on direct appeal from his 1982 conviction. In a 1988 amendment to his application for post-conviction relief in state court, Cochran did raise the claim. Based on his failure to somehow raise it previously within an allotted one-year window, however, the state court found the *Batson* issue procedurally barred. Cochran objected and submitted evidence of the prosecution's discriminatory behavior. In a nod to the substantive law, the same court looked at the evidence and noted it could not be certain discrimination had occurred, but it did not need to hold so because it concluded Cochran was procedurally barred from raising the claim based on his failure to raise it on direct appeal. Cochran petitioned for certiorari, was denied, and proceeded to file a petition for writ of habeas corpus in the federal district court. Thus, he found himself before a federal judge who, like all those state court judges before him, concluded Cochran had not followed the state court rules and so his *Batson* claim would not be heard.

Convinced the *Batson* issue was meritorious and clearly worthy of consideration by the court, we decided not to take "no" for an answer. As discussed above, in order for a state's determination regarding procedural default to preclude a federal court from reviewing a federal claim, the procedural bar must be firmly established and a regularly followed state practice. We filed a motion for reconsideration and, the second time around, the judge conceded discovery was warranted. Following an evidentiary hearing where the lead prosecutor on Cochran's case testified that, at the time of Cochran's trial, he believed black jurors were less "reliable" and less likely to return a death penalty verdict than white jurors, the judge ruled that Bo's *Batson* claim entitled him to relief. He found that the evidence tended to show the district attorney's office maintained an informal policy of striking black jurors because of their race, and agreed that race had been the decisive factor in the use of peremptory strikes in Bo's case.

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26. *Cochran VI*, 500 So.2d at 1187 (ordering that an entirely new sentencing hearing be held).

27. Cochran was lucky to have the option of raising *Batson* at all. In January of 1987, the United States Supreme Court held that *Batson* was to "be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 327 (1987). The United States Supreme Court denied certiorari in Cochran's case on April 27, 1987, therefore Cochran's judgment of conviction was not final when *Batson* was announced. *Cochran X*, 481 U.S. at 1033. "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

On appeal, the State persisted in its argument that Bo's *Batson* challenge was procedurally barred from consideration. In affirming the district court, the Eleventh Circuit Court of Appeals stated: "Cases such as Cochran's are unusual because the *Batson* decision came down while the case was on direct review. In such cases, the Alabama courts have not consistently applied a procedural bar to *Batson* claims asserted in state collateral petitions where the defendant had raised a *Swain* objection at trial."<sup>28</sup> The court continued: "We find that the district court was not precluded from addressing Cochran's *Batson* claim in a federal habeas proceeding because Alabama has not consistently applied a procedural bar to *Batson* claims in cases like Cochran's. Moreover, ... the district court did not clearly err in finding that the prosecution in this case impermissibly discriminated against blacks in using its peremptory strikes in violation of *Batson*."<sup>29</sup> Bo's second chance was thus restored.

### *Life Goes On*

Upon first seeing a group of Philadelphia lawyers arrive at his prison cell, Bo said he felt like he had already won. Inexperienced in criminal matters and state procedure, and frightened by the enormity of the repercussions emanating from a capital case, we were not so convinced. But we were there. And, we were energized beyond belief by his confidence in us. More than five years after that first meeting, Bo did win. He won the right to a new trial where he was acquitted of murder by a jury that was not selected primarily on the basis of race. This jury required less than one hour to acquit Bo of a crime for which he had spent 18 years on Death Row. On a chalkboard in the room in which that jury deliberated, the words "not enough evidence" were written next to the murder charge.

Popular discourse concerning the criminal justice system often focuses on individuals "slipping through the cracks." To most, the phrase evokes thoughts of those who "got away"—a suspect never apprehended, or a parolee released back into society who only goes on to commit a new, often more despicable, offense. But, Bo Cochran also qualifies as a man who slipped through the cracks, and not because he is somehow undeserving of the freedom he now enjoys. To the contrary, he is one of the fortunate few set free by a system effectively designed to prevent review or revision of many convictions and sentences, no matter how unjust. Only with the help of lawyers can such gross injustice be avoided.

### *Conclusion*

Who may live and who must die is unquestionably the gravest determination entrusted to our criminal justice system. Approximately 800 people have been executed in the United States since the death penalty was reinstated in 1976. Over this same period of time, more than 100 death row inmates have been retried and acquitted, or released outright, based on evidence that was not submitted in their

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28. *Cochran XIII*, 43 F.3d at 1409.

29. *Id.* at 1412.

original trials.<sup>30</sup> This ratio of the executed to the demonstrably innocent hardly confirms the current system's accuracy and reliability or its procedural and substantive fairness. Capital punishment derives its support principally from its plausible (but unproven) claim of deterrence or the notion that it represents the only suitable retribution for heinous crimes. However, those willing to look objectively at how the system dispenses justice to the poor and disadvantaged cannot easily discount the unacceptably high risk of wrongful convictions or the hideous implications of their finality.

Bo's story ends well. A man who spent the better part of two decades on Death Row is now free. He has a family. He works in his church. His refusal to look back in recrimination is an inspiration to many. I firmly believe the privilege of having been Bo's lawyer represents the high point of my legal career. I can only hope this lawyer's tale will inspire other lawyers to volunteer to represent indigent death row inmates. In any event, I wholeheartedly encourage them to do so because, in the words of Bryan Stevenson, "people are literally dying for effective representation."

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30. Though many of these individuals escaped death only because of the recent availability of DNA testing or other incontrovertible evidence of their innocence, Bo is living proof that others, whose cases were not impartially heard or well tried, can escape through the intervention of competent and committed counsel.

## MY JOURNEY WITH CARUTHERS

*Barbara Bader Aldave\**

### *How It All Began*

I first heard of Caruthers Alexander on June 8, 1994, a day that had started out with a bang. At the time, I was the dean of St. Mary's University School of Law in San Antonio, Texas. For almost a week I had been trapped in a courtroom at a preliminary hearing, where I had testified and listened to others testify in a suit filed against me by a professor who had been denied tenure. Immediately after the court convened on the morning of June 8, the judge ruled in my favor, reasoning that the plaintiff was unlikely to prevail at a trial on the merits.

Relieved and happy, I invited all my supporters in the courtroom to join me for a victory celebration at the best restaurant in the city. That celebration proved to be both lively and long. When I finally returned to my office late in the afternoon, I was astonished by the number of telephone messages, e-mails, and faxes that had accumulated in my absence. Looking at the fax on the top of the pile, I saw that it had been sent by Lynn Lamberty. At the time, Lynn was employed by the Texas Resource Center, a community defender organization that recruited and assisted counsel for death-row inmates in federal habeas corpus proceedings. Attached to Lynn's fax was a document entitled "APPOINTMENT OF ATTORNEY." I read it in disbelief. Signed by a Bexar County District Judge, it recited: "THE COURT IN ACCORDANCE WITH ARTICLE 26.04 CODE OF CRIMINAL PROCEDURE, AS AMENDED HEREBY APPOINTS: BARBARA BADER ALDAVE, ATTORNEY, TO REPRESENT CARUTHERS ALEXANDER...."

Still incredulous about what apparently had happened, I immediately called Lynn. Lynn confirmed that I had, indeed, been appointed to represent Caruthers Alexander, an individual who had been convicted of capital murder. The presiding judge of the 186th District Court of the State of Texas had chosen me to serve as Alexander's counsel in post-conviction proceedings. My client was scheduled for execution on July 8.

Thoughts were racing through my head. "Why me?" "Only thirty days?" "I can't do this." "Call the judge."

Call the judge I did. I stressed to him that I was a full-time academic, a specialist in corporate law and securities regulation. I had handled only one criminal case in my entire professional career, and that case had involved the misuse of a credit card. In short, I was totally unqualified to represent any felon, especially one awaiting execution.

Suddenly I realized that I was not telling the judge anything he did not already know. Angrily, I demanded to know whether my appointment was his idea of a joke—a sick one, in my view. Was I being punished for my outspoken opposition to the death penalty? Was I being paid back for having won the courtroom victory

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that I had celebrated earlier in the day? Was this an example of South Texas “get-even” justice?

After listening to my rant, the judge offered to let me withdraw as Alexander’s counsel, but on conditions that I chose not to accept. He later justified his actions to a newspaper reporter by saying that he had appointed me because he was sure that I would do what I subsequently did—get help. On the other hand, the deputy district attorney who had originally suggested my appointment informed the reporter that I had been singled out because I opposed capital punishment and served on the board of directors of the Texas Resource Center.

After hanging up on the judge, I called Jeffrey Pokorak. Several years earlier, I had recruited Jeff, who had previously worked for both the Resource Center and the University of Texas, to found and direct a Capital Punishment Clinic at St. Mary’s. Jeff immediately offered to serve as my co-counsel and promised me that Caruthers Alexander would receive first-class representation. Thus began both my collaboration with Jeff and my journey with Caruthers.<sup>1</sup>

#### *My First Trip to Death Row*

On June 16, 1994, I wrote a long letter to the judge who had appointed me to represent Alexander. In the letter I requested that he remove the execution date that he had previously set, postpone the deadline for the initial pleadings in the case, permit me to delegate any or all of my responsibilities to my experienced co-counsel, and grant me an allowance for reasonable litigation expenses. I never received a response to the letter. With some misgivings, but with Jeff’s assurances that the July execution date was not “real” and that he would take care of any problems that might arise while I was gone, I decided to proceed with my original plans for the summer. Near the end of June, I flew to Washington, D.C., to meet with Chief Justice William H. Rehnquist, with whom I had agreed to co-teach a week-long course offered by St. Mary’s in Innsbruck, Austria, in early July. From Washington I traveled directly to Innsbruck, where I spent several anxious days before receiving word that a stay of execution had been granted on July 5.

When I returned to San Antonio in the late summer of 1994, I devoted as much time as I could to learning the facts about Caruthers Alexander’s life, investigating the circumstances surrounding the murder of which he had been convicted, reading the trial transcripts and appellate opinions in his case, and studying the substantive and procedural law of post-conviction remedies. Finally, on September 14, Jeff and I made the first of our many joint trips to Texas’ Death Row, which was then housed

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1. The citations to the Caruthers Alexander case are as follows. The defendant was convicted and sentenced to death in *State v. Alexander*, No. 81-CR-1944 (Bexar County, Tex. Oct. 1981) [hereinafter *Alexander I*]. The Texas Court of Criminal Appeals reversed the conviction and sentence in *Alexander v. State*, 740 S.W.2d 749 (Tex. Crim. App. 1987) [hereinafter *Alexander II*], and remanded the case to the trial court. The defendant was re-tried, re-convicted, and again sentenced to death in April-May 1989. The new conviction and sentence were upheld on appeal in *Alexander v. State*, 866 S.W.2d 1 (Tex. Crim. App. 1993) [hereinafter *Alexander III*]. A rehearing was denied on Sept. 29, 1993, and the U.S. Supreme Court denied certiorari in 1994. *Alexander v. Texas*, 511 U.S. 110 (1994) [hereinafter *Alexander IV*]. An application for a writ of habeas corpus was denied in 2000. *Alexander v. Johnson*, 211 F.3d 895 (5th Cir. 2000) [hereinafter *Alexander V*].

in the Ellis I Unit in Huntsville. We flew from San Antonio to Bush International Airport in Houston, rented a car, and drove 50 miles north to Huntsville, where our first stop was the Texan Café. Fortified with chicken-fried steak, the house specialty, we made our way to Ellis I. Little did I realize that we had just established a ritual in which we would engage repeatedly during the next six and one-half years.

Fortunately, on the weekend preceding my appointment as Alexander's attorney, I had read John Grisham's novel *The Chamber*, in which the author graphically describes the observations and reactions of the lawyer-hero upon entering Mississippi's Maximum Security Unit for the first time.<sup>2</sup> Nevertheless, I was woefully unprepared for what we encountered at Ellis I. Upon request, Jeff and I deposited our Texas State Bar cards and our driver's licenses in a red bucket, which a heavily armed guard drew up to herself in the control tower from which she was scowling down at us. After what seemed like a very long time, she told us that everything appeared to be in order, but that we would not be admitted to the main building until a cage became available for Alexander. After all, there were hundreds of prisoners on Death Row and not enough cages to satisfy the demand. In passing through the gate that led to Ellis I, I tried to absorb as much as I could of our surroundings. I was first struck by the irony of a large sign admonishing us not to drive away without fastening our seat belts ("Everyone Lives Longer If Safety Is First."). Next came a sign that warned us not to spit on the cactus. As we entered the building, we were greeted by a plaque in honor of the prison's employees, who had earned a "Life Giver Award" for their generous donations to a blood drive. We proceeded through an unbelievably ugly waiting room and into the visiting area, where it took me a while to figure out the purpose of the "DIASTER" boxes that were scattered about the premises. By this time I feared I was going to vomit or faint, but I did neither. Instead, I took a deep breath, bit my lower lip, and kept walking.

Jeff escorted me into a long, narrow room with a row of cubicles on each side. Each visitor sat on a chair facing one of the cubicles, while the prisoner he or she was visiting sat inside the cubicle. Because the visitors and the prisoners could converse only through the plexiglass windows of the cubicles, everyone had to speak loudly in order to be heard. As a result, the entire room rang with a cacophony of voices.

Jeff showed me where to sit, and chatted with me briefly before going off to interview an inmate in another part of the visiting area. I seated myself and waited, and waited, for what must have been at least an hour. Finally, I was startled to attention when a handsome, middle-aged black man, who was handcuffed, shackled, and dressed in a white jumpsuit, was guided by a guard into a cage that had been positioned inside the cubicle directly in front of me. The guard removed the man's handcuffs, told him to sit down, locked the cage, and left. As the cubicle's door clanged shut, Caruthers and I smiled at each other, introduced ourselves, and began to talk.

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2. JOHN GRISHAM, *THE CHAMBER* 91-100 (Island Books 1995) (1994).

*The Case Against Caruthers*

I had planned to use my first visit with Caruthers to fill gaps in my knowledge—gleaned primarily from trial transcripts, judicial opinions, and newspaper stories—concerning both his past life and the events that had led up to his conviction of a brutal rape-murder. My task proved more difficult than I had anticipated, in large part because I could barely hear what he was saying. Still, hunched over with my right ear as close as possible to a small opening near the bottom of the window, I had asked and Caruthers had answered most of my questions by the time Jeff returned and joined in the conversation. The three of us continued talking until the guard reappeared, handcuffed Caruthers again, and led him away.

Both Jeff and I were in great moods and filled with high hopes when we left the prison that day. I was more than happy just to be out of there. Moreover, I was delighted that Caruthers seemed to be a kind, thoughtful, mature, intelligent human being—anything but the monster that two juries at two trials must have believed him to be. Even though both Jeff and I had been around the block a few times, and neither of us was naive, we shared the opinion that Caruthers might well be factually innocent of the crime for which the State of Texas was threatening to execute him.

Our euphoria did not last long. The wheels of the Texas and federal justice systems began to grind away, as we filed motion after motion and brief after brief. Early on, we settled on a mutually satisfactory division of labor: Jeff did the lion's share of the courtroom work and formulated all the technical legal arguments, while I concentrated on the factual and evidentiary issues. I, who had been a chemist in my youth, found the forensic evidence and expert testimony that had been used against Caruthers to be surprisingly weak. Without that evidence and that testimony, there was virtually no proof that he was the person who had, on a stormy night in San Antonio in April 1981, raped and strangled one Lori Bruch, a young white woman who worked as a nightclub waitress.

Whatever the strength or weakness of the case against Caruthers, all of our arguments on his behalf eventually were rejected. The following discussion, which I wrote in a clemency petition that Jeff and I filed with then-Governor George W. Bush at the end of June 2000, summarizes the facts that had given rise to *State of Texas v. Caruthers Alexander*.<sup>3</sup>

On the evening of April 22, 1981, Lori Bruch, a 19-year-old married woman and the mother of a two-year-old child (not, however, the child of her husband), left her home to go to her place of employment, the Wrangler Club of San Antonio. After the nightclub closed, Bruch joined some of her co-workers at a nearby restaurant, which she left at approximately 4:00 a.m. on April 23. Before 4:30 a.m., Bruch's car was found abandoned in a rain-swollen low-water crossing. At approximately 6:30 a.m. that same morning, a Carmelite friar and a monastery cook noticed a large white van parked near the monastery office, which was located in a part of the city quite distant from the Wrangler Club. Both the friar and the cook were able to make out some of the writing on the side of the van. The first line of the writing began with "A" or "AB," and the second line began with "Medic" or "Medical." Some

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3. *Alexander II*, 470 S.W. 2d at 751-54.

fifteen minutes later, two schoolchildren found Lori Bruch's body lying in the street near the site where the friar and the cook had seen the white van.

On Friday, April 24, Caruthers Alexander was greeted upon his arrival at his place of employment by two homicide detectives, accompanied by two managerial employees of Abbey Medical, his employer. The police officers asked Alexander about some scratches on the white van that he had been assigned to drive for Abbey Medical, told him that a similar vehicle had been used in a homicide, and asked him about the location of the van on the night of April 22 and the morning of April 23. In response, Alexander stated that he had taken the white van home with him after work on April 22. Then, when the branch manager of Abbey Medical asked Alexander whether anyone else could have driven the van during the critical time period, Alexander replied, "No, sir." He said that he had not loaned the van to anyone, and that no one else could have had possession of it on the night in question. Subsequently, Alexander was arrested and indicted for capital murder.

Two juries, one deliberating in 1981 and the other deliberating in 1989, found that Caruthers Alexander was guilty of raping and murdering Lori Bruch.<sup>4</sup> The first of Alexander's two convictions was overturned by the Texas Court of Criminal Appeals in 1987.<sup>5</sup> Before his retrial, Caruthers was offered the opportunity to enter a guilty plea in return for a sentence of life imprisonment. He refused to accept the plea bargain. He insisted that he was innocent and expressed confidence that he ultimately would be exonerated.

At both of his trials, Alexander was convicted on the basis of an extraordinarily weak body of circumstantial evidence. I firmly believe that the jurors at his second trial would have reached a different result if they had fully understood how little the evidence actually established. Unfortunately, the "rape kit," which included sperm-containing swabs from the vagina of the victim, had been lost or destroyed by the State of Texas in the interim between the 1981 and 1989 trials. The most important piece of evidence the prosecution introduced at each of the trials to connect Alexander to the crimes of rape and murder was a single "black hair fragment of Negroid origin" that had been found in combings from the victim's pubic region. Although it was not possible to carry out a meaningful DNA analysis of this hair fragment in 1989, the fragment was susceptible to such an analysis by July 2000, when Jeff and I had exhausted all the avenues of possible relief for our client and friend except that of executive clemency.

### *The End Game*

On June 10, 2000, almost exactly six years after I had undertaken the representation of Caruthers Alexander, I sent him a letter explaining the options that then faced us. Without consulting Jeff or me, the deputy district attorney in charge of Caruthers' case had secured a new execution date: July 12, 2000. Jeff told me this date was the "real" one. Unless we won a stay or a grant of clemency, Caruthers would soon be put to death. I wrote Caruthers the following:

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4. *Alexander III*, 866 S.W.2d at 2-3.

5. *Alexander II*, 470 S.W.2d at 750.

[L]et's keep hoping that worst will not come to worst, in July or ever. Jeff is preparing to take some bold steps this coming week. He has been conferring with Maurie Levin, who is the lawyer for Ricky McGinn, to whom Governor Bush recently granted a 30-day reprieve so that additional DNA testing could be done. Jeff and Maurie believe that after Jeff files the motion he is preparing now, the courts probably will order that DNA testing be done on the hair fragment that was a piece of evidence in both of your trials. If the court in San Antonio will not order the testing, it is likely that a higher court will. On the other hand, if the courts decide not to order the testing, there is a good chance that the Governor will grant a reprieve to allow the testing to take place.

If the tests show that the hair fragment is not yours, that will be good news indeed! If the tests show that the hair fragment is yours, regardless of how it ended up where it did, the news will not be good. It appears, however, that we have nothing to lose by going forward.

Caruthers and I had been corresponding regularly ever since our first meeting. On June 18, 2000, he responded to the letter quoted above. He now wrote from Livingston, Texas, where the Texas Department of Criminal Justice had relocated Death Row after a number of men had escaped from Ellis I, in Huntsville, during an eventful Thanksgiving weekend. In his letter, Caruthers reminded me of something that he had told me many times over the years: several hair samples had been taken from him shortly after his arrest in 1981. He feared that one of these could have been substituted for the hair fragment that had been found on the body of Lori Bruch, and subsequently introduced into evidence in order to strengthen the case against him.

I myself no longer knew whom or what to believe. Although I had no reason to attribute foul play to anyone involved in the investigations or prosecutions that had led to Caruthers' convictions, I had grown increasingly cynical about the Texas system of criminal justice. More importantly, I no longer cared where the ultimate truth lay. After years of visiting Caruthers and talking with his family members and friends, I was persuaded that he was a thoroughly good man who did not pose a genuine threat to anyone, regardless of whether he might have posed such a threat decades earlier. In my view, there was and could be no justification for the State's determination to kill him.

### *The Execution*

With Caruthers' concurrence, Jeff asked a state district judge to lift the execution date of July 12, 2000, so that the critical hair fragment could be subjected to DNA analysis. The newly elected district attorney supported Jeff's motion, the execution was stopped, and the DNA tests were ordered. When the tests were completed some five months later, however, the results were not good: Caruthers' DNA matched the DNA of the hair fragment.

I heard the bad news after my husband and I had moved out of Texas and back to Eugene, Oregon. Once again I was a professor at the University of Oregon School of Law, where I had begun my academic career in 1970. In fact, I had purposefully moved back to Eugene on July 13, 2001, the day after Caruthers would have been executed if his first "real" date of July 12 had not been delayed by the

DNA tests. After spending 26 years in Texas, I had a strong need to live somewhere else.

Near the end of December 2000, in the narrow window between Christmas and New Year's Eve, the State of Texas assigned a final execution date to the man who had originally been my client but had gradually become one of my dearest friends. On January 29, 2001, according to the Warrant of Execution, Caruthers Alexander was to be taken from his cell on Death Row in Livingston, Texas, to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, and there "be caused to die by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death until [he] is dead." Having lost all desire to participate in the ongoing holiday celebrations, I cried a lot, prayed a lot, and purchased a ticket to fly from Eugene to Houston on January 28, 2001.

Caruthers' mother, to whom he was deeply devoted, was in precarious health; and his stepfather, to whom his mother had been married for more than 32 years, had died during the late 1990s. Many years had passed since Caruthers had seen either his ex-wife or their two children, of whom he was extremely proud but whom he did not want to "bother." If Caruthers was not to be alone at the hour of his death, I would have to be with him. Although he worried out loud about whether he should accept my offer to witness his execution, he ultimately understood that I simply could not and would not abandon him before the bitter end of our journey together.

Fortunately, two women had offered to accompany me from Houston to Livingston, and from Livingston to Huntsville, for the awful series of events that would culminate in Caruthers' death. One of the two was Elise Garcia, the Director of Development and Communications (and my right hand and closest confidante) during my time as dean of St. Mary's University School of Law. The other was my daughter, Anna Marie Aldave, who had corresponded with Caruthers for about a year prior to the date of his execution, and who wrote to him almost every day during the last month of his life. Elise and Anna met me in Houston at George Bush International Airport on Super Bowl Sunday, January 28, 2001. We drove together from there to Livingston. My recollections of the subsequent events are blurry, at best, but Elise recorded her own observations and later disseminated them to the hundreds of people whom she had persuaded to join a national campaign, albeit an ultimately unsuccessful one, to secure clemency for Caruthers Alexander. Excerpts from her report appear below:

[On the morning of January 29, 2001,] we drove to Death Row, now located in the Terrell Unit in Livingston. Only Barbara was allowed to see Caruthers. Anna and I waited outside in the rain, on a bench under the only covered area outside the enormous gray concrete walls, topped by rolls of barbed wire, that surround what appear to be dozens of Soviet-bloc-like buildings....

Barbara was kept waiting in the visitor's booth for 45 minutes before they brought Caruthers to see her. She was still separated from him by bulletproof glass, and spoke to him through telephones. Jeff Pokorak ... came around 11:00 a.m. and joined her in the visit with Caruthers.

After the visit, Jeff flew to Austin to make some last-minute pleas at the Governor's office. The three of us then drove the 40 miles or so west to Huntsville, where

Caruthers was being taken for the execution. We were told to meet with the prison chaplain, Jim Brazille, at a "hospitality house" at 3:00 p.m.

We finally found the hospitality house, but the chaplain who opened the door said that this [was not] where we were supposed to go. Chaplain Brazille, he said, had called, asking us to go to the "Walls," where he would brief us. The Walls is the prison unit behind the administration building. It's a huge one- or two-block-long area, enclosed by thick 15-to-20-foot-high brick walls, covered at the top by two rolls of barbed wire, with guard houses at each corner, and guards pacing a railing on the upper part of the wall.

We were only allowed into a noisy, secured entrance hall where the chaplain came to meet us. He suggested that we step outside, onto the front stoop of the building, to have a conversation.

Chaplain Brazille explained that Barbara would be allowed to have a 30-minute visit with Caruthers right after our conversation. He said that he had just spent some time with Caruthers and that he was doing very well—at peace and prepared to go. The chaplain said to Barbara that Caruthers "really loves you!" He said that he wanted to give us a detailed description of what would happen so that we would be prepared.

Chaplain Brazille explained how, after the 30-minute visit, Barbara would be taken to a room in the administration building at 5:00 p.m., where we would join her. Another chaplain would be there to offer help. Around 5:45 p.m., she would be subjected to a pat-frisk, after which she could have no contact with either of us. Then she would be escorted across the street, back to the Walls and into the "Death House," where Caruthers would already be strapped to the table, with IVs in place. She would be sequestered in a room separate from the room in which relatives of the victim would be witnessing the execution.

He explained that soon after she was in the room, the warden would say that everything was ready, and a dosage of sodium pentathol would be sent flowing through the IVs. The chaplain said that he [could not] say exactly what would happen next. Each case differs. But most of the time, the person just coughs or takes a deep breath and then his eyes usually roll and he loses consciousness. At that point, the other chemicals are injected. "Then a very long minute or two goes by," he said, until the poison takes its intended effect. In another minute or two, the prison doctor would check his pulse and declare the official hour of his death....

Around 3:30 p.m., Barbara visited with Caruthers—separated now by a screen grill—while Anna and I paced outside the Walls, surreptitiously planting bluebonnet seeds all over the front entrance.... In one of his letters, [Caruthers] had told [Anna] about his love of fields of wild flowers. In one of her last letters to him, Anna wrote that she would plant bluebonnets all around Death Row....

Barbara, meanwhile, had emerged from the Walls and her visit with Caruthers. She told us that Caruthers was in great form. He talked about how wonderful it was to see the blue sky on the drive over from Livingston. It had been overcast and raining that morning, and he had told Barbara that he really wanted his last day to be a nice day, because he wanted to see the sky. He commented on how big it was....<sup>6</sup>

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6. Elise Garcia, *Journey to Death Row* (Jan. 31, 2001) (unpublished manuscript, on file with author).

Although I still cannot clearly recall much of what transpired before 6:00 p.m. on January 29, 2001, I can see in vivid detail the events that took place in the execution chamber that evening. Four or six guards escorted me back into the Walls unit shortly after 6:00 p.m. and guided me to the front of a room where I stood directly before a shaded window. When the shade was raised, I saw Caruthers lying on a gurney, his arms strapped to extensions that apparently had been pulled out from the sides of the gurney and were now perpendicular to it. I had the impression that he was ready to be crucified, but in a horizontal position. He was dressed not in the white jumpsuit to which I had grown accustomed, but in a brand-new, well-pressed dark brown shirt that was a size or two too large for him. From his waist down, he was covered with a white sheet.

Two men, whom I presumed to be the chaplain (although I did not recognize him) and the warden, were standing near the gurney. One of the two bent down and said something to Caruthers, who immediately turned his head toward me. I prayed that I would not cry, tried to look at him as lovingly as I could, and nodded ever so slightly to him. He smiled, almost imperceptibly, before he turned away from me again. Then, as reported in the *McAllen Monitor*, “[w]ith a tear running from his right eye, he declined to make a final statement. [H]e coughed, sputtered and exhaled as the lethal drugs began taking effect. Five minutes after the dose began, he was pronounced dead at 6:18 p.m. CST.”<sup>7</sup>

### *Epilogue*

I wish I could say that my experience with Caruthers transformed my life, and that I have lived as an heroically virtuous woman ever since the date of his execution. In truth, however, even now I do not know what to make of it all. I think of Caruthers often, and my eyes still fill with tears whenever I pause to reflect for more than a few seconds on the hopes and the fears, the triumphs and the tragedies, the good times and the bad, that we shared with each other. Nevertheless, I frequently ask myself—or my daughter, who is now a campus minister in Austin—“What does it all mean, anyway?”

Caruthers left his meager personal effects to me. Among them was a greeting card that had been signed by twenty or so of his fellow inmates. The message that was pre-printed on the card, which displayed an animal precariously clinging to a roof with a vicious beast baring its teeth below, was “HANG IN THERE!” Numerous hand-written messages covered what otherwise would have been empty spaces on the card. Most of these messages were addressed to “Gus,” or “Big Al,” or “Pops,” or “Gramps,” or one of the other nicknames by which Caruthers had been known on the row. All expressed respect, admiration, and affection for the old guy—the guy whom one of the signers called the “great soul”—the guy who had watched out for them, had taught them the ropes, and had helped them stay out of trouble. A surprising number of the signers, condemned by society as dangerous and unredeemable men, unabashedly told Caruthers that they loved him and were greatly blessed to have known him.

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7. Michael Graczyk, *State executes inmate for Bexar woman's slaying*, MCALEN MONITOR, Jan. 30, 2001, at 1C.



As Sister Helen Prejean, the author of *Dead Man Walking*, has often said, no one is defined by his worst act. Whether Caruthers Alexander did or did not commit a murder some 13 years before I met him, the man with whom I journeyed for six and one-half years was truly a “great soul.” It is hard for me to understand, even now, why I was appointed to be his lawyer. I have no doubt, however, that I was destined from the beginning to be his friend.

## ONE LAWYER'S JOURNEY TO CLEMENCY

Terri L. Mascherin\*

I began this journey in 1985 with a simple thought: as a lawyer, I have an obligation to help those who cannot afford to help themselves. That thought was one of the driving forces that led me, a died-in-the-wool easterner, to stay in the midwest and take a job as an associate with the Chicago firm Jenner & Block. It was at Jenner & Block where I felt I could satisfy my desire to practice criminal law and do some pro bono work that I could feel good about, while still having a big firm litigation practice. In my first year as an associate, I sought out pro bono criminal defense work. My first case involved representing a Lithuanian Catholic priest who had been charged with a misdemeanor—disturbing the peace while protesting the closing of a Lithuanian community-based nursing home. Not exactly a case that tested the cutting edge of criminal or constitutional law! Once that case was resolved, I went looking for something else. I wasn't looking for a death penalty case, but a death penalty case found me.

It was early 1985, and Illinois' post-*Furman*<sup>1</sup> death penalty statute<sup>2</sup> had been in effect for about six years. Two cases, one involving Cornelius Lewis and the other Dickey Gaines, were ahead of the pack in their post-conviction process approaching federal court. It appeared likely that one of these cases would be the case in which the federal courts would have to decide the constitutionality of Illinois' death penalty statute.<sup>3</sup> The Illinois statute was significantly different from all of the statutes that the United States Supreme Court had reviewed post-*Furman*,<sup>4</sup> and many thought at the time that there were substantial challenges to its constitutionality.<sup>5</sup> In fact, a majority of the sitting justices of the Illinois Supreme Court had taken the position that the statute was not constitutional. But because those decisions came in two different cases—the latter after the composition of the Court had changed—the Court, nonetheless, upheld the statute's constitutionality on the basis of *stare decisis*.<sup>6</sup>

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1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. ILL. REV. STAT. ch. 38, ¶ 9-1(b) (1979).

3. *Id.*

4. Illinois' statute was most similar—although not identical—to the statute enacted post-*Furman* in Pennsylvania, the constitutionality of which the Supreme Court ultimately upheld in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). The Supreme Court has never reviewed the constitutionality of the Illinois statute.

5. In fact, in the *Lewis* case the United States District Court for the Central District of Illinois expressed concerns about the constitutionality of the statute, but found it unnecessary to reach the issue because the court held that Lewis' death sentence was unconstitutional. *United States ex rel. Lewis v. Lane*, 656 F. Supp. 181 (C.D. Ill. 1987), *aff'd*, 832 F.2d 1446 (7th Cir. 1987).

6. See *People ex rel. Carey v. Cousins*, 397 N.E.2d 809 (1979); *People v. Lewis*, 430 N.E.2d

By happenstance, Dickey Gaines enlisted the help of Jenner & Block, and I became one of his lawyers. Dickey wrote a letter to Bert Jenner, senior partner of Jenner & Block, saying that he was aware that Mr. Jenner had represented William Witherspoon in a landmark case in front of the United States Supreme Court. Mr. Gaines asked Mr. Jenner to represent him in a federal habeas corpus action challenging his convictions and death sentence. Mr. Gaines had been convicted of a double homicide that took place when he was eighteen years old, and he had been sentenced to death in a hearing in which his attorney had not presented any mitigating evidence.

A partner with the firm, Jeff Colman, decided to take the case. He was joined by a former Jenner & Block partner, David Bradford, who had recently left the firm to become, among other things, General Counsel of the MacArthur Justice Center, a new public interest organization dedicated to civil rights work. Jeff and David were looking for associates to help, and I was looking for a criminal case. Another new associate and I volunteered and before I knew it, I had begun what would become a twenty-year odyssey of death penalty work that would culminate, eventually, in a Republican Governor of Illinois granting clemency to everyone on Illinois' Death Row. That prospect was far from my mind—our focus was on saving one life and maybe in the process resolving the constitutionality of the Illinois death penalty statute.

The journey that ensued was often infuriating, usually frustrating, sometimes exhilarating, and always rewarding. I have no regrets about my twenty years of death penalty defense work.

### *No Issue Is Hopeless*

I remember vividly my first visit to Death Row. We traveled to Menard Penitentiary on a beautiful early spring day. Menard sits on the banks of the Mississippi River, nearly as far south as one can go and still be in Illinois (so far south in Illinois, in fact, that the quickest way to get there from Chicago is to fly to St. Louis and drive two hours south). Menard's Condemned Unit (the name that the Illinois Department of Corrections gives to its Death Row units) sits atop a bluff overlooking the Mississippi. The view is spectacular, but once they entered, none of the prisoners who lived in the Condemned Unit ever saw it. I remember being surprised that our new prospective client was my age. I was equally surprised that he wanted to interview us before deciding whether he would agree to let us represent him. In my naiveté, I assumed that anyone lucky enough to have attracted the attention of three big-city, big-firm lawyers would jump at the chance of having us represent him. Ultimately, Mr. Gaines had no concerns, and we embarked on what would be an eight-year engagement representing him.<sup>7</sup>

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1346 (1981).

7. The citations to the *Gaines* case are as follows. Gaines' original conviction and sentence is at *Gaines v. Illinois*, No. 79C0485 (Cook County Cir. Ct. Nov. 2, 1979) [hereinafter *Gaines I*]. The affirmance of his conviction and sentence by the Supreme Court of Illinois is reported at *People v. Gaines*, 430 N.E.2d 1046 (Ill. 1981) [hereinafter *Gaines II*]. The U.S. Supreme Court denied certiorari. *Gaines v. Illinois*, 456 U.S. 1001 (1982) [hereinafter *Gaines III*]. The Circuit Court of Cook County denied Mr. Gaines' post-conviction petition. *Gaines v. Illinois*, No. 79C0485 (Cook County

When we filed Mr. Gaines' habeas corpus petition we found that, despite our efforts to challenge the Illinois death penalty statute, the federal district court preferred to dispose of the case without having to reach the constitutionality of Illinois' death penalty statute.<sup>8</sup> We labored away in the district court briefing and arguing claims ranging from ineffective assistance of counsel to an overturn of *Swain v. Alabama*.<sup>9</sup> We ultimately were granted an evidentiary hearing on our claim that Mr. Gaines' trial counsel—an experienced criminal defense lawyer who had made a name for himself representing alleged mob figures, but who had never before handled a death penalty case, was ineffective. We investigated Mr. Gaines' background thoroughly, and despite some resistance from family who did not want to open old wounds, uncovered evidence that Mr. Gaines had suffered horrendous abuse at the hands of an absentee father who had serious gambling and alcohol problems. Judge Plunkett of the United States District Court for the Northern District of Illinois issued an opinion in 1987, holding that Mr. Gaines' constitutional right to effective assistance of counsel had been violated.<sup>10</sup> Judge Plunkett reasoned that Gaines' trial counsel was ineffective for failing to present any mitigating evidence at his capital sentencing hearing.<sup>11</sup>

The State fought the case every step of the way, first appealing Judge Plunkett's decision to the Seventh Circuit.<sup>12</sup> I persuaded the other members of our team that we should cross appeal on two issues that went to the constitutionality of Mr. Gaines' convictions. The first issue was the *Swain v. Alabama*<sup>13</sup> issue, on which we had submitted extensive affidavits establishing the racial composition of the juries that had sentenced everyone then on Illinois' Death Row. The second issue was the confrontation clause. The trial court had admitted a statement by Gaines' brother and co-defendant implicating Mr. Gaines in the shootings, which was a clear

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Cir. Ct. Mar. 8, 1983) [hereinafter *Gaines IV*]. A notice of appeal was filed with the appellate court, but the state was successful in its motion to transfer the case to the Illinois Supreme Court in an unpublished opinion. The Supreme Court of Illinois affirmed the denial of post-conviction relief. *People v. Gaines*, 473 N.E.2d 868 (Ill. 1984) [hereinafter *Gaines V*]. The U.S. Supreme Court again denied certiorari. *Gaines v. Illinois*, 472 U.S. 1131 (1985) [hereinafter *Gaines VI*]. A habeas corpus hearing was held denying the writ except as to the death penalty, and a new sentencing hearing was ordered. *Gaines v. Thieret*, 665 F. Supp. 1342 (N.D. Ill. 1987) [hereinafter *Gaines VII*]. The Seventh Circuit reversed the district court decision holding that the state could place Gaines on trial again, resentence him for felony murder, release him, or prove that he was directly responsible for the murders beyond a reasonable doubt and sentence him to death. *Gaines v. Thieret*, 846 F.2d 402 (7th Cir. 1988) [hereinafter *Gaines VIII*]. Rehearing was subsequently denied at *Gaines v. Thieret*, 1988 U.S. App. LEXIS 15992 (7th Cir. July 6, 1988) [hereinafter *Gaines IX*]. The state chose to pursue the death penalty and established eligibility, but the jury chose not to impose the death penalty based on mitigating factors, and Gaines was sentenced to natural life in prison. *Gaines v. Illinois*, No. 79C0485 (Cook County Cir. Ct. Nov. 17, 1988) [hereinafter *Gaines X*]. That sentence was reversed and the case was remanded for resentencing because the eligibility finding which provided the basis for the natural life sentences was based on insufficient evidence. *Illinois v. Gaines*, 601 N.E.2d 949 (Ill. App. Ct. 1992) [hereinafter *Gaines XI*]. Gaines was resentedenced to two concurrent 40-year sentences.

8. *Gaines VII*, 665 F. Supp. at 1371.

9. 380 U.S. 202 (1965).

10. *Gaines VII*, 665 F. Supp. at 1370-71.

11. *Id.*, rev'd by *Gaines VIII*, 846 F.2d 402 (7th Cir. 1988), *reh'g denied*.

12. *Gaines VIII*, 846 F.2d at 402.

13. 380 U.S. 202 (1965).

violation of *Bruton v. United States*.<sup>14</sup> Every court considering the issue, however, had held the error to be harmless.

When the time came to argue the case, the Seventh Circuit panel assigned to hear arguments included two relatively newly-appointed conservative judges—Judges Posner and Easterbrook. We thought things looked hopeless.

Then came the first lesson I was to learn on the road to clemency—a lesson I was destined to relearn every several years: no issue is too hopeless to raise. To everyone’s surprise but mine, the court ruled in our favor on the *Bruton* issue.<sup>15</sup> More specifically, the court initially held that Mr. Gaines’ convictions were unconstitutional, but ultimately revised its opinion to hold that Mr. Gaines’ convictions were adequately supported without the co-defendant’s statement, but only on the basis of a felony murder theory.<sup>16</sup> The court gave the State a choice: either retry Mr. Gaines if the State wished to pursue a charge of intentional homicide or resentence him for the felony murder convictions.<sup>17</sup> If the State wished to pursue the latter course and to seek the death penalty again, it would have to establish beyond a reasonable doubt that Mr. Gaines was the trigger person in the crimes of which he stood convicted, pursuant to the statute in effect at the time of the crime.

The State opted to accept the felony murder conviction and try for death again. The State’s “star” witness at the eligibility stage of the sentencing—at which the State was required to establish beyond a reasonable doubt that Mr. Gaines was the trigger person—was a young man who admitted to having used marijuana and alcohol just prior to witnessing the shootings. We argued mightily that his identification of our client as the shooter was not reliable. Despite our efforts, the jury found Mr. Gaines eligible for the death penalty.<sup>18</sup> Then, in an aggravation/mitigation hearing at which we called dozens of mitigating witnesses, the jury found that death was inappropriate.<sup>19</sup> Under the curious language of the Illinois Pattern Jury Instructions, the verdict form actually read, “We the jury do not unanimously find that there are no mitigating factors sufficient to preclude a death sentence.”<sup>20</sup> I had the honor of doing the closing argument at the final stage of the death hearing, and it was hands-down the most moving professional experience I have had. It is difficult to put into words the feeling of responsibility and privilege engendered by the thought that another human being was relying on me to argue for his very life. When the jury came back with the “no death” verdict, I was as high as a kite. I can remember thinking at the time that perhaps I should have gone to medical school, because doctors, who get the opportunity to save lives every day, are able to experience this overwhelming feeling of accomplishment and sheer joy that I felt all the time.

Here is where I learned my first lesson again—no issue is hopeless! When the jury came in with its “no death” verdict, the judge sentenced Mr. Gaines to natural life in prison, relying upon the jury’s finding of eligibility under the death penalty

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14. 391 U.S. 123 (1968).

15. *Gaines VIII*, 846 F.2d at 404-05.

16. *Id.* at 406.

17. *Id.* at 407.

18. *Gaines X*, No. 79C0485.

19. *Id.*

20. *Id.*

statute.<sup>21</sup> At the time, there were two ways one could be sentenced to natural life: if one were found eligible for the death penalty but the death penalty was not imposed, or if the murders were exceptionally brutal and heinous.<sup>22</sup>

Mr. Gaines was not happy about the natural life sentence, and wanted to appeal. I persuaded the firm to let me handle the appeal, even though David Bradford, who had first-chaired the case through the resentencing, decided to bow out at that stage. I filed the appeal, and to my surprise, the Appellate Court held that because of the serious questions regarding the eyewitnesses' ability to perceive and remember events and contradictions in his testimony, the State had not proved beyond a reasonable doubt that Mr. Gaines was the trigger person.<sup>23</sup> That meant that Mr. Gaines was not eligible for death. That, in turn, meant that he could not be sentenced to natural life, because the trial court had imposed the natural life sentence solely on the basis of the jury's finding of eligibility.

After another round of sentencing, Mr. Gaines was given two concurrent 40 year sentences. With good time, he was released from prison in the fall of 1997. One of the first things he did was come to my office to have lunch with me—what a far cry from my first visit to the Condemned Unit at Menard twelve years earlier!

#### *No Issue Is Hopeless: Reinforced*

While I was handling Mr. Gaines' sentencing appeal, the second death penalty case found me. This client, Willie Thompson, Jr., had been represented by the Cook County Public Defender's Office, which had a crushing caseload. The Illinois Supreme Court had just affirmed his convictions and death sentence on direct appeal.<sup>24</sup> I agreed to take the case because I thought the record was peppered with constitutional errors in both Mr. Thompson's convictions and in his sentencing.

The Thompson case turned into a fourteen-plus year journey which continues to this day.<sup>25</sup> We began by filing a state post-conviction petition for Mr. Thompson.<sup>26</sup>

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21. *Id.*

22. ILL. REV. STAT. ch. 38 ¶ 1005-8-1(a)(1) (1979).

23. *Gaines XI*, 601 N.E.2d at 949.

24. *People v. Thompson*, 521 N.E.2d 38 (Ill. 1988).

25. The citations to the *Thompson* case are as follows. Thompson was originally convicted in *Thompson v. Illinois*, No. 81C2153 (Cook County Cir. Ct. June 8, 1982) [hereinafter *Thompson I*]. He waived sentencing by a jury and was subsequently sentenced to death by the judge at *Thompson v. Illinois*, No. 81C2153 (Cook County Cir. Ct. July 1, 1982) [hereinafter *Thompson II*]. The affirmance of his conviction and sentence by the Illinois Supreme Court is reported at *People v. Thompson*, 521 N.E.2d 38 (Ill. 1988) [hereinafter *Thompson III*]. The U.S. Supreme Court denied certiorari. *Thompson v. Illinois*, 488 U.S. 871 (1988) [hereinafter *Thompson IV*]. Rehearing was denied by the U.S. Supreme Court at *Thompson v. Illinois*, 488 U.S. 977 (1988) [hereinafter *Thompson V*]. Thompson filed a petition for post-conviction relief with the county court and all claims were denied. *Thompson v. Illinois*, No. 81C2153 (Cook County Cir. Ct. Oct. 8, 1991) [hereinafter *Thompson VI*]. The Illinois Supreme Court reversed and remanded on the claim of ineffective counsel at sentencing. *People v. Thompson*, 641 N.E.2d 371 (Ill. 1994) [hereinafter *Thompson VII*]. On Oct. 3, 1994, rehearing was denied in an unpublished opinion. The U.S. Supreme Court again denied certiorari. *Thompson v. Illinois*, 514 U.S. 1038 (1995) [hereinafter *Thompson VIII*]. Thompson's claim was again denied in an evidentiary hearing by the circuit court. *Thompson v. Illinois*, No. 81C2153 (Cook County Cir. Ct. Jan. 11, 1996) [hereinafter *Thompson IX*]. The Supreme Court of Illinois again remanded the case to the lower court directing it to reopen the

The case was assigned to an elderly judge who was determined not to allow us an evidentiary hearing on Mr. Thompkins' post-conviction petition. Along the way, before his post-conviction proceedings were resolved, we appealed three times to the Illinois Supreme Court.<sup>27</sup> In the first appeal, the Court ordered the Circuit Court to conduct a hearing on our claim that Mr. Thompkins' counsel was ineffective at sentencing because he failed to present the wealth of mitigating evidence that was available.<sup>28</sup> The trial court then gave us a hearing, which turned out to be merely perfunctory. Perfunctory because the judge excluded all of the expert testimony that we sought to offer, refused offers of proof for the testimony he excluded and, at the prosecutor's invitation, left the courtroom while one of our excluded witnesses was testifying in an offer of proof.<sup>29</sup> The Illinois Supreme Court, in a sharply worded opinion, reopened the hearing and ordered the Circuit Court to hear all the excluded testimony and issue new findings.<sup>30</sup>

Luckily for Mr. Thompkins, while the second appeal was pending, the judge assigned to the case retired. The case was reassigned to the Honorable Sheila Murphy, who had recently ruled in favor of some of the defendants in the highly-publicized Ford Heights Four case, in which four men were exonerated from murder convictions (and two from Death Row).<sup>31</sup> Judge Murphy heard all the excluded evidence and issued extensive findings. In our third post-conviction appeal, the Illinois Supreme Court, in June 2000, vacated Mr. Thompkins' death sentence.<sup>32</sup> It specifically held that his trial counsel was ineffective because he failed to even investigate, much less present, mitigating evidence that the Court described as "extraordinary."<sup>33</sup> Most notably, among that evidence was testimony from the Markham, Illinois' former Chief of Police that Mr. Thompkins, during the Chief's attempt to stop a gang fight, had saved his life by throwing himself on top of the Chief to prevent him from being stabbed.<sup>34</sup> Back we went to the Circuit Court of Cook County, with the State, predictably, seeking the death penalty.

This brings me to 2000, and the third time I learned that same lesson. While I was fighting in the trenches for Mr. Gaines and Mr. Thompkins, extraordinary things were happening in death penalty cases in Illinois. First, an incessant series

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evidentiary hearing on ineffective counsel. *People v. Thompkins*, 690 N.E.2d 984 (Ill. 1998) [hereinafter *Thompkins X*]. The evidentiary hearing was reopened and the circuit court reported its findings to the Illinois Supreme Court. *Thompkins v. Illinois*, No. 81C2153 (Cook County Cir. Ct. Oct. 19, 1998) [hereinafter *Thompkins XI*]. On appeal, the Supreme Court of Illinois found that the lower court's decision was "manifestly erroneous" and the death sentence was vacated due to ineffective counsel. *People v. Thompkins*, 732 N.E.2d 553 (Ill. 2000) [hereinafter *Thompkins XII*].

26. *Thompkins VI*, No. 81C2153.

27. *Thompkins VII*, 641 N.E.2d at 371; *Thompkins X*, 690 N.E.2d at 984; *Thompkins XII*, 732 N.E.2d at 553.

28. *Thompkins VII*, 641 N.E.2d at 371.

29. See *Thompkins X*, 690 N.E.2d at 984.

30. *Id.*

31. *Report of the Governor's Commission on Capital Punishment* at 8 (Apr. 15, 2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html) [hereinafter *Governor's Report*].

32. *Thompkins XII*, 732 N.E.2d at 553.

33. *Id.* at 573.

34. *Id.* at 560-61.

of appeals and post-conviction cases were pounding the courts. The steady force of these cases, like waves against a cliff, began to erode the high capital sentencing rate that the State was achieving at trial. By the early 1990s, the Illinois Supreme Court had reversed approximately 50% of the death sentences imposed by the trial courts in post-*Furman* cases. Second, an alarming and ever-increasing number of prisoners on Death Row succeeded in establishing their innocence and were released or exonerated completely.<sup>35</sup>

This convergence of events led a creatively-thinking group of death penalty defense lawyers to urge then Governor George Ryan to impose a moratorium on executions in Illinois until the death penalty system could be studied and repaired.<sup>36</sup> I cannot take credit for being part of that group, but I watched with interest as the Thompkins case wound its way through and to the end of post-conviction proceedings and toward a new sentencing hearing. Governor Ryan appointed a distinguished Commission—led by one of my partners, a former United States Attorney for the Northern District of Illinois, Thomas Sullivan—to study the death penalty system and recommend reforms.

That Commission's Report is a forthright delineation of the many problems with the Illinois death penalty system and the Illinois criminal justice system as a whole. Governor Ryan, in his last year in office, tried mightily to persuade the State legislature to adopt the Commission's recommended reforms, but the legislature was not interested.<sup>37</sup>

Enter clemency. In early 2002, Governor Ryan made a statement suggesting that if the reforms that his Commission recommended were not adopted, he might consider granting clemency to everyone on Illinois' Death Row. And here is the third time for the familiar lesson—no issue is hopeless. The same brain trust that had pushed for the moratorium on executions went into clemency mode. They persuaded all of us who were representing prisoners on Death Row (or recently on Death Row and awaiting resentencing) to file clemency petitions in the hope that Governor Ryan would seriously consider clemency.

The rest of 2002 was a roller coaster ride. First, the push to file clemency petitions. Then, the decision whether to request clemency hearings, which, incidentally, my client, unlike most others, did. In most cases, it was the State, not the petitioner, who sought a hearing. The hearings, which were conducted in a marathon session of the Prisoner Review Board in October 2002, drew large media attention, albeit mostly to the heinous nature of the crimes involved and the losses suffered by the victims' families. Many involved in the clemency effort thought all was lost at that point. But at the same time, the Illinois Legislature let the last session of Governor Ryan's term go by without adopting his Commission's reforms, and the die was cast. Governor Ryan did the unimaginable. He granted clemency and commuted the sentences of 167 Death Row inmates.<sup>38</sup>

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35. *Governor's Report*, *supra* note 31, at 7-10.

36. Press Release, Gov. George H. Ryan, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at [www.state.il.us/gov/press/00/Jan/morat.htm](http://www.state.il.us/gov/press/00/Jan/morat.htm).

37. *Ryan Halts Executions for Death Penalty Review; He Is Concerned About Exoneration of 13 Inmates Who Were on Death Row*, ST. LOUIS POST-DISPATCH, Jan. 31, 2000, at A3.

38. Eric Slater, *Blanket Clemency in Illinois; Illinois Governor Commutes All Death Row Cases*,



I venture to say that no one involved in death penalty defense work in Illinois throughout the decades of the 1980s and 1990s would have predicted that a Republican Governor of Illinois would grant clemency to everyone on Death Row. Even now, the battles are not over. Illinois Attorney General Lisa Madigan, like her predecessor, filed a mandamus action in the Illinois Supreme Court challenging Governor Ryan's orders.<sup>39</sup> She specifically challenged orders issued to prisoners who did not sign clemency petitions on their own behalf.<sup>40</sup> She also challenged the orders issued to prisoners who, like my client, had been sentenced to death but were awaiting resentencing as the result of either successful habeas corpus actions or decisions by the Illinois Supreme Court vacating their original sentences.<sup>41</sup> On January 23, 2004, the Illinois Supreme Court rejected Ms. Madigan's challenges to the clemency orders. Characterizing the clemency power as "essentially unreviewable," the court held that Governor Ryan had the constitutional authority to grant clemency to prisoners who did not sign petitions seeking clemency and to prisoners, like my client, who are convicted and awaiting resentencing.<sup>42</sup> The court's decision will stand as the most extensive analysis of the Governor's clemency power under the Illinois constitution.

My twenty years of experience in death penalty work has not been what I thought it would be—it has been much more. It has been an education about the power that attorneys hold to navigate the legal system, establishing good precedents and tearing down bad ones. It has also been an education about the public policy changes that attorneys can bring, both through direct advocacy and through traditional legal work. And, perhaps most of all, it has been an education about never giving up on issues that appear to be hopeless.

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L.A. TIMES, Jan. 12, 2003, at A1.

39. Steve Mills, *Ryan Clemencies Upheld; State Supreme Court Settles Dispute Over Death Row Commutations*, CHI. TRIB., Jan. 24, 2004, at C1.

40. *Id.*

41. *People ex rel. Madigan v. Snyder*, No. 95663, 2004 Ill. LEXIS 6 (Ill. Jan. 23, 2004).

42. *Id.*

## SWIMMING UPSTREAM, A COMMENTARY ON THE DEATH PENALTY

Julia Tarver\*

I was seventeen years old when Florida executed Ted Bundy—a nationally reviled serial rapist and murderer of 16 women—not far from my home in Mobile, Alabama. My life in those days was filled with pep rallies, proms, and college applications. Although I fancied myself “mature” and deep thinking for my age, this was the first time I had ever really thought about the death penalty. I recall standing in my bathroom, curling iron in hand, getting ready for high school and listening to the universally obnoxious morning disc jockeys. They were covering the Bundy electrocution, and for those in my community, it was cause for carnival-like celebration. There were “tail-gate” parties in the prison parking lot. My hometown radio station played clips of people shouting gleefully for “Bundy Barbeque.” My reaction was immediate and visceral. I felt disgusted and ashamed by their celebration. Didn’t they realize a *human being* was about to die? That said—and despite my first pangs of moral aversion to this barbaric display—I’m sure that I finished curling my hair, and carried on with my day. Little did I know how that morning, and the feelings it aroused in me, would later come to affect my life.

Some months later, I received a scholarship application from one of the colleges to which I was applying. Eschewing the more typical (and boring) essay questions such as “tell us about yourself” or “describe what you did last summer,” this institution asked me to define “*the evolving standards of decency that mark the progress of a maturing society*.” I was impressed. At first I did not know from where these words had come. I speculated they were from some famous piece of literature or political philosophy. Perhaps they had come from Jefferson, Locke, or the Magna Carta. I wanted to learn more about who had written them before I embarked on the daunting task of trying to define them for myself. I spent a day at my local public library playing the part of a word sleuth. I checked many places, tried lots of theories, until I finally found it: the words came from a 1958 Supreme Court opinion entitled *Trop v. Dulles*.<sup>1</sup>

As a high school student, I had never read an opinion before, much less an opinion from the United States Supreme Court. I didn’t know what I was looking for, but I wanted to know more about this provocative phrase. I learned that *Trop* was a case interpreting the Eighth Amendment’s “cruel and unusual” clause in the

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1. 356 U.S. 86 (1958).

context of review of the Nationality Act of 1940, which provided that a citizen “shall lose his nationality” by “deserting the military or naval forces of the United States in time of war.”<sup>2</sup>

In finding unconstitutional this practice of “denationalization” or “total destruction of the individual’s status in organized society,” Chief Justice Warren went out of his way to mention, in dicta, the death penalty.<sup>3</sup> He wrote:

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment—both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.<sup>4</sup>

When I read those words, I thought immediately of Ted Bundy (and “Bundy Barbeque”). That month, I wrote my scholarship essay on the death penalty as a disgraceful, anachronistic practice. I had missed Warren’s point about the importance of societal mores and public acceptability as a barometer for Eighth Amendment jurisprudence, but I had begun a life-long stance as a death penalty “abolitionist.”

In college and law school, I was a voracious consumer of literature and research on the death penalty. I bought every book I could find on the topic. I was fascinated by all of the arguments for and against. I was intrigued and frustrated by the common misconceptions that seemed to underlie support for the death penalty in this country: the belief that it is a deterrent (it is not); that it is cheaper than life in prison (it is not). So, what started out as a visceral response to a bad morning radio show became a deeply-seeded intellectual curiosity (and later a professional calling). I truly believed that if the rest of the public learned the things about the death penalty that I had learned, it would be abolished. What I didn’t understand was what had happened to those “evolving standards of decency” I had read about as a seventeen-year old. Had we made no “progress” since 1958?

In law school, I studied the case of *Penry v. Lynaugh*,<sup>5</sup> which shed some light on this question. Johnny Paul Penry, I learned, was a mentally retarded man on Death Row in Texas.<sup>6</sup> His case was heard by the United States Supreme Court in 1989 and

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2. *Id.* at 88 n.1.

3. *Id.* at 101.

4. *Id.* at 99.

5. 492 U.S. 302 (1988).

6. *Id.* at 311. Johnny Paul Penry was convicted in Texas state court of murder and sentenced to death at *State v. Penry* (Trinity County 1980) [hereinafter *Penry I*]. His conviction was confirmed at *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985) [hereinafter *Penry II*], *cert. denied*, 474 U.S. 1073 (1986) [hereinafter *Penry III*]. Penry instituted a habeas corpus proceeding which was denied by the district court. *Penry v. Lynaugh*, No. L-86-89-CA (E.D. Tex. 1986) [hereinafter *Penry IV*]. The appellate court affirmed the district court’s decision at *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987) [hereinafter *Penry V*]. The U.S. Supreme Court, however, vacated Penry’s sentence because the jury had not been adequately instructed with respect to mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302 (1989) [hereinafter *Penry VI*]. Texas retried Penry, and Penry was again convicted of capital murder and sentenced to death. *State v. Penry*, No. 15,977 (Walker County, July 17, 1990) [hereinafter

his lawyers argued that killing someone with the I.Q. of a seven-year old is “cruel and unusual” and inconsistent with “the evolving standards of decency that mark the progress of a maturing society.”<sup>7</sup> In an opinion written just a few months after Ted Bundy’s execution, the Supreme Court held that there was not—at least not yet—a “national consensus” against the execution of the mentally retarded.<sup>8</sup> What had seemed such a lofty and noble exercise to me when I wrote my college essay on Warren’s opinion in *Trop* was reduced in the *Penry* opinion to a simple, mathematical survey: more states permitted the execution of the mentally retarded than opposed it (assuming you didn’t count abolitionist states—which I always thought was unfair).<sup>9</sup> I was forced to take off the rose-colored glasses of my youth and begin to see the death penalty for what it was: a deeply engrained national practice that was not going anywhere any time soon. I remember feeling disappointed by the *Penry* opinion, but I never envisioned how that case, or that man, would come to affect my life in profound ways.

In seeking a job following law school, my single most important criterion in selecting a firm was its commitment to *pro bono* in general, and to death penalty work in particular. Yes, I wanted a place with an exciting litigation practice, and fun, smart, unique lawyers who would make the long hours bearable, but most of all I needed a place that I could feel comfortable, a place that shared my view of the importance of this type of work. Paul, Weiss was the perfect home for me.

As soon as I began at the firm, I requested death penalty work. At that time, the firm had at least four or five active death penalty cases, and you cannot imagine how surprised I was to learn I would be working on the *Penry* case—the same case that had caused me such disappointment in law school. You see, the disappointing portion of the *Penry* opinion I had read, finding it constitutionally permissible to

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*Penry VII*]. The Texas Court of Criminal Appeals affirmed *Penry*’s conviction and sentence and denied his state application for a writ of habeas corpus. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995) [hereinafter *Penry VIII*]. Thereafter, *Penry* sought an extension of time to file petition for writ of certiorari, but was denied. *Penry v. Texas*, 515 U.S. 1304 (1995) [hereinafter *Penry IX*]. *Penry*’s petition for writ of certiorari was denied. *Penry v. Texas*, 516 U.S. 977 (1995) [hereinafter *Penry X*], petition for rehearing denied, 516 U.S. 1069 (1996) [hereinafter *Penry XI*]. *Penry* then filed a federal application for a writ of habeas corpus and a motion for a certificate of appealability (COA), both of which the district court denied. *Penry v. Johnson*, No. 4:97-CV-4094 (S.D. Tex. Mar. 30, 1999) [hereinafter *Penry XII*]. *Penry* filed a motion for a COA in the United States Court of Appeals for the Fifth Circuit, but the court denied his motion and vacated the stay of execution. *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000) [hereinafter *Penry XIII*].

Thereafter, the U.S. Supreme Court granted *Penry* a stay of execution and his petition for writ of certiorari. *Penry v. Johnson*, 531 U.S. 1003 (2000) [hereinafter *Penry XIV*]; *Penry v. Johnson*, 531 U.S. 1010 (2000) [hereinafter *Penry XV*]. The U.S. Supreme Court reversed in part the U.S. Court of Appeals order denying *Penry*’s motion for a COA and remanded the case for further proceedings. *Penry v. Johnson*, 532 U.S. 782 (2001) [hereinafter *Penry XVI*]. On remand, the U.S. Court of Appeals granted *Penry*’s motion for a COA and vacated the district court’s judgment denying *Penry*’s application for a federal writ of habeas corpus. *Penry v. Johnson*, 261 F.3d 541 (5th Cir. 2001) [hereinafter *Penry XVII*]. *Penry* was retried and again convicted and sentenced to death. *State v. Penry*, No. 10,222 (Polk County, July 3, 2002) [hereinafter *Penry XVIII*]. *Penry*’s conviction and sentence is currently awaiting appeal.

7. *Id.* at 333-34.

8. *Id.* at 335.

9. *Id.* at 334-35.

execute the mentally retarded, had always eclipsed the fact that the opinion was a success on the more limited question posed by Penry's attorneys: whether Penry's jury, through its instruction, was afforded an opportunity to "give effect" to Penry's mitigating evidence of mental retardation. Thus, Johnny Paul Penry was still alive in Texas, and was now a client of Paul, Weiss. Indeed, in 1990, following the Supreme Court's reversal,<sup>10</sup> he was once again tried by a jury in Texas and once again given the death penalty,<sup>11</sup> this time with Paul, Weiss handling his case and his appeal. As a junior associate working on the case, I remember many long nights pouring over the trial transcript searching for legal error. I remember minor legal skirmishes in the state courts of Texas as the case slowly wound its way through the complicated legal maze of *habeas corpus* litigation.

And, for several years, Johnny Paul Penry was just a person I wrote about in legal briefs. An abstract legal principle, if nothing else. Because of his mental retardation, he was certainly never able to assist meaningfully in his defense (we'll table, for the moment, how the courts could ever judge such a person to have met the minimum standards of competency), so we did not frequently consult with him, as we did with other clients, about his case. Our loyal and dogged local counsel, John Wright, kept in touch with Johnny and tried, in his patient way, to explain all of the byzantine legal maneuverings to him. But, basically, Johnny was more a cause to me than a human being.

That all changed as his execution date approached. Another associate in our office had begun speaking with Johnny by telephone, and I remember the day she brought to my office two crayon drawings Johnny had done for us. It was around the time of Halloween, and Johnny had drawn a picture with a large orange pumpkin on it. It seemed so pathetic to me. This man was forty-four years old, not more than two months away from his scheduled execution, and he was drawing us, his lawyers, bright orange pumpkin faces. This simply did not comport with my notions of "decency" or "progress." For the first time, I became scared that we might not just lose this legal battle—this fight over what was, in my mind, right versus wrong—we might lose our client.

I was not the only one afraid. Probably one of the most heartening things about this work is that you are absolutely never alone. The support you receive working on a death penalty case is unparalleled. This community of lawyers has among the best hearts and minds you will ever meet, and it does not matter what time of day or night—weekend or holiday—there is always someone there to lend a helping hand, provide a needed case citation, or toss around a new legal theory. And all of those folks, too countless to mention here, came to our aid in Johnny's case. Through their tireless efforts, numerous groups formed to advocate for Johnny both in and out of court. The media shed spotlights on the injustices of Johnny's case, international groups lent their support, and nationally regarded medical groups wrote *amicus curiae* briefs on Johnny's behalf. As Johnny's execution date came closer and closer, this machine seemed to be behind him, willing him to live.

Everyone had always told me that the days and hours leading up to an execution were frenzied and frenetic—full of publicity campaigns, clemency determinations,

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10. *Id.* at 340.

11. *Penry VII*, No. 15,977; *Penry VIII*, 903 S.W.2d at 715.

and last minute legal appeals. And it was certainly true that the period leading up to Johnny's execution date was a crazy time. But what scared me more than that was when the work stopped. That is, when there was nothing left to do but wait. Within a few days of his execution date, we had already heard that the Texas Board of Pardons and Paroles had denied clemency. Our cert petition to the Supreme Court was fully briefed. My colleagues on the case were down in Texas to be with Johnny in his final hours, to watch him say his final goodbyes to his family. My job seemed absurdly easy in comparison: I just had to sit by the phone in New York and wait to hear from the Supreme Court clerk's office.

Like any watched pot, the phone in my office refused to ring. I sat there all day, just waiting for the call. As it was getting dark outside, I began to get more and more nervous. I called the clerk's office again just to make sure they had my number. The woman I spoke with assured me that they did. I sat and stared at the pile of documents on my desk. I seemed incapable of making even the most basic privilege and responsiveness determinations on my other cases. All I could think about was the deafening silence of my phone *not ringing*. Finally, a good friend came by and told me I had to walk upstairs to get some dinner. I resisted at first, but then relented, and sure enough, I was not more than twenty feet from my office when the phone rang: it was the Supreme Court clerk's office. The Motion for Stay of Execution had been Granted!<sup>12</sup> Johnny Paul Penry would not die tonight. The Court would decide at their next bench conference whether to grant certiorari in the case. I had chills running up and down my spine for what felt like hours. My trembling fingers could barely dial the numbers on the phone to reach my colleagues in Texas; when I did, the other associate on the case dropped the phone in a mixture of shock, excitement, and general emotional overload. Ironically, Johnny was the one person who, because of his mental impairments, just didn't really seem to get it. Johnny's priest, who was with Johnny when the news came, said Johnny seemed to have no real grasp of the gravity of the situation: he just wanted to know whether he could still have the special cheeseburger they had prepared for his last meal.

The weeks following the stay of execution were filled with what we call in our profession "cautious optimism." Surely the Supreme Court would not grant Johnny a stay of execution and then turn around only a few weeks later and refuse to hear his case. But I had already learned that in death penalty cases the usual rules rarely apply, so I did not actually breathe a sigh of relief until we got the call from the clerk's office telling us that cert had been granted on all of our questions. Finally, we felt like lawyers again. We were back in the game, and there was work to be done, briefs to be written. We had written these same arguments countless times before for Johnny, but all of those briefs seemed like dress rehearsals for this opus. This brief was before a "real" court, a court that affirmatively expressed interest in hearing Johnny's case. They had heard Johnny's case before, and now they had agreed to hear it again. We hoped we were up to the challenge of demonstrating Johnny's meritorious claims.

Our primary claim boiled down to the fact that in retrying Penry in 1990, the Texas trial court had repeated the same error that the Supreme Court found

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12. *Penry XIV*, 531 U.S. at 1004.

unconstitutional in *Penry VI*.<sup>13</sup> that the jury instructions did not permit the jury to give effect to Penry's mitigating evidence of mental retardation. Eventually, the Texas legislature dealt with this problem by amending the death penalty statute to require juries to decide whether mitigating circumstances (such as mental retardation) outweighed aggravating circumstances and thus required a life, rather than a death, sentence. However, in their haste to re-try Penry after *Penry VI*, the State of Texas did not wait for the Texas legislature to modify the death penalty statute to deal with the problem articulated in *Penry VI*. Instead, the trial court judge attempted to fix the problem on his own. He simply told the jury, in a convoluted instruction, that if they felt that Johnny should not die, they should just answer one of the special questions "no"—even if they thought the factually correct answer was "yes."<sup>14</sup> Only a handful of cases in Texas involved the use of this special "nullification instruction"—as the Texas state courts came to call it. *Penry* was one of them. Oddly enough, Johnny did not get the benefit of the statutory amendment that his case had generated. It was just one of many cruel ironies in Johnny's case.

The day the Supreme Court heard oral argument was bright, crisp, and beautiful—one of those perfect Washington D.C. spring days. The cherry blossoms were in full bloom. An hour or so before the argument, the lawyers were invited into one of the special drawing rooms at the Court and were given a brief tutorial by the staff about the protocols for oral argument in the high court. The mystical red and green podium lights were explained to us, and we were given a seating chart with the Justices' names on them. I remember feeling as if someone should pinch me; it all seemed like a dream. Not long thereafter, we were ushered into the courtroom and seated at counsel table. As the partner on the case stood up to begin the argument, I remember turning around and seeing behind me several rows of our supportive death penalty colleagues filling the defense bar. Once again, I felt we had this amazing community of lawyers at our back.

The argument went well. Just the day before, we had received word that the Supreme Court had granted certiorari in another case challenging the Court's holding in *Penry VI* that it was not *per se* unconstitutional to execute the mentally retarded.<sup>15</sup> That was certainly a jolt in the arm, and we spent some time the night

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13. *Editor's Note:* In standard judicial parlance, when the same case is decided by the Supreme Court more than once, each decision is consecutively titled, for example, *Penry I*, *Penry II*, and so on. Because of the nature of this edition and the use of a special procedural history footnote, we abandoned this common practice in favor of numerically titling each decision of the case in chronological order.

14. The Texas statute in effect at Penry's first—and second—trial asked jurors to answer three questions: i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result; ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2004). However, as the Supreme Court had explained in *Penry VI*, evidence of mental retardation and severe child abuse are "beyond the scope of [the first special issue]" (concerning the defendant's deliberateness); are relevant to the second special issue (concerning future dangerousness) only as an *aggravating* factor; and they simply have no bearing on the third special issue (victim's provocation). *Penry VI*, 492 U.S. at 322-25.

15. Certiorari was granted in *McCarver v. North Carolina* on March 26, 2001. 523 U.S. 941

before the argument scrambling to decide how we might answer questions concerning that cert grant.

In the end, our argument was limited to the facts and legal arguments in our case, and Bob Smith, the partner on the case, did an outstanding job. It was great to see him responding with his typical incisive wit and intellect to the bench's questions; it looked like he did this every day. What really struck me more than the legal discussion, however, were a few asides made by one of the Justices. As Bob was describing how convoluted and absurd the jury's "nullification" instruction was, Justice Scalia interrupted him, saying: "They seem pretty clear to me. Even if the defendant is mentally deficient, we assume the jury is not." It seemed like a rather cheap shot. Then, our adversary, counsel for the State of Texas, bemoaned the fact that he had little time left after the Court's questions to get to his main point, noting that his "time was near." Scalia once again retorted: "We're not going to execute *you*. Your time is far off." As published accounts later verified, few in the audience laughed. There was something in those comments that made me wonder whether capital cases had become so commonplace before the Court that they had lost their fundamental human *gravitas*.

In the weeks and months following the oral argument, we all worked as hard as we could to think about something else, to work on other cases, and to forget that this decision was out there being debated and drafted among the Justices. For me, that work took me to other parts of the world. I was working very late into the night in Singapore, when I got the news from my colleagues back in New York: we had won, by a vote of 6-3!<sup>16</sup> The Supreme Court once again reversed Johnny's death sentence and remanded it to the Texas state court for a new sentencing hearing.<sup>17</sup> A few hours later, my room service breakfast arrived with a copy of the morning paper—the *International Herald Tribune*, complete with an article about my client's legal victory in the Supreme Court.<sup>18</sup> I was glowing.

The euphoria generated by that victory lasted for a deliciously long time. I do not think any of us had ever felt so proud of any legal accomplishment. Indeed, it lasted so long that we were all shocked a bit into reality when we began to have contact with the prosecutors on the case to schedule a pre-trial conference. It was like water on a camp fire. What did they mean, a pre-trial conference? We had won! Especially with the Supreme Court still slated to consider the *per se* constitutionality of executing the mentally retarded in *Atkins v. Virginia*,<sup>19</sup> we could not fathom how Penry could be tried—for a third time—so soon.

Yet, despite all of our motions to every court who would listen (and several that refused), there was nothing we could do to keep Johnny from being retried prior to the Supreme Court's ruling in *Atkins*. It seemed an absurd waste of all sorts of judicial resources to try Penry for the death penalty at a time when the nation's

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(2001). However, following the cert grant, the North Carolina legislature passed a bill outlawing the death penalty for the mentally retarded, which mooted the case. The Court later accepted certiorari on the same question in the case of *Atkins v. Virginia*, 536 U.S. 304 (2002).

16. *Penry XVI*, 532 U.S. at 782.

17. *Id.*

18. David Stout, *Supreme Court Gives Reprieve to a Retarded Killer in Texas*, INT'L HERALD TRIB., June 5, 2001, at A3.

19. 536 U.S. 304 (2002).



highest court was deciding whether such a trial was constitutional, but it quickly became clear that there was nothing we could do to stop this “machinery of death.”<sup>20</sup> However, on one of our early trips to Livingston, Texas, I began to get a sense of why.

On Valentine’s Day 2002, Judge Elizabeth Coker invited us back to her private chambers to discuss various pretrial issues. She disclosed to us (off the record) how she had gone to school with the victim, Pamela Carpenter, and how she remembered the day that news of Pam’s murder had arrived at the school. As if the Judge’s salient childhood memory was not enough, there was also a sign hanging on the wall just to the left of her desk. It looked like one of those deliberately tacky “gone fishin’” signs painted on a piece of wood, with a metal wire across the top. Except this sign read:

Judge’s Office Open: When I’m Here Closed: When I’m Not Hangins’ on Tuesday!
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All along, we tried in earnest to persuade the prosecution that a plea bargain was the appropriate way to resolve this case, once and for all, after 23 years of legal battles. We certainly made efforts toward that end before Penry’s third trial was to begin. But we quickly discovered that when all the other side is willing to accept is your client’s death, there is not much room for bargaining. I wondered why the prosecution would want to put the victim’s family through the ordeal of yet another trial and a decade more of lengthy appeals; in many ways, the trial was more a torture for them than for anyone else. But, sadly, I have come to believe that the prosecution (and I suspect the victim’s family as well) views the acceptance of any result less than Johnny’s death as a mark of disloyalty and dishonor to the memory of the victim. This fact really hit me just before one of Johnny’s execution dates. The victim’s family took out an ad in the local Texas newspaper. It still chills me when I think of it: it has a beautiful picture of the victim, along with her name and her dates of birth and death. It then read: “We love you. We miss you. We will never forget you. May the execution of Johnny Paul Penry happen on [the then-scheduled date].” That ad taught me more about why we have the death penalty in this country than all of the countless law review articles and books I had ever read on the topic.

If only I could find a way to convince this family that accepting a punishment other than death for Johnny would not mean they loved their daughter any less; if only I could make them see that Johnny’s death would not heal, and could not heal their undeniable pain, and that another decade of legal battles was only going to pick at the scab of their never-healing wounds. My heart goes out to that family. They are good people, and neither they, nor their daughter, deserved what happened to

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20. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., respecting denial or certiorari). It also seemed like Texas hadn’t learned much from *Penry XVI*, because once again, the courts were hastily moving forward to try Penry without first clarifying, through legislative enactment or Supreme Court guidance, what the appropriate prevailing standards would be.

them. But I still had a client to defend, and I still fundamentally believe that what is broken inside of them will not be fixed by killing a mentally retarded man.

Defending a man who has been tried and convicted twice before, and whose two previous trips to the Supreme Court has made him a national celebrity of sorts, presents some unique problems for jury selection. That was complicated by the fact that weeks before we had tried and lost a competency trial in the same town with substantial news coverage. For Penry's punishment trial, we sent jury notices to over 1,000 potential jurors. We were forced to exclude many of the potential jurors for hardship and patent conflicts of interest, leaving us approximately 100 jurors to question in individualized voir dire. The vast majority knew all about Johnny and his prior convictions. The only thing they didn't know was why he was back here again. The few that did know the answer to that question told us they deeply resented the fact that Johnny was not dead already.

Voir dire is the best sociology course one can take. I had walked into that courtroom confident that, having been raised in the South, I would be prepared for, and understand, these people and their views. But the truth is, we are a nation of communities, and this group of people bore little resemblance to the community in which I had been raised. Some of the attitudes and prejudices were the same, and I felt them, but one critical difference was just the raw anger and spirit of violence I felt radiating from these jurors as they shared with us their lives and their attitudes. Maybe it is the fact that Texas is somehow steeped in the violence of the "West"—guns, large trucks, and the open range—I don't know. All I know is that when we looked for some sign of mercy or understanding in these potential jurors, all we saw was anger. They told our local counsel that they didn't like him, or the tie he was wearing. More than one told us that they were open to the death penalty as a punishment for vehicular manslaughter. Our veteran jury consultant shared her time-worn conclusion: "angry people kill." And that is exactly what we expected many of these people wanted to do to our client.

Voir dire is also a daunting psychological exercise. As each new potential juror walks in the room, you are searching for some sign in their words, their background, or their body language that they will not kill your client. You watch them watch Johnny and you watch them look with authority to the prosecution. As you question them repeatedly about their views—many of which you find utterly inimical to your own—you have to find a way to swallow your own sense of right and wrong and engage them where they are. You are not going to change these folks' views of the death penalty and social justice in an hour.

It took over six long weeks to complete this process. At the end, we felt good about what we had done, but we still knew the deck was stacked against us. Even with the use of our peremptory strikes, we were left with a jury that included a state trooper and a female corrections officer who transported inmates from Death Row. We were also mindful of the chilling fact that when we asked potential jurors from the same community to raise their hand if they thought competency trials and mental health defenses were just a "sham" put on by the defense, virtually every hand in the courtroom flew up. So, we knew this was going to be an uphill battle, or, as our seasoned local counsel once reminded me: "we're all swimming in the same stream, but we're swimming upstream, and they're swimming down it."

One of the advantages of litigating a capital case from a large law firm is the arsenal of resources the firm can bring to the problem. In this post-O.J. Simpson world, no one is naïve enough to believe that resources do not impact the quality of defense. And, once again, Paul, Weiss was incredibly supportive. We hired a “dream team” of psychological and other mental health experts because, despite the overwhelming evidence, the State was disputing Johnny’s mental retardation.

Johnny was diagnosed mentally retarded in the first grade, and had gone to the Mexia state school for the mentally retarded. (Bob, the partner on the case, used to love to say, “Who tries to cheat their way into the state school for the retarded?”) When Johnny got in trouble as a juvenile, the case against him was dismissed because the prosecution admitted he was mentally retarded. His prison records from 23 years on Death Row were replete with references to his mental retardation (until the issue began to take prominence in the courts, and then, mysteriously, the diagnoses became more vague). In the ten times he had been given I.Q. tests from ages seven to forty-six, every time his results fell in the mentally retarded range. As our experts testified, one would literally have to be a genius with a background in the creation and standardization of I.Q. tests to get results in the same range every single time over such a long period with so many different test forms and versions.

However, that did not stop the prosecution from arguing Johnny was not mentally retarded. They claimed Johnny was faking his mental retardation (presumably from age six), that his poor vision and lack of formal education were the reason for his low I.Q. scores, and that mental retardation was just a “label” that followed him throughout his life, but was not accurate. The prosecution was too afraid to give Johnny their own I.Q. test, but that did not stop their mental health professionals from opining that he was *not* mentally retarded—based on their review of records and a limited interview of Johnny (a practice that is universally decried in the professional literature as a basis for a mental retardation diagnosis).

In addition to the mental health “dream team” we assembled to debunk these absurd allegations, we also had a “dream team” of mitigation fact witnesses thanks to the tireless efforts of one of our associates, a paralegal, an investigator, and our amazing mitigation specialist, who traveled to every tiny town in Texas (including one aptly named “Cut-n-Shoot”) to locate people who had known Johnny as a child. It was amazing what we found. We found Johnny’s first grade teacher (now 90 years old) who recalled the fact that Johnny was so slow she had to put him at a desk beside her and give him dolls to play with while the rest of the class learned. We put on one of Johnny’s teachers from the Mexia school for the retarded, who testified that even at a school for the retarded, Johnny was slower than his peers. We had children from the neighborhood (now adults) who testified how Johnny, at age 17, would try to play kickball and hide-n-seek with kids ten years younger than him.

These same individuals, as well as numerous members of Johnny’s family, also told stories about the horrific child abuse they saw Johnny suffer at the hands of his mother. They described how Johnny’s mother (who had, for a time, been institutionalized in a psychiatric hospital) hit Johnny in the mouth when he was still a baby in a high chair. At age one, she broke his arm, and when he was a toddler, she put him in scalding hot water that left with him severe scars. According to these eyewitnesses from both inside the family and around the neighborhood, Johnny’s

mother hit him with everything she could get her hands on, from belt buckles and extension cords, to mops and a tree limb. She put cigarettes out on his flesh and chased him around the house with a butcher knife, threatening to cut off his penis when he wet the bed. And in an act so vile it still makes me gag every time I hear it, she “potty-trained” Johnny by forcing him to drink his own urine from the toilet bowl and eat his own feces from his underpants when he had an accident. But, in the end, none of these facts about Johnny’s mental retardation or his severe child abuse meant much if we could not convince twelve people that the facts were sufficient to save his life.

As we had predicted, the Supreme Court decided *Atkins* right in the middle of our trial, throwing the entire proceedings into temporary chaos. When the Supreme Court decided in *Atkins* that the mentally retarded could no longer be executed,<sup>21</sup> the Judge called a temporary halt to the proceedings and dismissed the jurors from the courtroom. Because Johnny had long been the poster child for mental retardation and the death penalty, a swarm of media descended on the courthouse, as the parties fought to find copies of the opinion to review. Ultimately, the judge ruled that despite the obvious significance of the opinion and our motion for a mistrial, the case was going forward. (We were later told that when the jurors asked courtroom personnel what all the buzz was about, the Judge told the jurors that the Supreme Court had issued a ruling but that “it had nothing to do with this case.”)

So, when it came down to July 3, 2002, the day of closing statements, I was not sure what to feel. The case had been through so many ups and downs. I tried to recapture the feeling of lucky pride we had felt when we got the stay of execution from, and ultimately won in, the Supreme Court. But this was a totally different venue with totally different decision-makers. All that our incredible success had bought us was the right to be back in front of these people. In many ways, the victory was now beginning to feel hollow. I agonized over the possibility that after everything we had been through, and despite all of our successes in the Supreme Court, Johnny Paul Penry was now going to be the only mentally retarded defendant whose life *Atkins* did not save.

The day of the closing statements was a media circus. When we walked into the courtroom, you could not find a seat anywhere, and there were cameras flashing like crazy. The Judge had permitted ABC News’ *Nightline* to set up a special camera in the courtroom with a media feed to all the local news stations. This room, which had been “home” to us for several months, had suddenly become foreign. I could not help but wonder how all of this media attention would impact the jurors. In addition, I was beginning to wonder whether I was going to be able to get through the closing statement myself. I guess the strain of the last four weeks had accumulated, and my body was beginning to suffer the physical repercussions of the hard days and long nights of the trial. I was sure my entire closing was going to be lost in a fit of coughing. I will never forget how just before I stood up to deliver my closing, one of the reporters sitting in the row behind me heard my cough and passed me a few cough drops. I am sure it was just a kind gesture, but somehow I felt that she, too, was on Johnny’s side. Luckily, as I stood up and walked across the courtroom toward the jury box to deliver my closing, all the minutiae—the

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21. *Atkins*, 537 U.S. at 321.

media and the coughing fits—melted away. All I saw were the twelve sets of eyes in front of me, and I spoke to them for an hour about why I thought Johnny had never had a fair shot in life, and how although he deserved to live in prison for the rest of his life, he did not deserve to die for what he had done. After the closings were over, I felt that we had said our peace (as they would say in Texas), and now all that was left to do was wait.

At first, the waiting seemed long indeed. Conroe, Texas is a small town, so there were only a very limited number of restaurants within walking distance of the courthouse for all of us to grab some lunch while the jury deliberated. Ironically, the defense and the prosecution ended up at the same restaurant and, although at separate ends of the room, we waited together. We had barely ordered when we received word from the clerk that the jury had returned with a question. We all tromped back over to the courthouse, where we learned that the jury wanted to know how much the prosecution's expert had been paid. Although no more scientific than reading tea leaves, we thought this was a good sign for Johnny. But the jury also wanted to view a videotape of Johnny speaking on television, a video clip that the prosecution had used to try to demonstrate that Johnny was faking a speech impediment.<sup>22</sup> So, together, these two requests told us that the jury was conflicted about what to do with Johnny's life. The rest of the afternoon crept on, and time seemed to stand still. With every minute, we became more hopeful for Johnny's life, but we also knew that as it got later into the evening on the eve of the July Fourth holiday, we were not going to keep these jurors around much longer.

Sure enough, at around 6:00 p.m., the jury came back with the verdict. We all piled into the courtroom again and the jury filed in, one by one, some of the women holding hands, others with tears in their eyes. The state-trooper foreman announced the verdict: Johnny Paul Penry should be executed by lethal injection. The victim's family cheered and applauded. The Judge immediately turned and told Johnny to stand up for his sentencing. He looked confused and afraid. I could not bear to see him standing there alone like that, so, not knowing what else to do, I stood up next to him. I felt as if I was receiving the death sentence along with him. I have never felt lower as a human being. We had lost the most important case a lawyer can be asked to try—the case I had prepared for in my mind since I was seventeen. I knew then I would always torture myself with questions about how that could happen, and what I could have done differently. But, at the same time, despite the devastating blow of that loss, I can honestly say I have never felt prouder as an advocate than I did just standing there next to Johnny that day. I know it meant a lot to him, and it has come to mean even more to me.

As I write this, over fifteen months have passed since that difficult day, and we are still fighting. We have only recently received the court reporter's record, which took well over a year to complete, and spans 89 volumes and several thousand pages. It has been a strange year, as we have all tried to return to work on our "normal" cases and wait for what we hope and expect will be the eventual appellate vindication of Johnny's rights and the sparing of his life. The trial court has tried

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22. Of course, as we pointed out at trial—and as anyone with a speech impediment will tell you—the impediment often becomes more exaggerated when the speaker is nervous. So the prosecution's claim that Johnny was faking his speech impediment was utterly specious.

to get our local counsel off the case and replace him with someone who consulted with the prosecution during the trial. The lead prosecutor was killed in an automobile accident after leaving a dinner party attended by the Judge and several of the jurors from the case. We were told it was not the first time the group had socialized together.

We do not yet know who will represent Johnny on appeal, but, rest assured, the battle still goes on. We are still swimming in the same stream, but they are going down, and we are headed up.

## LEARNING THE LEGAL ROPES WITH THE DEATH PENALTY

David J. Kessler\*

THE day I joined Drinker Biddle & Reath LLP, April 6, 1998, I was asked if I wanted to be part of a team representing Tommy Lee Waldrip, who was sitting on Death Row in Jackson, Georgia. I enthusiastically said yes. Little did I realize that within months I would be the “senior” associate on this matter and the lead lawyer in Tommy’s fight for a new trial.<sup>1</sup> It was even less apparent that now, more than five years later, I would be working ever more enthusiastically than the day I started. But that is the way it turned out. Much to my surprise, I have been Tommy’s primary lawyer almost from the beginning.

I have grown up as a lawyer with Tommy’s case and, in the process, I have led a double life. In one, I am a general litigator specializing in patent, copyright, and complex litigation. These cases have several common characteristics. I represent a variety of paying clients with teams of other litigators. For these clients, we win and we lose. But, generally we settle before the end. I like to win, and I hate to lose. The clients generally provide us with the resources to advocate zealously on their behalf. While my opponents frustrate me, they usually play fair, and I have felt generally that no matter how difficult the venue or forum, our client’s cases would be heard on the merits.

In my other life, I am a habeas corpus specialist by virtue of true on-the-job training. I represent one client *pro bono* with an ever-shifting team of litigators. These cases also have several common characteristics, but are otherwise distinct from those encountered in my other life. Here too, we may win and we may lose.

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1. The citations to the *Waldrip* case are as follows. Waldrip’s original competency hearing and criminal trial is at *State v. Waldrip*, No. 91-CR-300 C (Dawson County Super. Ct. Oct. 26, 1994) [hereinafter *Waldrip I*]. Waldrip was convicted on October 26, 1994 and sentenced to death on October 28, 1994. The Georgia Supreme Court affirmed the trial court’s pre-trial orders denying Tommy’s motion to suppress the discovery of the victim’s body on June 27, 1994. See *Livingston v. State*, 444 S.E.2d 748 (Ga. 1994) [hereinafter *Waldrip II*]. The Georgia Supreme Court affirmed Waldrip’s conviction and sentence on March 10, 1997. *Waldrip v. State*, 482 S.E.2d 299 (Ga. 1997) [hereinafter *Waldrip III*]. The United States Supreme Court denied certiorari. *Waldrip v. Georgia*, 522 U.S. 917 (1997) [hereinafter *Waldrip IV*]. With the help of the author’s firm, Waldrip filed his original writ of habeas corpus on March 17, 1998 and amended his petition on June 28, 1999, both under the caption *Waldrip v. Turpin*, No. 98-V-139 (Butts County Super. Ct. Mar. 17, 1998) [hereinafter *Waldrip V*]. On interlocutory appeal from *Waldrip V*, the Georgia Supreme Court reversed the habeas court and found that Waldrip had not made a blanket waiver of his attorney-client privilege because he claimed ineffective assistance of counsel and he had a right to a protective order. *Waldrip v. Head*, 532 S.E.2d 380 (Ga. 2000) [hereinafter *Waldrip VI*].

But, this case will never settle. In Tommy's case, I win much less often and everything—each mistake, each success, and each decision—lingers in my psyche much longer. Tommy has no resources, and Georgia provides no money for habeas counsel, much less the talented investigators and experts it takes to prepare and present a habeas case. I am thankful to report, however, that Drinker Biddle & Reath has been more than generous to this case. It has allowed me, and several other litigators, to work the necessary hours to represent Tommy. Moreover, we have benefitted from the generosity and friendship of people throughout the death penalty community, including the Georgia Resource Center and the Federal Defenders in Atlanta and Philadelphia.<sup>2</sup> Finally, I have never felt that any case I have worked on was factually or legally stronger than Tommy's and, paradoxically, that my opponent, in order to succeed, had to do less work.

#### *How I Started*

It was through my work as a summer associate that I learned about Drinker Biddle & Reath's commitment to *pro bono* work—the firm has a very long history of doing work for the public good. The firm represented Communists during the McCarthy era and the Schempp family in the school prayer cases.<sup>3</sup> In addition to these high profile cases, it represented Baby Neal in the case brought to challenge the Philadelphia foster care system in which the adequacy of funding and care for children placed in the system was contested.<sup>4</sup> And, in fact, the firm has represented five death row inmates at various stages of their appeals, including the Bo Cochran case in Alabama, where the firm's Lawrence J. Fox, Kenneth Frazier, and Seamus Duffy secured Mr. Cochran a new trial and ultimately an acquittal of the capital crime.<sup>5</sup> Although I was aware of this commitment, I came to Drinker Biddle & Reath with no interest in doing death penalty work. In fact, I entered law school to become a prosecutor.

Being more than slightly naive, however, I agreed to work on Tommy's case as soon as I started at Drinker. After I received my offer to join, Luke, a good friend from law school already working at Drinker for two years, asked me if I wanted to help. He explained that he and Larry were working on the case and that I would have the opportunity to take on responsibility almost immediately.

I did not know how right he was. Luke left Drinker in August, shortly after I joined. Ever since, the laboring oar has been in my hands. In fact, although numerous other lawyers and associates have helped Larry and me over the last five and a half years, I have been the only lawyer working the case on a day to day basis since 1998. In this time, I have developed as an attorney. Indeed, I do not think I could have learned complex litigation so quickly doing anything else.<sup>6</sup>

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2. It would be wrong to write about the representation of Tommy without thanking Laura Hill Patton, Rebecca Cohen, Beth Wells, and Christina Swarms, all of whom have provided exceptional help and guidance to me.

3. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

4. Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48 (3d Cir. 1994).

5. Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995).

6. This development is partly attributable to Drinker Biddle's decision to allow hours spent on Tommy's behalf to be treated the same as hours spent for any billable client.



This, however, only scratches the surface. Before you can understand exactly what Tommy's case has meant to me, both personally and as a lawyer, you need to understand a little about the matter. When we started working for Tommy, we were told that this was not a "sexy" death penalty case—it was your standard, average capital habeas case (if those words even make any sense under these circumstances).

The murder for which Tommy had been convicted was grisly and tragic. He is on Death Row for allegedly helping his son and retarded brother-in-law kill a popular young man in rural Georgia. The victim, in fact, was the star witness in the armed-robbery trial of Tommy's son.<sup>7</sup> During the trial, Tommy and his former counsel argued that Tommy was innocent. The fact remained, however, that Tommy had confessed to the murder not once, but three times.

Moreover, even though Tommy was suffering from some form of mental illness, he had been found competent to stand trial after a hearing before a jury. In addition, race did not even seem to be a factor. Tommy was white, the victim was white, the judge and district attorney were white, and the jury was white. In light of these facts, for someone who did not morally oppose the death penalty, Tommy's case did not scream out as an injustice. But these few sentences are only a "sound bite" of Tommy's trial and our case. It is the prosecution's story (and a successful one, given that Tommy is sitting on Death Row). It is only a surface snapshot, it is not the truth!

As a result of the apparent hurdles explained above, we undertook Tommy's case with great determination but little hope. To make things worse, we had only a limited understanding of state habeas procedure, mainly because we had never litigated a Georgia case before. In Georgia, as elsewhere, state habeas is a civil remedy<sup>8</sup> in which the petitioner is granted the right to undertake discovery<sup>9</sup> and present evidence at a hearing before the judge assigned to the case.<sup>10</sup> Our approach, therefore, was just like any complex civil litigation, with two minor exceptions. First, we understood that we could not waive any potentially meritorious argument, no matter how slim its chance of success. Second, we would need to consider not only our current audience (the trial judge assigned to Tommy's case), but all the other potential audiences, including the Georgia Supreme Court and the Federal courts.

#### *Taking the First Steps for Tommy*

With this in mind, as in normal civil litigation, we began with discovery. We talked to our client. We read the voluminous record.<sup>11</sup> We spoke to the three former counsel and reviewed their files.<sup>12</sup> And then we began probing the prosecution and

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7. The Georgia Supreme Court, on Tommy's direct appeal, adopted the prosecution's facts of the case. *See Waldrip III*, 482 S.E.2d at 299.

8. *Fullwood v. Sivley*, 517 S.E.2d 511, 515 (Ga. 1999).

9. GA. CODE ANN. § 9-14-48(a) (Supp. 2003).

10. GA. CODE ANN. § 9-14-47 (Supp. 2003).

11. It exceeds 40 volumes and more than 30,000 pages, not including the co-defendant's trials and all of the appeals.

12. These files consisted of more than 6,000 pages.

their files. It was only after we started doing all of this that we began, slowly, to learn the truth about Tommy, the murder, and his prosecution.

In addition to the unsympathetic facts and the demands of discovery, there is the issue of Tommy. Tommy is not an easy client. Tommy has been in jail for more than a decade and on Death Row since 1994. He is emotionally disturbed and mentally ill—not an uncommon trait among those convicted of capital crimes. One thing that quickly became apparent—and has been a useful lesson in all my other cases—is that you cannot learn everything about your client from your client. Obviously, Tommy is a particularly stark example, given his clear mental illness. But even without his impairments, Tommy is neither impartial, nor informed, nor sophisticated enough to understand what the most important facts are for the case or what their effect would be on the litigation. Nor does it help that Tommy's mental illness makes him instinctively distrustful of lawyers. Winning his trust was a slow and unending process. Only by performing our own independent due diligence, by investigating his background, and by obtaining multiple sources of information were we able to formulate an accurate picture of Tommy. This habit of performing due diligence on every aspect of the case (whether the opposition's or my client's) was one of the first things I learned as a lawyer. I have incorporated it into both of my "lives."

*You Have to Read All of the Fine Print*

As mentioned earlier, the record of Tommy's underlying trial is massive, but, as it turns out, every part of it matters. If there was a part of the transcript that I had skimmed over or had only read once, that part turned out to be crucial for a motion, deposition, or claim. Nor could I guess what was important, thus preventing me from reading only select bits. More importantly, without understanding the whole picture and deeply understanding the factual foundation, I could not understand the effect of an omission by Tommy's former counsel or the willful misconduct of the prosecution. I had to be thorough.

Adherence to this mantra produced one of my favorite moments in the case—and has influenced every other case on which I have ever worked. It occurred in our discovery of the files from the district attorney's office that had prosecuted Tommy. Now, as I said, Tommy had confessed three times to being involved in the death of the victim. Each confession was mutually inconsistent. Even more troubling, each confession was inconsistent with the evidence at the crime scene. The prosecution had no physical evidence that tied Tommy to the crime scene or any direct evidence, other than the confessions, that linked him to the murder. Moreover, Tommy had every reason to provide a false confession, in addition to being mentally ill, his son was the prime suspect. It is thus no surprise that the admissibility of the confessions was one of the fiercest battles fought at the underlying trial. In the end, however, despite finding numerous violations of *Miranda*<sup>13</sup> in contacts between law enforcement and Tommy before he made his first confession, the court admitted the

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13. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the presumption may not use statements obtained while questioning a defendant unless procedural safeguards secured the privilege against self-incrimination).

three confessions. Finally, because the court believed the state's witnesses that Tommy had never requested an attorney, the court held that Tommy's right to counsel had not been violated.<sup>14</sup>

In spite of these findings, we pressed on, making an Open Records Act<sup>15</sup> request (the Georgia equivalent of a FOIA request) to the district attorney's office in the summer of 1998. This is where I began to learn the importance of persistence and follow-up, because the District Attorney, even though he was clearly required to cooperate, ignored our request. The DA's hope, I guess, was that we would get frustrated and quit. It took three months, and letters on a weekly, and then almost a daily, basis, but eventually the DA's office let us have access to the requested information. Even then, it did not let us see everything.

We then took the DA's office's deposition, in part to gain further access to the documents. The documents we were given access to were "stored" in the basement of an old courthouse. Boxes and boxes of files and evidence were strewn across the basement. Boxes and file folders were empty, papers were damp and smeared from floods. Clearly, the DA's office was not giving us access to everything. As it turned out, the DA's office refused to produce more than 4000 pages, claiming privilege and work product.

We then moved to compel access to those withheld documents, but the court denied our motion, claiming that it did not have jurisdiction to review the DA's files or compel it to produce documents. Following this ruling, we went back to the judge who presided over the underlying criminal trial with a similar request. This move paid off. More than two years after we first requested the documents, a court finally held that the DA's office had waived its protections, compelling it to produce the documents.<sup>16</sup>

Subsequently, the DA's office produced more than 10,000 pages. In the end, we reviewed every one. Although extremely taxing, it was worth it. In one sentence, on one page, in the primary memo summarizing the investigation written by the Assistant District Attorney in charge of the case, I found the following:

Tommy was initially interviewed by [the Sheriff], however, he asked for an attorney and the interview was terminated.

Nothing demonstrated the importance of thoroughness and perseverance more than those eighteen words. They changed the case. Not only are those words an admission of a classic *Edwards* violation,<sup>17</sup> not only did the prosecution fail to disclose this document and this information to the defense in violation of *Brady*,<sup>18</sup>

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14. The three witnesses included an assistant district attorney, the sheriff, and a special agent of the Georgia Bureau of Investigations.

15. GA. CODE ANN. §§ 50-18-70 to -77 (2003).

16. In actuality, the trial court compelled the DA's office to produce the files to the Court and then granted us access to the files.

17. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once an accused has invoked his right to counsel, the accused cannot be subject to further interrogation until counsel has been made available to him or the accused initiates further communications with authorities).

18. *Brady v. United States*, 397 U.S. 742, 755 (1970) (requiring prosecutors to disclose exculpatory evidence to the defense).

but three law enforcement agents proffered false testimony to the Court *and* the DA's office knew about it, a classic violation of *Napue v. Illinois*.<sup>19</sup> If I had not continued to push the DA for every document, and if I had not read every page, I would never have found this admission. It is my hope this discovery will save Tommy's life—since the law and these uncovered, uncontradicted facts demand that it does.

#### *Our Journey to the Georgia Supreme Court*

Another one of my favorite moments representing Tommy was, not surprisingly, one of our clearest successes and one that started out as a disaster. In the summer of 1999, the Warden, with the Attorney General's office as his lawyer, began taking discovery—nearly a year after the discovery period had started. We learned this one day in late July when we received in the mail the Attorney General's motion to compel all of Tommy's counsel's files. Accompanying this motion was a request to the court to hold that Tommy had waived all of his protections under the attorney-client privilege and work-product doctrines. Now, those of us who conduct discovery outside of habeas would realize that this was very odd because the Attorney General had not subpoenaed the records, negotiated with counsel about waiver of privilege, or even discussed a protective order. The first official pleading from the Attorney General was a motion to compel. We immediately started drafting a response.

Before we had a chance even to start our work, we received an order from the court the next day granting the motion to compel and holding that Tommy had waived all his attorney-client privilege and work product protections. The *next* day! In addition to the remarkable speed with which the court acted, the order did not limit the waiver to the former counsel's privilege and work product. Instead, the order was so broadly written that it could be read to include our work for Tommy as well. Thus, all of Tommy's privileges and protections had been forfeited without any chance to respond. We rushed a letter to the judge, asking him to vacate the order and give us a chance to respond.

The court did vacate the order and we quickly responded, explaining that while Tommy had put the advice of his counsel at issue by claiming ineffective assistance of counsel, this acted as a limited waiver. More importantly, we asserted, it certainly did not act to waive his privilege as to our advice. Moreover, we asked for an order protecting Tommy's files from disclosure to third parties and protecting their confidentiality. While the court agreed that Tommy's privilege and work product protections with Drinker Biddle had not been waived, the court found that Tommy's claim of ineffective assistance of counsel had acted as an absolute waiver as to his former counsel.

While the right legal answer was that a claim of ineffective assistance of counsel should act only as a limited waiver and that Tommy had a right to a protective order, the habeas court found that the requested order to protect Tommy's privacy was unripe for adjudication. We knew the habeas court was predisposed to such a

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19. 360 U.S. 264, 269 (1959) (holding that it is a denial of due process for the state to obtain a conviction through testimony the state knows to be false).

ruling. It had already done so once and it was not a surprise when it merely reinstated, with a minor clarification, its earlier ruling. We had drafted our papers knowing we were likely to lose, but hoping that when we eventually appealed we would have success. We did not know how soon that was going to be, nor how significant that success would be for capital habeas petitioners in the future.

Although the habeas court denied our certificate for interlocutory appeal, we, nonetheless, filed for immediate review to the Georgia Supreme Court.<sup>20</sup> We did not think we had much of a chance of the Georgia Supreme Court hearing our case because not only was it discretionary, it was a novel procedural approach to begin with. But, not only did the court take our case, it held oral argument on the jurisdictional issue,<sup>21</sup> as well as on the privilege and the protective order questions.<sup>22</sup>

Each issue before the Georgia Supreme Court was a question of first impression. On June 20, 2000, the Georgia Supreme Court issued its opinion and agreed with us on all three issues: (1) it had jurisdiction; (2) Tommy had made only a limited waiver; and (3) Tommy deserved a protective order.<sup>23</sup> No one thought we would argue before the Georgia Supreme Court on interlocutory appeal, much less win. This was a tremendous success for Tommy, but, importantly, the precedent provides valuable protection for all capital habeas petitioners in Georgia.

### *I Am Still Learning*

As these small vignettes demonstrate, I have learned a great deal, mostly through trial and error, from Tommy's case. These "war stories," however, only scratch the surface of Tommy's case and what it has meant to my development as a lawyer. I have learned complex litigation skills. I have learned the necessity of performing due diligence on every aspect of a case, regardless of the subject matter. I have also learned that no matter how large the record or complicated the facts, one must be thorough and persistent. From the appeal to the Georgia Supreme Court, I learned that you do not always fight the battles you are going to win, but you fight the battles worth fighting, because the success sought may not be achieved until all other appeals are exhausted. Finally, while I have no moral objection to the death penalty, what I have learned over the last few years is that many cases, including Tommy's, are so riddled with inconsistencies, errors, and misconduct that fair trials and correct decisions are far from guaranteed. But, just as the memo we discovered is only one of many examples of clear constitutional violations we unearthed in Tommy's case,<sup>24</sup> the lessons I have learned here stretch far beyond these few examples.

Obviously, being a volunteer lawyer for someone on Death Row is rewarding in more important ways than simply becoming a better lawyer. Even though I have learned so much in this case, that is not why I would recommend being a volunteer

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20. This court hears directly all appeals on death penalty cases.

21. The jurisdictional question was whether the court could properly take the case.

22. Moreover, it held the oral argument at Georgia State University Law School, in front of the entire law school student body.

23. See *Waldrip VI*, 532 S.E.2d at 383.

24. Our post-hearing briefs requesting relief on more than 43 claims were more than 800 pages long.

lawyer. Tommy's case is important to me and it is not simply what is at stake. I know Tommy. I know his wife Linda. I know his children: Mike, John, and Paul. Depending, in large part, on what I do, Tommy will or will not be executed. That's huge and overwhelming, but it is not everything.

Tommy's case has been with me from the beginning of my legal career. Every other case that I started working on in my first year at Drinker has since been resolved. Until very recently, when we filed our last post-hearing brief and now await the habeas court's decision, I have always had something to do on this case. One of the "joys" of working in a large law firm is that I have meticulously tracked my time over the last five years—I know what I have worked on every working day since I started. After recently reviewing my time, I realized that I have worked harder and spent more hours on Tommy's case than on all of the school work I ever did. This includes my work as an undergraduate, graduate, and law school student combined.

But this still does not explain why I cannot "leave it behind" when I go home. There have been months when I have worked exclusively for other clients on extremely important matters. In these cases, however, when the brief is filed or the hearing finished, I am able to let go and move onto the next task for that client. This is nearly impossible with Tommy.

Tommy is the only reason I wake up in the middle of the night afraid that I have forgotten to do something or afraid that I did not do a good enough job. This is not attributable to the amount of work I do for Tommy. This is not attributable to Tommy's flawed underlying trial or the numerous blatant constitutional violations by the prosecution. It is not even attributable to Tommy's being on Death Row, though that contributes to it. What makes me stay up at night and worry is that, even though I am not morally opposed to the death penalty, I am absolutely convinced that Tommy should not be on Death Row—because he is INNOCENT of any capital crime.

This is what keeps me up and worried. Tommy has received the short-end of the proverbial stick in every stage of his underlying trial. These wrongs have allowed a man actually innocent of capital murder to await his execution. While I would do this work even if Tommy were guilty,<sup>25</sup> I feel more responsible for every possible decision and potential mistake, because of Tommy's innocence. Having passion for Tommy and his case and, maybe most importantly, learning to channel that passion, is one of the greatest gifts Tommy's case has given me. Howling at the moon, ranting about injustice in the system, and screaming that Tommy is innocent will not get him off Death Row. Careful, strategic, considered legal work is Tommy's only chance. Learning how to apply the law in, I hope, a skillful way, even when the odds seem stacked against you, is a rewarding lesson in itself.

And, even if you did not believe it, and even if you were to think Tommy was guilty, based on all the facts and everything that I know, I doubt that you would not feel the same in representing Tommy. We started this case thinking there was no hope for Tommy. We thought that we would fight the "good fight," consciously aware of the fact that Tommy had no issues and nothing to which he could cling.

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25. One thing you quickly learn doing capital work is that from both a constitutional and moral perspective, not every murderer deserves the death penalty.

It only took a little bit of digging (about three years worth), but we could not have been more wrong. Tommy's underlying criminal trial cannot possibly support his incarceration and sentence of death.

While being a volunteer counsel can be exhausting, nerve-wracking, and frustrating, above all it is rewarding. I am sure I am a better lawyer having represented Tommy with the full resources of Drinker Biddle & Reath behind me. When I started, not knowing what I was getting into, the opportunity to be involved in a large complex litigation was enticing. I envisioned learning as much as possible as quickly as possible. It was all important to me to become involved and obtain substantial responsibility as soon as possible. My wishes were granted in the extreme, but it no longer drives me and, in itself, is no longer important.

I became a volunteer lawyer to become a better lawyer, but what is actually important is overturning the gross injustices in his case. Because we took on this representation, we should succeed—and nothing would make me happier.

## EXZAVIOUS GIBSON: RELUCTANT PRO SE HABEAS PIONEER

*Jane C. Luxton\* and Kerri L. Ruttenberg\*\**

EXZAVIOUS Gibson's case first began to attract national attention after a habeas corpus hearing in Butts County, Georgia on September 12, 1996.<sup>1</sup> "Condemned killer Exzavious Lee Gibson sat behind the defense table, alone. His IQ was in the 80s, and he had no knowledge of the law. He didn't even have a pen to take notes. Across the aisle, as opposing counsel, sat state attorney Paige Whitaker, one of the top death penalty litigators for the [Georgia] Attorney General's Office."<sup>2</sup> Unable to represent Gibson because of massive funding cuts, Georgia Resource Center attorney Elizabeth Wells "stood in the courtroom gallery and implored the judge to grant a continuance,"<sup>3</sup> begging for time to secure pro bono counsel. The court refused to entertain her argument despite Gibson's obvious need and proceeded with the hearing.

The Court: Okay. Mr. Gibson, do you want to proceed?

Mr. Gibson: I don't have an attorney.

The Court: I understand that.

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\*. Partner in the Washington, D.C. office of King & Spalding LLP. Other King & Spalding attorneys who have been part of the *Gibson* habeas team include Joe Bankoff, Courtland Reichman, Anne Walsh, Ned White, Demetria Titus, Augusta Ridley, and Booth Ripke. Georgia Resource Center attorneys Tom Dunn and Laura Berg have also been very active in the habeas case.

\*\*\*. Associate in the Washington, D.C. office of King & Spalding LLP.

1. See *Gibson v. Head*, No. 95V648 (Butts County, Ga. Super. Ct. Mar. 11, 1997). Gibson's original conviction and sentence is reported at *State v. Gibson*, No. 90R-1746 (Dodge County, Ga. Super. Ct. June 14, 1990) [hereinafter *Gibson I*]. A motion for a new trial was denied November 19, 1990. The affirmance of his conviction and sentence by the Georgia Supreme Court on direct appeal is reported in *Gibson v. State*, 404 S.E.2d 781 (Ga. 1991) [hereinafter *Gibson II*]. The U.S. Supreme Court denied certiorari at *Gibson v. Georgia*, 502 U.S. 1101 (1992) [hereinafter *Gibson III*]. Furthermore, the Court denied the petitioner's request for a rehearing in *Gibson v. Georgia*, 503 U.S. 999 (1992) [hereinafter *Gibson IV*]. The state habeas petition was disposed of by the trial court in *Gibson v. Thomas*, No. 95V648 (Butts County, Ga. Super. Ct. Mar. 11, 1997) [hereinafter *Gibson V*]. The denial of Gibson's application to the Georgia Supreme Court for probable cause to appeal is reported in *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999) [hereinafter *Gibson VI*]. The Georgia Supreme Court denied the request for reconsideration on April 9, 1999, and the U.S. Supreme Court denied certiorari as reported in *Gibson v. Head*, 528 U.S. 946 (1999) [hereinafter *Gibson VII*]. The federal habeas petition was presented to the U.S. District Court for the Southern District of Georgia and the court remanded the petition back to the state trial court in *Gibson v. Head*, No. CV300-013 (S.D. Ga. Sept. 28, 2000) [hereinafter *Gibson VIII*]. The second state habeas action was denied again by the state trial court in *Gibson v. Head*, No. 2000V240 (Butts County, Ga. Sup. Ct. June 26, 2001) [hereinafter *Gibson IX*]. Most recently, the Georgia Supreme Court approved Gibson's certificate of probable cause to appeal in *Gibson v. Head*, No. S02E004 (Ga. June 21, 2002) [hereinafter *Gibson X*].

2. Bill Rankin, *When Death Row Inmates Go To Court Without Lawyers*, ATLANTA J.-CONST., Dec. 29, 1996, at D5.

3. Bill Rankin, *Judge Calls For Review of Gibson Death Case*, ATLANTA J.-CONST., Sept. 20, 2000, at B1.



Mr. Gibson: I'm not waiving any rights.  
The Court: I understand that. Do you have any evidence you want to put up?  
Mr. Gibson: I don't know what to plead.  
The Court: Huh?  
Mr. Gibson: I don't know what to plead.  
The Court: I am not asking you to plead anything, I'm just asking you if you have anything you want to introduce to this Court.  
Mr. Gibson: But, I don't have an attorney.  
The Court: Yes, sir. Do you have anything you want to tell this Court?  
Ms. Wells: Your Honor.  
Mr. Gibson: I don't waive my rights.  
The Court: Yes ma'am.  
Ms. Wells: My name is Elizabeth Wells. I have filed a number of motions in this Court as Amicus Curiae. If I could be heard for a moment.  
The Court: No, ma'am, have a seat. Mr. Gibson, do you have anything you want to tell this Court?  
Mr. Gibson: I don't waive any rights....  
The Court: ...Mr. Gibson, I will be glad to listen to anything you want to tell me, anything you want to say. I judge you have nothing you want to say or nothing you want to tell me. Is that correct? Except what is in your petition.  
Mr. Gibson: I don't have an attorney.<sup>4</sup>

Following this exchange, the court deemed Gibson's case-in-chief closed and turned to the State for its presentation. The State began a line of questioning about whether Gibson had said anything to his attorney that would incriminate him. The court felt compelled to ask Gibson: "[D]o you have any objection to [your trial counsel's] testifying as to what you told him?"<sup>5</sup> "Your Honor," Gibson replied, "I don't know what to do, I don't have an attorney."<sup>6</sup> The court allowed the improper questioning to proceed, predictably without any objection from Gibson. Some time later, the Court finally asked Gibson if he had any objection to a document proffered by the State. The resulting colloquy is representative of virtually every key encounter in the proceedings:

The Court: Okay. Any objection, Mr. Gibson?  
Mr. Gibson: Your Honor, I don't waive any rights, but I don't have counsel, so I don't know what to say about anything you have asked me or anything you will ask me.  
The Court: Okay. Okay. Admitted.<sup>7</sup>

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4. Transcript of Original State Habeas Corpus Hearing, at 2-4, *Gibson v. Head* (Super. Ct. Butts County Sept. 12, 1996).

5. *Id.* at 29.

6. *Id.*

7. *Id.* at 64-65.

When the State finally concluded its direct examination of Gibson's trial counsel, Gibson's "chance" to cross examine arose:

The Court: Mr. Gibson, would you like to ask [trial counsel] any questions?  
Mr. Gibson: I don't have any counsel.  
The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?  
Mr. Gibson: I'm not my own counsel.  
The Court: I'm sorry, sir, I didn't understand you.  
Mr. Gibson: I'm not my own counsel.  
The Court: I understand, but do you want, do you, yourself, individually, want to ask him anything?  
Mr. Gibson: I don't know.  
The Court: Okay, sir. Okay, thank you, [Trial Counsel], you can go down.  
[Trial Counsel]: Thank you.  
[State's Attorney]: Your Honor, I would like to at this time inquire of Mr. Gibson the circumstances of filing his petition.  
Ms. Wells [from behind the bar]: Your Honor, this is improper, [the State's Attorney] can't ask —<sup>8</sup>

With that, the court had Ms. Wells physically removed from the courtroom by a sheriff.

Thus, notwithstanding Gibson's repeated requests for a lawyer and clear indications he did not understand the proceedings, the hearing went forward. Gibson was "forced to fend for himself at an unfair and one-sided proceeding in which the state took every advantage of [his] lack of counsel."<sup>9</sup> In a scathing editorial, the Atlanta Journal and Constitution pointed out that a habeas corpus proceeding involves "extremely complex legal work that stymies even the best of lawyers," and concluded that "[f]orcing Exzavious Gibson to go into a habeas hearing without a lawyer makes a mockery of justice."<sup>10</sup> Lacking counsel and handicapped by diminished mental capabilities, Gibson was unable to present any witnesses or evidence, offer any cross examination, or raise any objections. Gibson entered the record books as the only defendant in the modern history of the death penalty required to undergo a habeas corpus hearing without a lawyer.

Approximately five months after the hearing, the court signed an order that had been drafted by the State and submitted *ex parte*. Not surprisingly, the order rejected all of Gibson's claims. As to the absence of counsel at the hearing, the order contained the following finding: "It is clear to this court, given Petitioner's demeanor and his statements at the evidentiary hearing, that Petitioner made a conscious choice not to proceed with his case at the evidentiary hearing."<sup>11</sup> This

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8. *Id.* at 67.

9. Sandy Hodson, *Judge to AG Office: Give Death Row Man Day in Court*, FULTON COUNTY DAILY REP., Sept. 12, 2000, at 2 (quoting Thomas Dunn, executive director of the Georgia Appellate Practice and Educational Resource Center).

10. *Even Convicts Deserve Fair Appeals*, Editorial, ATLANTA J.-CONST., Jan. 29, 1999, at A16.

11. *Gibson V* at 5.

finding is followed by several citations to the transcript where Gibson pleaded for an attorney.

### *Habeas Appeal*

Our firm, King & Spalding LLP, entered the case on appeal of the habeas judgment.<sup>12</sup> We were not alone in our objections to Georgia's refusal to provide counsel for indigent habeas defendants. The firm's brief seeking reversal was joined by amici, including the American Bar Association, the Georgia Bar, the National Association for the Advancement of Colored People, and the Southern Center for Human Rights. After deliberating for two years, the Georgia Supreme Court held by a narrow four-to-three majority that there is no right to counsel at any stage of state habeas court proceedings in Georgia.<sup>13</sup> As the Fulton County (Ga.) Daily Report noted, the Georgia Supreme Court decision meant that Georgia "would be the only Southern state that still allows Death Row inmates to go through a critical appeal without counsel, no matter how much they want one."<sup>14</sup> The U.S. Supreme Court declined to grant certiorari.<sup>15</sup>

At the time King & Spalding joined the case, we knew several facts:

- Our client, Exzavious Gibson, had been convicted and sentenced to death for stabbing a convenience store clerk in rural Georgia in 1990.
- At the time of the crime, Gibson was seventeen years old and borderline mentally retarded.
- Gibson's trial lawyer spent a total of thirty-two hours on the case, including travel, trial preparation, and the trial itself. Further, trial counsel wholly failed to telephone or interview key witnesses in the case, instead mailing out form letters requesting that they contact him and declining to take additional action when they did not. Ultimately, trial counsel put on no affirmative defense at trial. His guilty phase opening statement consisted of seventeen lines of transcript, his closing ran to eleven lines, and his penalty phase closing statement extended to two and a half pages, and neglected to mention critical mitigating factors.
- In late 1995, Gibson had filed a "skeletal" habeas corpus petition, representing himself because no pro bono counsel could be found. The Georgia Resource Center, appearing as amicus because lack of funding prevented its full involvement, filed six motions for additional time to try to secure pro bono counsel to represent Gibson during the habeas proceeding. All were denied and the matter was brought on for hearing in eight and a half months, far quicker than the twenty-month average that has become the norm under new expedited habeas procedures implemented by the State of Georgia in 1996.

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12. *Gibson VI*, 513 S.E.2d at 187.

13. *Id.* at 188.

14. Ann Woolner, *A Decision That Means the South Can Say "Thank God for Georgia,"* FULTON COUNTY DAILY REP., Mar. 1, 1999, at 1.

15. *Gibson VII*, 528 U.S. at 946.

- At his habeas hearing, “Gibson had little idea of what was going on before him, at one point saying he did not know how to plead, even though the proceeding did not require one.” He did, however, repeatedly request the assistance of an attorney.<sup>16</sup>

#### *Recourse to Federal Court*

With the Georgia and U.S. Supreme Courts unwilling to establish a right to counsel in habeas proceedings, King & Spalding filed a habeas petition in federal district court in Augusta, Georgia.<sup>17</sup> At the federal habeas hearing, King & Spalding’s Courtland Reichman summarized the sad history of the case, and outlined both familiar and new evidence demonstrating ineffective assistance of counsel. Judge Dudley Bowen was moved to acknowledge that “there is not a lawyer in this courtroom who, in the exercise of intellectual honesty, could say that this case is one which has no troubled background.”<sup>18</sup> Stating that the 1996 state habeas proceeding resembled “a sparring match,” and that Gibson’s claims deserved “meaningful” review, Judge Bowen secured agreement from Georgia state court Judge Curtis Blount to consider a motion for a new habeas hearing, and from the state Attorney General’s Office not to oppose it.<sup>19</sup> When the time came, however, the State vigorously opposed Gibson’s motion, and getting the state court to hear Gibson’s habeas claims a second time would prove to be a challenge, even in the face of a farcical initial hearing.

#### *Second Petition in State Court*

In Georgia, any grounds for habeas relief not raised in the original habeas petition are deemed waived unless the petitioner can demonstrate that he “could not reasonably have raised” those grounds initially,<sup>20</sup> the so-called “successiveness” standard. Many facts demonstrated that Gibson could not have raised his ineffective assistance of counsel claim in his initial petition. Gibson was not represented by counsel when he filed his original habeas petition, a generic form pleading that contained no particularized allegations specific to Gibson’s claims. Moreover, while incarcerated, Gibson could not have conducted any proper investigation or discovery in order to develop his ineffective assistance claim. Finally, lacking access to counsel and handicapped by a borderline retarded I.Q., Gibson was effectively precluded from presenting evidence and argument on his habeas petition.

An expanding King & Spalding team continued to dig into the facts and record, looking for the best grounds on which to base new arguments. To cover all bases, the team looked beyond the confines of the ineffective assistance of counsel claim to determine whether entirely separate claims were available that were simply

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16. Rankin, *supra* note 3, at B1.

17. *Gibson VIII* at 2.

18. Transcript of Habeas Corpus Hearing, at 2-3, *Gibson v. Head*, CV300-013 (S.D. Ga. Sept. 8, 2000).

19. *Gibson VIII* at 2.

20. GA. CODE ANN. § 9-14-51 (1984).

unexplored or undiscovered when Gibson filed his original petition. Miraculously, an unexpected tip provided just the break that Gibson and his lawyers needed.

After months of investigating, combing through the trial record, consulting with the Georgia Resource Center, and strategizing, the team learned that Gibson's trial lawyer was simultaneously employed as a Special Assistant Attorney General for the State of Georgia while acting as Gibson's defense attorney in his capital case. Following up on that information, King & Spalding discovered that trial counsel continued working as an attorney for the State while representing Gibson in his capital trial and on appeal, and also during Gibson's initial habeas hearing, contrary to Georgia law<sup>21</sup> and a strict interpretation of that law issued by the Georgia Attorney General.<sup>22</sup> Moreover, trial counsel failed to disclose his conflict of interest to the court, the State, or even Gibson, despite an affirmative duty to do so. As appalled as we were by this discovery, we also knew we had learned the fact most critical to this stage of Gibson's case.

Gibson now had a strong argument that he could not reasonably have raised the grounds for a conflict of interest claim when he filed his initial habeas petition. Trial counsel never revealed his close relationship with the State to Gibson, and because the lawyer was court-appointed, there was certainly no reason for Gibson to suspect that such a conflict existed. Even King & Spalding only learned of the conflict through serendipity. The discovery became the "smoking gun" in our efforts to meet the successiveness standard to secure a new habeas hearing.

The conflict of interest claim was significant for another reason. If Gibson could demonstrate that the conflict of interest adversely affected trial counsel's performance, prejudice to his case would be presumed by the habeas court, and reversal would be automatic.<sup>23</sup> In Gibson's case, many facts strongly suggested that trial counsel was adversely affected by his conflicting interests. In addition to his woeful performance before and during Gibson's capital trial and sentencing:

- Counsel withdrew perfectly appropriate and legal subpoenas served upon expert witnesses, including employees of the state crime laboratory, after learning that the Attorney General's office was seeking sanctions against him because of the subpoenas. Counsel persisted in withdrawing the subpoenas

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21. GA. CODE ANN. § 45-15-30 (1984) ("...representation of a defendant in criminal proceedings by [an] assistant attorney general shall not constitute a conflict of interest if that assistant attorney general provides written disclosure of such appointment or designation to the defendant prior to accepting employment by that defendant or, when a court has appointed an assistant attorney general to represent an indigent criminal defendant, disclosures to the defendant and to the court, to be reflected in the record of that court, such appointment or designation as assistant attorney general." ). The record showed that none of these exemptions had been met.

22. 1984 Op. Att'y Gen. No. U84-27 (interpreting GA. CODE ANN. § 45-15-30 (1984) to mean that a Special Assistant Attorney General is completely barred from serving as defense counsel in "criminal cases in which the death penalty may be imposed" because such representation "may create impermissible conflicts of interest between the interests of the State of Georgia ... and the interests of the defendant and the criminal justice system, so as to make consent by the Attorney General to such multiple representation impossible." ).

23. See, e.g., *Wood v. Georgia*, 450 U.S. 261, 267-68 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 488-89 (1978); *United States v. Levy*, 25 F.3d 146, 152-57 (2d Cir. 1994); *Selsor v. Kaiser*, 22 F.3d 1029, 1032-33 (10th Cir. 1994).

even after the court expressed extreme reluctance at this course of action and explained that counsel could apply for funds to cover the cost of any sanctions.

- Counsel failed to cross-examine certain prosecution witnesses who gave testimony vulnerable to attack. For example, counsel failed to cross-examine an employee of the state crime lab who first testified that a shoe print was unidentifiable, and then testified that the print in question was similar to the tread on Gibson's sneakers.
- At the habeas hearing, Counsel offered testimony that was harmful to Gibson and helpful to the State. For instance, he stated that Gibson had a "better education" than the typical defendant, although school records, which he failed to obtain, would have shown that Gibson had an eighth grade education and horrendous grades.
- At the habeas hearing, Counsel misleadingly stated that he was "in private practice" at the time he represented Gibson, although he was in fact an acting Special Assistant Attorney General.
- Counsel requested in writing to the trial judge that the bill for his work not be made part of the record in the case because, "I see no reason to provide ammunition for the inevitable appellate claims."

After presenting all these arguments to the habeas court and losing, King & Spalding filed a lengthy and detailed Application for a Certificate of Probable Cause to Appeal in the Georgia Supreme Court. On June 21, 2002, the Georgia Supreme Court issued a one-paragraph opinion:

This Court hereby denies Gibson's application for certificate of probable cause to appeal on all of his claims except for the alleged conflict of interest of his trial counsel. As for the latter claim, the Court remands the case to the habeas corpus court for an evidentiary hearing to determine whether the claim is defaulted and, if not defaulted, whether it is meritorious.<sup>24</sup>

The decision was a tremendous and hard-fought victory for Gibson. In its decision, the Georgia Supreme Court acknowledged the seriousness of the claim and moved Gibson a gigantic step closer to securing an authentic evidentiary hearing on the issue. This time, Gibson would be represented by counsel.

Our involvement in the Gibson case gave us a unique opportunity to right a serious wrong that led to severe consequences. The satisfaction we felt after our involvement with the case was tremendous. But the case also drove home another point that is all too often taken for granted, even by those in our own profession—that there can be no constitutional rights without lawyers who step forward to protect them.

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24. *Gibson X* at 1.

## FIGHTING FOR LIFE AND JUSTICE IN ALABAMA: OBSERVATIONS FROM THE FRONT LINES

*William F. Abrams\**

I am the Co-Chair of the Intellectual Property Section at Pillsbury Winthrop LLP. My office is in Palo Alto, California and I work with a group of more than 200 Pillsbury lawyers around the world. I represent clients involved in disputes related to patents, trade secrets, copyrights, and trademarks. My clients are start-ups, mature public companies, educational institutions, and individuals. These cases usually are disputes over the ownership or use of ideas that are the core of their business. Quite often, these cases are “corporate death penalty” cases. If the client loses the intellectual property that is the basis for its existence or is found to be violating someone else’s rights, it could go out of business. I am the client’s counselor and trial lawyer in helping them to survive and grow.

In addition to “corporate death penalty” cases, I am very busy on real death penalty work. I represent two men in Alabama whose trials and convictions are, we believe, constitutionally defective, and on whose behalf we have filed petitions for relief under a “Rule 32” petition, Alabama’s equivalent of a habeas proceeding.<sup>1</sup> I am grateful for the opportunity to share these experiences with you. It allows me to highlight the extraordinary rewards of such an experience.

### *How I Got Started*

I have always believed that there is no endeavor more important or noble for a lawyer than to fight for a person’s life. This belief, like many lawyers my age (49), was inspired by the well-known book *To Kill A Mockingbird*.<sup>2</sup> The depiction of the lawyer Atticus Finch struggling against injustice and prejudice was extremely moving, particularly in the context of the civil rights movement and the struggles in the South that dominated the news of my youth. Indeed, the news was replete with images of towns like Birmingham and Selma, Alabama; Philadelphia and Oxford, Mississippi; and countless other places in the South where people demonstrated extraordinary courage and, in some cases, paid for this courage with their lives. I admired and envied the bravery of those who fought for justice. The landscape of the region and the times were engraved indelibly in my mind and heart.

I therefore went to law school intending to go into public service or possibly to teach. Instead, I ended up in a large firm and discovered that I liked working with interesting businesses and the people who run them. Protecting their rights and livelihoods against claims made by others is intellectually challenging and professionally satisfying. Despite this unexpected professional discovery, the

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1. ALA. R. CRIM. P. 32.

2. HARPER LEE, *TO KILL A MOCKINGBIRD* (London: Heinemann 1960).

lessons of my youth and desire for change remained. Consequently, I became active in pro bono work. In doing so, I focused my efforts on cases involving children whose interests are often, if not usually, without a voice in the legal system. Soon, I was involved in several significant cases, two of which were considered by the Supreme Court. My pro bono case load consisted of nearly 1000 hours a year, in addition to a full billable load. In spite of the demands on my time, I found the more I did pro bono work, the better and happier lawyer I was. While this work was satisfying, I still always thought about taking on a death penalty case, but believed it was too burdensome and impractical.

That opportunity came in late 1998 while I was immersed in a difficult and complex international patent case. The case was heading for a resolution after several years of intense litigation, and I faced the prospect of having extra time on my hands when it concluded. I realized that I needed a new challenge in a new area. I felt myself getting dull from the consuming technical case that was going to be wrapping up in the months ahead. Concurrent with that, a good friend and former partner of mine, Jon Streeter, had just achieved a great victory on a habeas case he had worked on for nearly 15 years.<sup>3</sup> I greatly admired Jon's steadfast resolve in his many years of toil and setbacks for a convicted murderer. I began to consider whether I could take on a case like his.

Coincident with these events, my son was working on a school project involving the death penalty, and his class, which was considering the book and movie *Dead Man Walking*,<sup>4</sup> asked me to help them understand the legal context of capital punishment. My research for the class further piqued my interest in the subject, solidifying my commitment to working on a death penalty case. Therefore, I started scouting for opportunities to get involved in a capital case.

Stephen Bright provided the opportunity I was searching for. I read an article that appeared in the *National Law Journal* that featured Stephen Bright, the head of the Southern Center for Human Rights in Atlanta.<sup>5</sup> The article profiled Steve on the occasion of his receiving the American Bar Association's Thurgood Marshall Award, which is the legal analog to the Nobel Peace Prize. The article detailed Steve's remarkable career. It showcased his selfless dedication to representing condemned men and women on death rows, people who were innocent or clearly incompetent to stand trial, and people who often had pathetically incompetent counsel.<sup>6</sup> I was so overwhelmed with Steve's courage, skill, and wisdom that I wrote him a fan letter. In the letter, I congratulated him on receiving the Award and told him how much I admired him and his life's work. I concluded the letter by offering my assistance. Although I had no idea how a lawyer in California could be of help in his cases in the South, I said that, if I could possibly provide any pro bono assistance, I'd be happy to help.

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3. *Dyer v. Calderon*, 141 F.3d 970 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1033 (1998).

4. HELEN PREJEAN, *DEAD MAN WALKING* (1st ed. 1993); *DEAD MAN WALKING* (PolyGram Video 1996).

5. Cynthia Cotts, *Trumpeting the Cause of Civil, Human Rights*, NAT'L L.J., Aug. 24, 1998, at C15.

6. *Id.*



A few days after I sent the letter I was in my office meeting with my client in the patent case I mentioned earlier, discussing a settlement proposal that was in the final stages. While my client reviewed a draft agreement, I looked at my e-mails and saw that one had just arrived from Steve Bright. I opened it and read Steve's message. It began by thanking me for my kind words. Then, to my surprise, he wrote, of course your help is needed on cases in the South. In a few minutes, the email continued, you are going to get a call from a person named Lis Semel, who is the Director of the ABA Death Penalty Representation Project in Washington, D.C. Her role, the email explained, is to obtain representation for men and women on death rows. Ironically, the letter concluded, she happens to be in San Francisco today, and I hope you have a few minutes to talk with her.

Within minutes after receiving the e-mail, my phone rang. It was indeed Lis. She was outside my office building and wanted to stop in and talk. I explained the situation to my client, who, knowing me well, said that he knew I would end up taking a case. I then arranged to visit with Lis. I learned from her that the ABA, recognizing the crisis of indigent men and women convicted of capital murder and sentenced to death, had formed the Death Penalty Representation Project in Washington, D.C. To combat the crisis, the ABA recruits lawyers and law firms to represent these individuals in post-conviction challenges as permitted by the Constitution. Lis, one of California's premier criminal defense lawyers, recruited by then ABA President Larry Fox to come to Washington to be the first Director of the Death Penalty Representation Project because of her expertise on death penalty matters, was sitting in my office to convince me to get involved. Lis was in California, making the rounds of firms to get them interested in taking on cases in Alabama, Mississippi, Texas, Georgia and other places where the need was greatest.

During our meeting, Lis outlined the details of the commitment. She explained to me, for example, that taking an Alabama case was quite different from a California death penalty case. Unlike a typical California case after all direct appeals are exhausted, where an enormous record would have been generated, a typical Alabama case would have a record that might fit into a box, maybe two. She further explained that many of the Alabama cases had had virtually no work done on them during trial and direct appeal. In fact, the lawyer doing the post-conviction phase was often presented with a blank slate in terms of investigation and strategy. The key to most of the cases, she concluded, was proving ineffective assistance of counsel under the Sixth Amendment.<sup>7</sup>

After considerable discussion with Lis about the scope of the task, my firm generously allowed me to take on a case. Once the decision was made, we began the process of deciding what case to take. Ultimately, we decided on Jimmy Davis,

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7. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court identified the rules governing the ineffective assistance of counsel defense.

Jr.<sup>8</sup> Because the case, *Jimmy Davis, Jr. v. State of Alabama*,<sup>9</sup> is still pending, I am unable to offer detailed information about our selection of the case.

Here is what I can tell you. One of the first things I did was to go to my dear and trusted friend and mentor, Jack Lahr of Foley & Lardner in Washington. I asked him if he would co-counsel the case. Jack had worked on the previously mentioned patent case with me, and I knew I was going to miss working with him. He was a professional and personal mentor to me, and I had much more to learn from him. Thankfully, Jack agreed. He enlisted a young associate, Joy Langford, to his Foley team. I also enlisted a young associate at my firm, Nicole Townsend, who became our key “go to” person on the Pillsbury team. We also received major support from the Bradley Arant firm in Birmingham; specifically, we are indebted to Paul Ware, Rich Sharff, John Harrell, and Hope Stewart for their invaluable contributions.

We began our work on Jimmy’s case in early 1999 and had our Rule 32 hearing in August 2002 in Calhoun County Circuit Court in Anniston, Alabama. The hearing consisted of a week of testimony by both expert and fact witnesses. The hearing was the culmination of several years of hard work in learning everything about the trial, the events leading up to and after the shooting, and the psycho-social history of Jimmy’s family going back over one hundred years. The case is under submission. I therefore must decline comment on our strategy and work product. What I can comment on, however, is the significance of the experience.

It was overwhelming to be with our client, Jimmy, for the week of the hearing and most of the preceding week. He was transferred from Holman State Prison in Atmore, Alabama to the county jail in Anniston for the week of the hearing. At the Anniston jail, we worked with him to prepare for the hearing. We had, of course, met with Jimmy many times at Holman during the years leading up to the hearing, but this was our first chance to see and talk with him everyday. Representing Jimmy in that courtroom every day was one of the most intense and penetrating personal experiences of my life. The stakes were and still are unspeakably high. Similarly, the drama and emotion were profoundly powerful. We had to confront the lawyer who was Jimmy’s appointed defense counsel during his trial, a lawyer who we accused of being wholly and constitutionally ineffective in his defense of Jimmy. That lawyer also happened to be, nine years after the trial, the district attorney in the adjoining county. Enhancing the intensity of the courtroom experience was the fact that the brother of the man who Jimmy was convicted of shooting sat through most of the hearing. Encountering him released a flood of powerful emotions. He firmly believed that my client had murdered his brother, a service station attendant, in cold blood and should be punished by execution. Conversely, I firmly believed that Jimmy had inadequate counsel at trial, that Jimmy was innocent, and that Jimmy,

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8. The citations to the Jimmy Davis, Jr. case are as follows: the original conviction and trial was in the Calhoun County Circuit Court in 1993. The affirmance of his conviction and sentence by the Alabama Court of Criminal Appeals is reported at *Davis v. State*, 718 So. 2d 1148 (Ala. Crim. App. 1997). The Alabama Supreme Court’s affirmance of the lower courts is reported at *Ex parte Davis*, 718 So. 1166 (Ala. 1998). The United States Supreme Court denied certiorari at *Davis v. Alabama*, 529 U.S. 1179 (1999). The post-conviction relief proceedings are pending in Calhoun County Circuit Court under Case No. CC-93-534.60.

9. No. CC-93-534.60 (Calhoun County Cir. Ct.).

in any event, had many mitigating factors that should have precluded imposition of the death penalty.

A few side notes about the positive aspects of the hearing are warranted. First, we were all very impressed by the professionalism and courtesy that all the Court staff showed us. The Court, the clerks, and the staff were extremely helpful, welcoming, and accommodating to us. This was so much appreciated, particularly when we were trying a hard case for an extended time a long way from home and office. Second, the Courthouse in Calhoun County, well over one hundred years old and beautifully restored, was an aesthetic marvel. In fact, it is one of the nicest places where I have tried a case. It is a restored building that looks like a courthouse should look, and the courtroom itself is elegant and majestic. The judges and lawyers of Calhoun County are lucky to have such a venue in which to practice.

#### *Next Case*

After Jimmy's case was argued, we knew that the next phases of his case would be "legal." That is, the factual part of the case that had dominated our efforts for several years would give way to the legal arguments that would govern the appellate process to follow.<sup>10</sup> While much work on Jimmy's case lay ahead, Nicole and I wanted to take on another case in Alabama in the meantime. Jack, who was approaching retirement at Foley, obtained his firm's agreement to support his involvement in a new case. We went back to the ABA Death Penalty Representation Project to find a new matter.<sup>11</sup> By this time, Lis had taken a job heading up the death penalty clinic at Boalt Hall, and Robin Maher, a very experienced litigation lawyer, had become the Director of the Death Penalty Representation Project. We worked with Robin, Bryan Stevenson, and Randy Susskind at Equal Justice Initiative in Montgomery to select a new case, *Melvin Davis, Jr. v. State of Alabama*.<sup>12</sup>

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10. Assuming that whatever side loses the Rule 32 phase would seek appellate review.

11. By the time Jimmy's case went to the Rule 32 hearing, Joy Langford had gone to Chadbourne & Parke in Washington, where she and a colleague, Katie Montgomery, worked hard on Jimmy's case. Joy did an outstanding job at the hearing doing difficult cross-examinations of many witnesses. The Chadbourne firm was extremely generous in its support of the case. Jack had brought on his team a young lawyer, Catherine Watson, who made important contributions to our effort.

12. The citations to the Melvin Davis, Jr. case are as follows: Davis' original conviction and sentence is at *Alabama v. Davis*, No. CC-98-131 (Montgomery County Cir. Ct. Aug. 27, 1998) [hereinafter *Davis I*]. The affirmance of his conviction and sentence by the Alabama Court of Criminal Appeals is reported at *Davis v. Alabama*, 804 So. 2d 1153 (Ala. Crim. App. 2001) [hereinafter *Davis II*]. The Alabama Supreme Court denied certiorari at *Davis v. Alabama*, No. 1001023 (Ala. June 21, 2001) [hereinafter *Davis III*]. The U.S. Supreme Court also denied certiorari at *Davis v. Alabama*, 534 U.S. 1024 (2001) [hereinafter *Davis IV*]. The initial denial of post-conviction relief is at *Davis v. Alabama*, No. CC-98-13160 (Montgomery County Cir. Ct. Aug. 2002) [hereinafter *Davis V*]. The subsequent denial of post-conviction relief is at *Davis v. Alabama*, No. CR-02-0729, 2003 WL 22220367 (Ala. Crim. App. Sept. 26, 2003) [hereinafter *Davis VI*], *rev'd* by the Alabama Supreme Court at *Ex parte Davis*, 2004 WL 226106 (Ala. Feb. 6, 2004) [hereinafter *Davis VII*].

Many wonder if our specialty is representing Davis, Jr.s. in Alabama. Again, Nicole and I were very grateful for Pillsbury's commitment, support, and generosity, particularly from our Chair, Mary Cranston, and our Managing Partner, Marina Park. And again, the Bradley Arant firm, with Rich Sharff and Hope Stewart leading the way, joined our team to provide counsel and help that is much

We filed a Rule 32 petition in October 2002.<sup>13</sup> The State moved to dismiss it, arguing that an intervening change in the time limit for filing the petition, from two years to one, made the petition untimely.<sup>14</sup> We felt that the application of the new, and largely silently promulgated, rule was unconstitutional. But the trial court granted the motion.<sup>15</sup> We appealed to the Alabama Court of Criminal Appeals, which heard the case on June 17, 2003, and issued a ruling on September 29, 2003, affirming the trial court.<sup>16</sup> We filed a petition for certiorari with the Alabama Supreme Court seeking review of the decision of the Alabama Court of Criminal Appeals' affirmance of the dismissal. On February 6, 2004, the Alabama Supreme Court not only granted certiorari, but issued a writ reversing the dismissal of the case and remanding it back to Circuit Court to proceed to hearing.<sup>17</sup> We are very gratified by the Alabama Supreme Court's decision and look forward to the opportunity to proceed with Melvin's case.

Meanwhile, my work has led me to teach a class at Stanford on the death penalty. This adds to my course load of teaching an undergraduate class on children and the law and advising numerous students as a faculty advisor. What is so rewarding for me is that a number of my students have gone on to work on death penalty cases at organizations such as the Southern Center for Human Rights with Steve Bright in Atlanta, Texas Defenders Inc. in Austin with John Niland, and the ABA Death Penalty Representation Project with Robin and Lis. Helping to channel the passion of young people dedicated to this important cause is a profound joy and blessing.

### *Closing Thoughts*

I am very grateful for the opportunity to work on capital cases. I feel that I have made important contributions to the administration of justice and the enforcement of the Constitution. I am a much better lawyer from this experience. This is the result of working with extraordinary people, like Steve Bright, Bryan Stevenson, Randy Susskind, Lis Semel, Robin Maher, and my colleagues and partners Jack Lahr, Nicole Townsend, Joy Langford, Rich Sharff and Hope Stewart, and our many expert witnesses and consultants. I am also a much better father to my children, who are beneficiaries of the knowledge I have gained about life and people. I have gained understanding about people in circumstances that are very different from mine. This, in turn, has given me a better sense of perspective and direction. I strongly encourage everyone to try to take on one of these cases.

From a professional perspective, I strongly encourage the same. I believe a person accused of a capital crime should have the same vigorous representation in Alabama as in California. A black person accused of killing a white person should have the same chance and effectiveness of counsel as a white person accused of killing a black person. I do not presume to know how I would feel if a family

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needed.

13. *Davis V*, No. CC-98-13160.

14. *Id.*

15. *Id.*

16. *Davis VI*, No. CR-02-0729.

17. *Davis VII*, 2004 WL 226106.

member were the victim of a heinous murder or what would be an appropriate punishment. But when many people accused of capital crimes are provided trial counsel who are wholly, if not pathetically, inadequate to represent them, with no resources for investigation, all of us are at risk. The Constitution is simply not being applied. Therefore, for the sake of the Constitution, do take on one of these cases. Call Robin Maher, Steve Bright, or Bryan Stevenson if you are interested. And don't hesitate to call me or my colleagues for help and counsel—you'll be the first call we will return.

## JUDICIAL ADMINISTRATION OF THE DEATH PENALTY

John H. Schafer\*

IT is a capital crime in Alabama to shoot and kill someone in the course of a robbery attempt.<sup>1</sup> Anthony Keith Johnson<sup>2</sup> was indicted and charged with “intentionally caus[ing] the death of Kenneth Cantrell by shooting him with a pistol” while attempting to rob him.<sup>3</sup> Under Alabama law, this indictment included, without alleging, the alternative charge that Johnson was guilty as an accomplice in the killing of Cantrell by another.<sup>4</sup> Under both charges, the State had the burden of proving beyond a reasonable doubt that Johnson specifically *intended* that Cantrell be killed.<sup>5</sup>

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\*. Partner, Covington & Burling, Washington, D.C.

1. ALA. CODE § 13A-5-40(a)(2) (2003).

2. Johnson was originally convicted and sentenced in the Morgan County Circuit Court on November 8, 1985 [hereinafter *Johnson I*]. The affirmance of his conviction and sentence by the Court of Criminal Appeals of Alabama is reported at *Johnson v. State*, 521 So.2d 1006 (Ala. Crim. App. 1986) [hereinafter *Johnson II*]. The Supreme Court of Alabama denied Johnson’s petition to review the judgment of the Court of Criminal Appeals. *Ex parte Johnson*, 521 So.2d 1006, 1018 (Ala. 1988) (per curiam) [hereinafter *Johnson III*]. The United States Supreme Court also denied certiorari. *Johnson v. Alabama*, 488 U.S. 876 (1988) [hereinafter *Johnson IV*]. Johnson moved the Court for a rehearing on the writ, but his motion was denied. *Johnson v. Alabama*, 488 U.S. 976 (1988) [hereinafter *Johnson V*]. Upon exhaustion of his direct appeals, Johnson petitioned for a post-conviction judgment of acquittal in the Morgan County Circuit Court, which petition was denied on May 23, 1991. *Johnson v. State*, 612 So.2d 1288, 1291 (Ala. Crim. App. 1992) [hereinafter *Johnson VI*]. The Alabama Court of Criminal Appeals ordered the circuit court to file a more specific order of denial, which was in fact filed, but it denied Johnson’s appeal of that more specific order. *Id.* at 1304. The Supreme Court of Alabama denied Johnson’s petition for review of that decision. *Ex parte Johnson*, No. 1920371, 1993 Ala. LEXIS 303 at \*1 (Ala. Feb. 19, 1993) [hereinafter *Johnson VII*]. Johnson’s petition for writ of habeas corpus was denied by the federal district court for the Northern District of Alabama. *Johnson v. Nagle*, 58 F. Supp. 2d 1303 (N.D. Ala. 1999) [hereinafter *Johnson VIII*]. The Eleventh Circuit Court of Appeals affirmed at *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001) [hereinafter *Johnson IX*], *reh’g denied* 273 F.3d 1123 (11th Cir. 2001) (en banc) [hereinafter *Johnson X*]. Just months before his execution, the U.S. Supreme Court denied Johnson’s writ of certiorari to review the denial of habeas corpus. *Johnson v. Nagle*, 535 U.S. 926 (2002) [hereinafter *Johnson XI*].

3. *Johnson II*, 521 So.2d at 1007.

4. ALA. CODE § 13A-5-41 (2003) (“[T]he jury may find a defendant indicted for [capital murder] not guilty of the capital offense but guilty of a lesser included offense or offenses.”). Alabama’s capital murder statute, section 13A-5-40, indicates that murder as defined in section 13A-6-2(a)(3) may be a lesser included offense of the capital offenses described earlier in that section. ALA. CODE § 13A-5-40(b) (2003). Section 13A-6-2(a)(3) states that a defendant has committed murder if “[h]e commits or attempts to commit ... robbery in any degree ... and, in the course of and in furtherance of the [robbery] he, or another participant if there be any, causes the death of any person.” ALA. CODE § 13A-6-2(a)(3) (2003) (emphasis added).

5. *Beck v. State*, 396 So. 2d 645, 661-62 (Ala. 1980) (noting that “the legislature has spelled out specifically what offenses it considers to be capital offenses” and that each of those offenses “requires an *intentional killing* with aggravation, and not some crime other than homicide under aggravated circumstances”); *Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982) (“The accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying

The jury found Johnson guilty of the crime “as charged in the indictment” and, after a short sentencing hearing, recommended by a 9 to 3 vote that Johnson not be sentenced to death.<sup>6</sup> The trial judge refused to accept the jury’s recommendation and sentenced Johnson to death.<sup>7</sup> This conviction and sentence were affirmed on appeal.<sup>8</sup> Both the Alabama Court of Criminal Appeals and the trial court understood that Johnson had been convicted of actually shooting and killing Cantrell.

However, there was no evidence that Johnson had done so. The State admitted this early in the post-conviction proceedings. It sought in those proceedings to justify its conviction and sentence on the ground that Johnson had participated with the actual killer in the shooting of Cantrell and was therefore guilty as an accomplice.

Even more problematic, none of the three lawyers appointed by the State to represent Johnson during the original trial and for the direct appeal was aware that, under Alabama law, the State *had* to prove intent to kill in order to secure a conviction for capital murder. They believed, instead, that Johnson was guilty if he had been at the crime scene to participate in the robbery attempt. Their misunderstanding of the law was communicated to the jury during their closing argument.

You are going to have to find that the State has proved an intentional killing occurred, a forcible robbery or intent to rob, and, ... that Keith was one of the men that was out there.<sup>9</sup>

And, as the other trial counsel testified in post-conviction proceedings, “You know, we looked at it like, if he [Johnson was] there to rob the man and the man got killed, he is just as guilty as everybody.”<sup>10</sup> Guided by this view of the law, defense counsel never challenged the State on the issue of intent. In the post-conviction proceedings, the State argued that the jury could have found unlawful intent from the State’s evidence that Johnson had been one of two who engaged in a shootout with Cantrell. Mrs. Cantrell’s testimony led to the opposite conclusion, however. But her testimony was never argued to the jury, and never even mentioned in the closing argument or elsewhere. In short, there was no jury trial on the only fact issue in the case—whether Johnson had been one of the two men engaged in a shootout with Cantrell.

Johnson’s post-conviction petitions were denied by four courts writing three opinions.<sup>11</sup> This result raises substantial doubt as to the ability of the judiciary to assure that persons are not put to death in America in violation of their constitutional rights.

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felony.”).

6. *Johnson II*, 521 So. 2d at 1007, 1017.

7. *Id.* at 1007.

8. *Id.* at 1015.

9. *Johnson VI*, 612 So. 2d at 1299.

10. Transcript of March 20, 1996 Evidentiary Hearing at 35 [hereinafter Evidentiary Hearing]; *Johnson VIII*, 58 F. Supp. 2d at 1337 (“This court’s evidentiary hearing made it fairly clear that counsel simply did not think much about the intent issue at all.”).

11. See cases cited *supra* note 2.

The judiciary found no constitutional flaw in defense counsel's failure to put the intent issue to the jury. This piece describes the different ways in which this implausible result was reached. More importantly, it is intended to suggest that, despite public perception, the judiciary is not the guarantor of fairness in the administration of the death penalty that the polls indicate the public believes it to be.

*The Trial Was Sham Because the Only Fact Issue Was Not Litigated*

On a Sunday evening in March 1984, four men decided to rob Kenneth Cantrell, a jewelry dealer. One of the men called Cantrell, notifying him that they wanted to buy some jewelry. Cantrell agreed to meet with the men at his home. When he hung up the phone, he had his wife get him his gun.

Mrs. Cantrell, the only eyewitness, testified that when the men arrived, two of them forced their way into the house. A gun fight ensued in which Cantrell was killed. Mrs. Cantrell then testified that when the shooting appeared to be over one of the men called to someone outside. "Come on in, Bubba, we have got him." Almost simultaneously, Cantrell fired one last shot, and someone said "Oh."

Mrs. Cantrell then testified as follows:

Q. Now, and your husband fired one last shot, is that correct?

A. That is correct.

Q. How long after that was it that you heard them leave the house?

A. It didn't take them long after that to start moving over further towards the door.

Q. Further towards the door?

A. That is right.

Q. So neither one of them was at the door when your husband fired the last shot.

A. No. They wasn't.

Q. They were not?

A. No.<sup>12</sup>

The State then proved that Cantrell's last shot had passed through some glass in the entrance door, hit Johnson on the right side of his back, which indicated that he may have been entering the house. The refractive index of the glass taken from the bullet in Johnson's back matched the refractive index of some of the glass in the entrance door.

The State's post-conviction claim was that Johnson was not the first robber who fired the shots that killed Cantrell, but was the second robber who went into the house and participated in the shooting. However, the evidence established something different. The State's glass evidence, and Mrs. Cantrell's testimony established that Johnson had been shot when he was behind the entrance door, possibly entering the house, while the two robbers who engaged in the actual shooting were still in the living room. This meant that Johnson was not one of the two men who had engaged, at least the jury could so find, in the shooting of Cantrell.

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12. Evidentiary Hearing Transcript at 385-86. See also *Johnson VIII*, 58 F. Supp. 2d at 1331.



There was other evidence that could have been cited to support this finding. Mrs. Cantrell had seen the two robbers who engaged in the shooting. Nevertheless, she had not identified Johnson as one of them. Hair found in a cap she had seen on the second man was not Johnson's hair. Mrs. Cantrell testified that one of the robbers she had seen was wearing brown boots. Yet, the boots found in Johnson's possession when he was arrested were not identified by Mrs. Cantrell. More importantly, the soles of those boots did not contain any glass from the entrance door. Mrs. Cantrell testified that the second robber had a "shiny" gun. As with the boots, there was no match with the gun found in Johnson's possession. Johnson's gun was found by the State's expert to be unconnected to the crime.

Even more striking, the State had "little solid evidence" that Johnson had been one of the shooters.<sup>13</sup> It relied on questionable testimony from a party not involved in the crime who claimed that Johnson had, a few days after the crime, admitted participation in the shooting. The State's "main argument" had been that two men had engaged in the shooting. Since only two men were at the crime scene, and Johnson was one of them, the State argued, Johnson was one of the two shooters.<sup>14</sup>

Both the prosecutor and the two defense counsel knew that there had been more than two men at the crime scene. In spite of this knowledge, however, this fact was not presented at trial. That is, defense counsel never used Mrs. Cantrell's testimony to argue that Johnson had not been one of the two men engaged in the shooting, even though the State's claim that Johnson had been the second robber clearly posed a substantial unresolved issue of fact. Counsel, in effect, conceded the issue, because counsel did not discern the legal differences between just being present at the crime scene and participating in the shooting.

*Reasons Given by the Courts for Endorsing the Trial and Its Results Are Unpersuasive*

As the previous section indicates, there was a substantial factual issue as to the identity of the second robber. This issue, of course, was key to whether the State had proved Johnson intended a killing and, hence, his guilt or innocence. Even though Johnson was not afforded a jury trial on this issue, not one of the courts in which we argued for habeas relief expressed concern about sending Johnson to his death on the basis of such a truncated jury trial, in which the principal fact issue was not put to the jury.

First, the Alabama trial court, unmoved by the fact that the principal factual issue in the case was never presented to the jury, denied Johnson's petition without opinion.<sup>15</sup> The Alabama Court of Criminal Appeals then held that counsel's failure to argue that Johnson was not one of the two participants in the shooting was within the range of acceptable conduct.<sup>16</sup> Instead of arguing that Johnson had not been one of the shooters, counsel had argued that the State had failed to prove that Johnson was at the crime scene. Not to do so, according to the court, was a "reasoned,

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13. *Johnson VIII*, 58 F. Supp. 2d at 1330.

14. *Id.*

15. *Johnson VI*, 612 So. 2d at 1291.

16. *Id.* at 1297.

strategic decision.”<sup>17</sup> The court reasoned that the alternative would require counsel to assert inconsistent arguments “such as that Johnson was not present at the crime scene and alternatively that Johnson was present but did not intend that the victim be killed.”<sup>18</sup>

This rationale for abandoning the intent issue is unpersuasive. This rationale does not take into account of the fact that counsel in fact did not ever argue at the trial that the State had not proved that Johnson had been at the crime scene. Moreover, there is nothing “alternative” or “inconsistent” about arguing that the State had to prove both that Johnson had been at the crime scene, and that he had intended a killing. Indeed, defense counsel did just that in its closing argument when it told the jury that, if a crime requires proof of eighteen facts and the State proves only seventeen of them, the verdict must be for the defendant.<sup>19</sup> Counsel, in fact, never contested the State’s claim that Johnson had been at the crime scene. For this reason alone there would have been nothing “alternative” or “inconsistent” about challenging the State’s claim that Johnson had engaged in the shooting.

The foregoing demonstrates that no reasonably competent attorney would abandon the argument that Johnson had not been one of the shooters. The State’s proof that Johnson had been hit by Cantrell’s last shot was overwhelming proof that Johnson had been there. Counsel knew of this evidence two or three weeks prior to trial.<sup>20</sup> No rational lawyer could sensibly be found to have made a “reasoned, strategic” decision to abandon the sound argument offered by Mrs. Cantrell’s testimony in order to preserve the hopeless argument that Johnson had not been at the crime scene. Also, the record is overwhelming that counsel thought the key issue was whether the State could prove that Johnson had been there. With this muddled view of the law, it is impossible rationally to find that counsel had exercised a “reasoned, strategic” judgment in consciously abandoning the argument set up by Mrs. Cantrell’s testimony. The plain fact is, as the federal district court acknowledged, “counsel did not recognize the import of ... Mrs. Cantrell’s testimony,”<sup>21</sup> instead believing that the determinative issue was whether Johnson had been there.

Not only did the Alabama Court of Criminal Appeals hold that Johnson’s counsel was justified in making just the one argument, it also implied that the decision was wise, reasoning that counsel had no additional evidence to offer absolving Johnson of the alleged shooting.<sup>22</sup> This conclusion ignores the fact that the issue to be posed was only whether the State had carried its burden of proof in light of Mrs. Cantrell’s testimony to the contrary. Nothing more was needed to make that failure-of-proof argument. That is, Johnson’s counsel was under no legal obligation to establish that Johnson was not a shooter. The state had the burden on that issue. Even more problematic, the court held that Mrs. Cantrell had never testified that there were more than two men at the crime scene. Although Mrs. Cantrell never affirmatively

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17. *Id.*

18. *Id.* at 1296.

19. Transcript at 770, *Johnson I.*

20. Evidentiary Hearing Transcript at 40.

21. *Johnson VIII*, 58 F. Supp. 2d at 1337.

22. *Johnson VI*, 612 So. 2d at 1297.

testified in this manner, the court's finding takes no account of her testimony about the call made to "Bubba." In light of these two findings, the court concluded the petitioner had not shown that prejudice resulted from counsel's failure to argue Mrs. Cantrell's testimony.<sup>23</sup> The court did not consider the impact of its decision on Johnson's constitutional right to a jury trial.

The next court to examine Johnson's case, the U.S. District Court, noted that there was "little solid evidence" that Johnson had been one of the participants in the shooting.<sup>24</sup> The court continued, explaining that "if both Mrs. Cantrell's and the State's physical evidence [that Johnson had been hit by the last shot while behind the entrance door] were believed, Johnson could not be the second man."<sup>25</sup> It ruled, however, that Johnson was not entitled to have the jury decide this factual issue.<sup>26</sup> In its view, "[t]he balance of the available evidence" pointed to two intruders with Johnson as one of them, and, therefore, according to the court, Johnson "suffered no constitutional deprivations for want of such a defense."<sup>27</sup> What the court did in reaching its conclusion was to weigh Mrs. Cantrell's testimony against the "little solid evidence" that Johnson was a participant in the shooting. Assuming the jury would have weighed the evidence as the court did, Johnson was not prejudiced by not having Mrs. Cantrell's testimony considered by the jury.

While there was the testimony from an individual who claimed that Johnson had admitted to committing the crime, as well as evidence that several shots were fired through the entrance door, there is no reason to believe that the jury would have found this evidence to outweigh Mrs. Cantrell's testimony. In fact, just the opposite is probably true. The testimony came from David Lindsey, a disreputable individual, and the jury would have had no reason to find his testimony more reliable than Mrs. Cantrell's. Indeed, Mrs. Cantrell's testimony was consistent, clear, and forthright. There is no apparent reason why the fact-finder would give less weight to her testimony than to that of Lindsey. The District Court certainly provides no reason why it would. There is, then, no basis in the trial record for concluding that Johnson's right to a jury trial was not prejudiced by counsel's failure to argue the line of defense suggested by Mrs. Cantrell's testimony. In addition to reaching a factually incorrect decision, the court made an even more egregious error by weighing the evidence in the first place. Weighing conflicting evidence is, of course, a function of the jury, not of a court sitting in review years later.

The last court to examine Johnson's appeal, the Eleventh Circuit Court of Appeals, produced a similarly disappointing decision.<sup>28</sup> The court of appeals initially ruled that it was not constitutional ineffectiveness for counsel to have decided before trial to rely on the State's obligation to prove that Johnson had been present at the crime scene. Johnson had never argued that it was. Johnson's claim was that counsel should not have abandoned the issue of whether Johnson had been a participant in the shootout. The court does not address this question. In approving

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23. *Id.*

24. *Johnson VIII*, 58 F. Supp. 2d at 1330.

25. *Id.* at 1331.

26. *Id.* at 1344.

27. *Id.*

28. *Johnson IX*, 256 F.3d at 1194.

counsel's choice of issue, the court does not acknowledge the overwhelming evidence of counsel's misperception of the law that led them to believe that Johnson would be found guilty of capital murder if the jury found he had been at the crime scene. In this context, it is difficult to see that the choice of issue had been an informed choice. The court also fails to acknowledge the hopelessness of the "out there" argument in view of the State's evidence that the bullet in Johnson's back had glass from the Cantrell door on it when it was extracted from Johnson's back. The court deals with the glass evidence only by mistakenly finding that it was not known to counsel until "the eve of trial."<sup>29</sup> It fails to take into account counsel's testimony that it was known to them two or three weeks before trial. As counsel acknowledged, the glass evidence made the chance for a successful "not there" argument "very dim."<sup>30</sup>

Even more problematic is the lack of support for the court's remarkable conclusion that "[e]ven [glass] evidence ... did not make unreasonable a defense strategy based on Johnson's [supposed] absence from the [crime] scene."<sup>31</sup> It did not take account of the minimal prospects for this argument or counsel's abandonment of the intent issue, nor does it ever acknowledge the overwhelming evidence of defense counsel misunderstood the law.<sup>32</sup>

In addition to the inadequacies mentioned above, the court of appeals then dismissed the claim that Johnson's counsel inappropriately ignored Mrs. Cantrell's testimony that Johnson was not one of the shooters.<sup>33</sup> The court was not "persuaded" that counsel's failure to do so evidenced professionally incompetent assistance.<sup>34</sup>

According to the Eleventh Circuit, the conclusion that Johnson was not constitutionally entitled to have jury consideration of Mrs. Cantrell's exonerating testimony was justified by three considerations. First, the court reasoned that the relevant testimony "was very brief, not altogether clear, and at odds with other portions of her account of the incident."<sup>35</sup> Moreover, the court noted that not "every reasonably competent attorney would have realized or attempted to take advantage of ... Mrs. Cantrell's testimony."<sup>36</sup> However, the testimony was not "very brief." It was repeated by defense counsel, and was completely clear in its meaning. Additionally, the court does not say what other testimony was "at odds" with the cited testimony, nor is there anything in Mrs. Cantrell's other testimony that is "at odds" with her placement of the two shooters when Mr. Cantrell's last shot was fired. Finally, there is no reason at all why any relatively competent attorney who

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29. *Id.* at 1180 n.12.

30. Transcript at 632, *Johnson I.*

31. *Johnson IX*, 256 F.3d at 1180 n.12.

32. Defense counsel thought they had to convince the jury that Johnson had not been proved to have been present. Evidentiary Hearing Transcript at 33-34, 35, 38-39, 67-68. That is, they testified that they thought that if the jury found Johnson had been there, a conviction would follow—that, contrary to Alabama law, the felony murder doctrine would supply the necessary proof of intent to kill. *Id.* at 33-35, 38-39, 67-68.

33. *Johnson IX*, 256 F.3d at 1180.

34. *Id.*

35. *Id.*

36. *Id.*

is cognizant of the law would not have realized the potential of the testimony and used it to challenge the adequacy of the State's proof.

The court advanced a second justification for excusing counsel's failure to use Mrs. Cantrell's testimony, stating that counsel had already committed themselves to the defense that "Johnson was not there," and shifting to a lack of intent argument would be "risky" because of possible adverse jury reaction.<sup>37</sup> While this may be a logical argument in the abstract, there is nothing in the record that evidences such a commitment.<sup>38</sup> The Court of Appeals, however, cites a finding by the District Court that counsel, in their opening statement, had somehow committed themselves irrevocably to argue only the "not there" line of argument.<sup>39</sup> This citation does not support the commitment justification. Instead, it supports the opposite conclusion because it only records defense counsel's testimony that he could not recall what his co-counsel said in the opening statement.<sup>40</sup> Not only is there no factual evidence to support the commitment argument, it is unsound for other reasons. Specifically, proposing the other argument is not too "risky" because all that had to be said was that Mrs. Cantrell's testimony raised reasonable doubt that she had seen Johnson at the crime. In fact, defense counsel never argued at the trial that the State had failed to prove that Johnson had been at the crime scene, so it is irrational to subscribe to this excuse for counsel's failure to argue the exculpatory testimony.

The final reason cited by the Court of Appeals was that, not only did petitioner lack evidence that the State had not proved beyond reasonable doubt that Johnson participated in the shooting, but conversely, the State had facts demonstrating that Johnson *was* involved in the shooting.<sup>41</sup> The court does not indicate why this is relevant nor does it identify such supposed facts. It appears to be the same argument advanced by the District Court that there was no prejudice to Johnson because the jury would have found against him anyway. As discussed above, this kind of judicial fact-finding is no basis for foreclosing Johnson's right to a fair jury trial.

The jury's function, of course, is to assess the credibility of witnesses, to weigh their conflicting testimony, and to resolve what conflicts need to be resolved. The court closed this part of its discussion noting that, in its view, under *Strickland v. Washington*,<sup>42</sup> the question is not "what the best lawyers would have done," or "what most good lawyers would have done," but "whether some reasonable lawyer ... could have acted ... as defense counsel acted."<sup>43</sup> We doubt that any lawyer could be called reasonably competent who failed to use exonerating testimony to support a failure of proof argument because he could rely only on one piece of evidence, or because the facts gave the State an opposing argument.

*The Courts Sent Johnson to His Death Without According Him a Fair Trial*

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37. *Id.* at 1180-81.

38. All trial proceedings except opening statements were transcribed.

39. *Johnson IX*, 256 F.3d at 1180-81 (citing *Johnson VIII*, 58 F. Supp. 2d at 1344).

40. Evidentiary Hearing Transcript at 24-25.

41. *Johnson IX*, 256 F.3d at 1181.

42. 466 U.S. 668 (1984).

43. *Johnson IX*, 256 F.3d at 1181 (citing *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)).

The trial was a charade right out of Lewis Carroll. From a distance, there appeared to be a trial. Everyone acted as they would act in a real trial. But the determinative issue for jury decision wasn't tried, or even mentioned. Nevertheless, Johnson was put to death following his conviction and sentence, just as if the trial had been bona fide and the jury had decided the guilt or innocence issue after it had been fully argued.

Judicial endorsement of this parody is very troublesome and exposes the minimal utility of the tests laid down in *Strickland*, which measures compliance with the effective counsel guarantee of the Sixth Amendment.<sup>44</sup> The courts handling Johnson's claim refused to inquire whether there had been "meaningful adversarial testing" of the State's claim.<sup>45</sup> There obviously had not been such adversarial testing; there had been no testing at all. Instead, the courts avoided dealing with this test of effectiveness by resorting solely to *Strickland*—whether the attorney conduct had been below professional standards, and, if so, whether it was reasonably probable that the conduct had changed the result of the trial.

Using *Strickland*, the main issue was avoided and never answered. Approval of the surprising result—that no constitutional issue was raised in denying Johnson a jury trial on the fact issue that determined guilt or innocence—could be achieved by never considering it. Defense counsel's mistakes could be brushed over by creating a fictional lawyer who "could" have done the same thing. This approach, which essentially requires subjective judgments by the judiciary to determine the appropriateness of attorney conduct, is not subject to effective review and control.

The inadequacies of such an approach become apparent when juxtaposed with the court's acceptance of the senseless actions of defense counsel in this case. It is utterly misleading, for instance, to review counsel's actions in this case as if they were the result of deliberate decision-making informed by a knowledge of relevant law. The record shows overwhelmingly that counsel's reliance on the "not there" line of argument was the direct product of counsel's belief that Johnson would be convicted if the jury found that he had been at the crime scene. Counsel made no "reasoned, strategic" decision to abandon the intent issue. The truth is the courts refused to take into account the fact that defense counsel "simply did not think much about the intent issue at all."<sup>46</sup>

Johnson has gone to his death without receiving a full and fair jury trial on the only issue his case presented. The issue of his guilt or innocence was withdrawn from jury determination by his counsel, and the habeas courts denied relief. The decisions and opinions supporting this leave scant room for the public to retain its confidence that the judiciary can administer the death penalty objectively, fairly, and accurately. This inability to administer the death penalty with any sort of fairness or objectivity can be expected with the malleability of the *Strickland* standard, coupled with Congress' failure to pass legislation that defines with particularity the level of competence required of state-appointed counsel, or how to measure the impact of attorney's mistakes on the result of the trial and appeal. In fact, in some

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44. *Strickland*, 466 U.S. at 684-85.

45. *United States v. Cronin*, 466 U.S. 648, 659 (1984).

46. *Johnson VIII*, 58 F. Supp. 2d at 1337.

cases, the court, not the facts, largely affects the result of the habeas petition, thus adding another element of chance to the capital punishment mosaic.

The judicial performance in this case brings these stark realities into focus. Keith Johnson's death demonstrates the need to intensify the current debate over the compatibility of the death penalty with American values. The State knows who the other three would-be robbers were, including Cantrell's killer, and has never prosecuted any of them. Keith Johnson should not have been killed by the State. His sentence of death was unconstitutional under recent authority.<sup>47</sup> His conviction should not have withstood constitutional challenge. He was an intelligent, generous man who thought only, so far as I could tell, about the welfare of others. He was no threat to society, and his execution was mindless. If his death calls attention to the inadequacies of the judicial process or intensifies the current debate, perhaps my friend Keith will not have died in vain.

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47. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

## REPRESENTING JOHNNY LEE GATES

Ronald J. Tabak\*

### *Becoming Involved*

I first became involved in the representation of Johnny Lee Gates in 1985.<sup>1</sup> At that time, George H. Kendall, then with the American Civil Liberties Union of Georgia, asked me if I would handle Mr. Gates' appeal in the United States Court of Appeals for the Eleventh Circuit if the United States District Court dismissed Mr. Gates' petition for a writ of *habeas corpus*. I agreed to do so. I had a bit over two years experience in representing death row inmates, all of it *pro bono*, and virtually all of it appellate briefing and argument. I had met Mr. Kendall when preparing for oral argument in my first capital punishment case. Due to the fact that the Federal District Judge apparently lost track of Mr. Gates' case, it was not until 1988 that I briefed and argued his appeal in the Eleventh Circuit.<sup>2</sup> I was by then at my present firm: Skadden Arps Slate Meagher & Flom LLP.

As matters have turned out, I have continued, along with Mr. Kendall, and later also with Gary Parker, representing Mr. Gates for eighteen years. Our work culminated in a November 2003 trial regarding his mental retardation<sup>3</sup>—a trial that ended in a mistrial followed by an agreement under which Mr. Gates, who has served on Georgia's Death Row since 1977 for a crime he probably did not commit, is no longer in danger of being executed.

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1. Gates was originally convicted and sentenced at *State v. Gates*, No. 38355 (Muscogee County Cir. Ct. Nov. 30, 1977) [hereinafter *Gates I*]. The affirmance of his conviction and sentence by the Georgia Supreme Court is reported at *Gates v. State*, 261 S.E.2d 349 (Ga. 1979) [hereinafter *Gates II*]. The United States Supreme Court denied certiorari. *Gates v. Georgia*, 445 U.S. 938 (1980) [hereinafter *Gates III*]. The state habeas corpus petition was denied in an unpublished opinion on Jan. 16, 1981, in the Superior Court of Butts County, Georgia. The Georgia Supreme Court denied the application for probable cause to appeal without a written opinion on May 14, 1981. The U.S. Supreme Court denied certiorari. *Gates v. Zant*, 463 U.S. 1213 (1983) [hereinafter *Gates IV*]. The U.S. Supreme Court also denied the application for rehearing. *Gates v. Zant*, 463 U.S. 1249 (1983) [hereinafter *Gates V*]. After Mr. Gates exhausted all state remedies, the Middle District of Georgia denied all relief in an unpublished opinion on Sept. 12, 1985. The timely motion for amendment of the judgment was subsequently denied in an unpublished order on Oct. 8, 1987. The motion for a certificate of probable cause was granted on Nov. 9, 1987. The habeas corpus appeal decision denying relief is reported at *Gates v. Zant*, 863 F.2d 1492 (11th Cir. 1989) [hereinafter *Gates VI*]. The petition for rehearing was also denied. *Gates v. Zant*, 880 F.2d 293 (1989) (per curiam) [hereinafter *Gates VII*]. The U.S. Supreme Court denied certiorari. *Gates v. Zant*, 493 U.S. 945 (1989) [hereinafter *Gates VIII*]. *State v. Gates*, No. 38355 (Muscogee County Cir. Ct. Nov. 2003) [hereinafter *Gates IX*].

2. *Gates VI*, 863 F.2d at 1492.

3. *Gates IX*.



*Immediate Skepticism About Gates' Guilt*

In preparing to write the opening appellate brief, I reviewed the record of the trial,<sup>4</sup> the direct appeal,<sup>5</sup> the state post-conviction proceeding,<sup>6</sup> and the federal district court proceeding.<sup>7</sup> One thing was apparent from the beginning: the evidence upon which the jury convicted Mr. Gates and sentenced him to death was extremely questionable, although it was challenged little, if at all, at his trial.

Mr. Gates was convicted of the murder and rape of Katharina Wright on November 30, 1976, in Columbus, Georgia. Ms. Wright was killed in her apartment in the middle of a weekday. Initially, the police had the following information: a woman who resided in another apartment in the complex reported seeing a white man running away from the building at about the time of the killing. A man who resided in an apartment on the lower floor of the complex said that over an hour before the killing, a black man, described as about 5 foot 9 or 5 foot 10, and weighing about 170 pounds, had come to his apartment, explained he was from the gas company, and asked if the tenant would like his gas turned off. The police searched the Wrights' apartment for fingerprints but found none from anyone other than the victim and her husband.

Later, a white man named Lester Sanders was found fondling the victim's body in the mortuary. Police testified to a grand jury that Mr. Sanders had begun confessing to the murder and in doing so had told them something only the murderer could know and that the police had not noticed: that when killed, Ms. Wright was tied to a bedroom door. The police testified that they had returned to the scene and, for the first time, saw blood on the door. The grand jury had not indicted Mr. Sanders, for reasons that never became clear.

Ms. Wright's November 1976 murder was unsolved as of January 1977 when Johnny Lee Gates, then 21 years old, was arrested along with two other men while attempting to rob a store. The police asserted that an informant named James Albert Taylor told them that in November 1976, Mr. Gates had borrowed Taylor's .32 caliber gun and later had claimed he had killed Ms. Wright. Taylor allegedly said that he had thrown the gun away in a creek after Gates returned it. Later, the police found the gun, test-fired it, and concluded that it could not have been used in Ms. Wright's killing. In the meantime, they had gotten Mr. Gates to confess to the killing.

Mr. Gates' confession was typed up by the police. He also confessed on a videotape that, for the first time in the history of the Columbus Police Department, was recorded at the crime scene. According to the confessions, Gates:

- dressed up as though he was from the gas company and went to the apartment complex in which the Wrights lived;
- went to an apartment downstairs and talked to a tenant about being from the gas company;

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4. See generally *Gates I*.

5. See generally *Gates II*.

6. See generally cases cited *supra* note 1.

7. *Gates II*.

- went upstairs to the Wrights' apartment and told Ms. Wright he was from the gas company, to which she responded that she had called the gas company because her heater was not working;
- was led to the heater by Ms. Wright, who handed him a can of oil, and he began working on the heater;
- told Ms. Wright it was a robbery, to which she responded that all she could give him was sex; they then had consensual sex, after which he washed up;
- insisted on being given money and was given some by Ms. Wright; he also found \$300 under a mattress and \$180 in a "reel-to-reel tape" and looked throughout her drawers and elsewhere in the apartment;
- tied up Ms. Wright on her bed, and was about to leave when she said she would identify him, whereupon he shot her.

The remainder of the State's case against Mr. Gates consisted of (1) evidence that there was non-consensual sexual intercourse, although from the semen evidence the crime lab could not identify Mr. Gates as the person who had had the intercourse; (2) Mr. Gates' handprint on the heater, which was found shortly after his videotaped confession at the crime scene when a police officer was directed to go to the heater and lift a print; the officer testified that if someone had had oil on his hands, the print could still be there two months later; and (3) the downstairs tenant's testimony that Mr. Gates, although he was only about 5 foot 6, and weighed about 135 pounds, was the person the tenant had seen on the day of the crime posing as someone from the gas company.

It seemed to me, as it did to George Kendall, that it was highly unlikely that anyone would commit a crime in the manner described in the confession. Why would someone, after gaining entry to an apartment by claiming to be from the gas company, then go ahead in the middle of the day—when the chances of being detected are greatest—and try to fix a heater? This seemed even more unlikely when we learned that there was no record that the Wrights' heater had needed repair or that the gas company had been called.

Instead, it appeared to us that Mr. Gates had been "fed" this story so that it would tie in with the account of the downstairs neighbor—although the only thing about Mr. Gates' appearance that was consistent with that account was that he was African-American. This enabled the police, who had found in their initial investigation no physical evidence tying Mr. Gates to the crime scene, to have an "explanation" for "finding" his handprint on the heater two months thereafter. We thought it much more likely that Mr. Gates' handprint had been placed there when he went to the crime scene after his arrest in January 1977.

#### *Arguments Presented to the Eleventh Circuit*

The likelihood that an inmate, even a death row inmate, is innocent is not a basis for habeas corpus relief. Accordingly, we had to focus on other issues.

The leading issue on our appeal to the Eleventh Circuit was racial discrimination in the composition of the pool of prospective jurors, from which Mr. Gates' all-white trial jury had been selected. Working closely with a legal assistant, I prepared a detailed showing in our opening brief that the extent to which African-Americans

had been “under-included” in the venire was sufficiently great as to present a *prima facie* case of unconstitutional racial discrimination. We showed that the percentage of African-Americans in the jury pool was so much lower than the percentage of African-Americans who were eligible to be called for jury service that the federal court would be required to overturn Mr. Gates’ conviction and death sentence unless the State could meet its burden of showing a non-discriminatory reason for this tremendous disparity.

In ruling on Mr. Gates’ appeal, the Eleventh Circuit found that we had shown a *prima facie* case of unconstitutional racial discrimination.<sup>8</sup> However, instead of requiring the State to refute this showing through a non-discriminatory explanation, the court held that it could not consider this claim because Mr. Gates’ trial lawyer, the appointed public defender, William Cain, had not raised it before or during the trial.<sup>9</sup>

In briefing and oral argument, I pointed out that Mr. Cain had testified in the state post-conviction proceeding that he and the other local defense lawyers had agreed *never* to allege racial discrimination in the jury pool. They felt that even if they ever won such a claim, jurors would become biased against them and their clients for having raised the claim. I cited cases from the era of legal segregation (which, at the time of Mr. Gates’ trial in 1977, was only about a decade in the past) in which the federal courts dealt with lawyers facing a “Hobson’s choice of evils”: racial segregation or jurors biased against the defendant for having attacked the racial segregation.<sup>10</sup> In these cases, the federal courts held that a lawyer who did not object under such circumstances did *not* waive his client’s claim of racial discrimination.<sup>11</sup> Nevertheless, the Eleventh Circuit held that Mr. Cain’s failure to object constituted waiver of this argument and that he had not been ineffective when he failed to object.<sup>12</sup>

Our other principal argument in the Eleventh Circuit was that Mr. Cain’s performance had been so ineffective as to be unconstitutional. While we pointed to his failure to present some readily available evidence and argument about the weakness of the prosecution’s guilt-phase case, our principal attack was on his complete failure to present *any* mitigating evidence. In the penalty phase of a death penalty case, defense counsel is entitled to present anything about the defendant’s background that might lead a jury to sentence him to a sentence other than death. Yet, Mr. Cain claimed in his post-conviction testimony that despite combing Columbus trying to find anyone who could say anything helpful about Mr. Gates, he had been unable to find a single useful witness.

In the Eleventh Circuit, I was limited to the record that existed prior to my involvement in the case. With regard to available mitigating evidence, this meant that I could cite only such evidence as had been uncovered during the state post-conviction proceeding by Ronnie Batchelor, the pro bono lawyer who represented

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8. *Gates VI*, 863 F.2d at 1498.

9. *Id.* at 1500.

10. See, e.g., *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973) (en banc); *Whitus v. Balkcom*, 333 F.2d 496, 506-10 (5th Cir. 1964), *cert. denied*, 379 U.S. 931 (1964).

11. See generally *Whitus*, 333 F.2d at 496 (holding no procedural bar in “Hobson’s choice” situations).

12. *Gates VI*, 863 F.2d at 1500.

Mr. Gates. Mr. Batchelor had found several witnesses who were available in Columbus at the time of the trial and who would have said nice things about Mr. Gates. However, the Eleventh Circuit held that even assuming these witnesses could have been presented, Cain's failure to do so was not ineffective.<sup>13</sup>

Due to Mr. Batchelor's limited resources and time, he only skimmed the surface in investigating the available, but never presented, mitigation evidence. He did not even come close to finding the compelling witnesses whom our investigators found years later while looking into Mr. Gates' mental retardation. Even so, if it were dealing with the issue today the Eleventh Circuit would probably hold, based on what Mr. Batchelor presented, that Cain's penalty phase performance was unconstitutionally ineffective. Unfortunately, it was not until a decade or more after our appeal that the Supreme Court held in *Williams v. Taylor*<sup>14</sup> and *Wiggins v. Smith*<sup>15</sup> that defense counsel should be found ineffective for presenting *none* of the available mitigating evidence.

One other aspect of our ineffectiveness argument will always remain in my memory. I asserted at oral argument, as I had in the brief, that Cain should have objected when the prosecutor scoffed at the portion of the confession in which Gates said that the sexual intercourse had been consensual by saying that, after all, this was a white woman and he was a black man. The members of the Eleventh Circuit panel were incredulous at my argument. One of them said that the prosecutor's argument seemed perfectly logical to him. You will not find mention of this in the court's opinion, which merely says that my remaining arguments were meritless.<sup>16</sup>

After we lost in the Eleventh Circuit panel, we sought and were denied en banc review, although two judges dissented. We then sought certiorari in the Supreme Court. The Court accepts extremely few cases each year. We hoped to interest the Court in this case by focusing on the egregious racial discrimination. A significant number of amici curiae filed briefs in support of our certiorari petition. These included Jewish, Hispanic, and various other groups that expressed horror at a prima facie case of unconstitutional racial discrimination being barred from consideration because of a timid trial lawyer's failure to object. The Court, however, declined to grant certiorari.<sup>17</sup> While Justices Brennan and Marshall dissented, they issued only their usual dissent, stating that they believed capital punishment to be unconstitutional in every case.<sup>18</sup>

#### *Our Realization that Mr. Gates Might Have Mental Retardation*

Ordinarily, the denial of certiorari would have meant, for all practical purposes, the end of any meaningful opportunity to prevent Mr. Gates' execution. Securing executive clemency had become virtually impossible in Georgia by 1989. Moreover, the supposed review of the merits of a death row inmate's case by

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13. *Id.* at 1500 n.7.

14. 529 U.S. 362 (2000).

15. 123 S. Ct. 2527 (2003).

16. *Gates VI*, 863 F.2d at 1500 n.7.

17. *Gates VIII*, 493 U.S. at 945.

18. *Id.*

numerous courts provided another basis for rejecting clemency—even though, as in our case, the merits of our main claim had never been adjudicated, and the facts supporting our ineffectiveness claim had been inadequately investigated by volunteer counsel.

However, a confluence of circumstances enabled us to keep Mr. Gates before the courts and, in 2003, finally to get him off of Death Row. First, in 1989, after its execution of a mentally retarded man, Jerome Bowden, Georgia became the first state to enact legislation prohibiting the execution of people with mental retardation.<sup>19</sup> Although the legislation limited its application to those not already on Death Row, the Georgia Supreme Court later held that people already on Death Row could not be executed if they could prove by a preponderance of the evidence that they were mentally retarded.<sup>20</sup> (Under the new statute, those not already on Death Row had to prove their retardation beyond a reasonable doubt.<sup>21</sup>)

Second, George Kendall and I were among those who attended a session on mental retardation at the NAACP Legal Defense and Educational Fund, Inc. (“LDEF”) annual conference for death penalty litigators. We were both surprised and impressed by Dr. Ruth Luckasson’s presentation, which included a videotape showing various people. Dr. Luckasson asked the audience members which of the people they observed talking on the videotape had mental retardation. She told us that all but one had mental retardation. From this and other things she explained that day we realized that we had a great deal more to learn about mental retardation.

While Dr. Luckasson’s presentation was geared toward lawyers throughout the country and focused on the importance of showing a client’s mental retardation as mitigating evidence in a capital sentencing proceeding, for those with cases in Georgia the significance of her discussion was even greater. Based on her talk, and our subsequent discussion with her and others, George and I decided that we needed to consider the possibility that Johnny Lee Gates has mental retardation.

#### *Securing an Order Requiring a Trial on Whether Mr. Gates Has Mental Retardation*

This required us, with the enormous help of an investigator from Washington, D.C., Lee Coykendall, to find and review all the school, health, and prison records we could find on Mr. Gates. We then had to interview him and as many people as we could find who knew him prior to age eighteen. Those with knowledge of him prior to age eighteen were particularly important because, in order to demonstrate mental retardation, one must show not only a significantly subaverage IQ, but also limitations in two or more aspects of “adaptive behavior,” and that these limitations manifested themselves prior to age eighteen.

In this process, our client was probably the least reliable source of information. This is usually so with people with mental retardation, because they have spent a lifetime honing their ability to hide, or “mask,” their retardation. They are ashamed of their mental limitations and do everything they can to make it appear that they

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19. GA. CODE ANN. § 17-7-131(j) (1997).

20. *Fleming v. Zant*, 386 S.E.2d 339, 342-43 (Ga. 1989).

21. GA. CODE ANN. § 17-7-131(c)(3) (1997).

can do more than they really can. Nonetheless, I spent a great deal of time with him, trying to get names and contact information about people he knew while growing up, and attempting (much less successfully) to get accurate details about his childhood. Even after we learned from numerous other people about his problems doing things that non-retarded children could do, he would consistently deny that he had had such problems, or would say that if these things happened, he did not remember them.

Fortunately, we saw in the school records significant information consistent with mental retardation. Mr. Gates failed the second and seventh grades and was sent to a reading program that was the closest thing to special education that Columbus' segregated school system then provided to African-American students. We also saw an I.Q. score of 77 from when he was in a Youth Development Center in Augusta. There was no back-up documentation about the administration of that test, but we realized that it could pose a problem because, even though at the time it was administered 77 was within the mental retardation range, thereafter the generally accepted definitions lowered the upper range of I.Q. for the mentally retarded to approximately 70-75 or below. We also saw that when Mr. Gates entered the adult prison system, he was given a screening I.Q. test, which was less complete than a full I.Q. test, and he had scored 65.

George found a Georgia psychologist, Dr. Mary Ann Drake, who agreed to administer I.Q. and other tests to Mr. Gates, to review the background documents on him that we had collected, and to meet him and people who had known him prior to age eighteen. Before Dr. Drake did this work, Lee Coykendall located a substantial number of such people who described numerous adaptive behavior problems that Mr. Gates had prior to age eighteen. Dr. Drake found these people credible, and the score she calculated for Mr. Gates on the most commonly used I.Q. test for adults, 72, was within the mental retardation range and was supported by her substantial additional testing. She prepared an affidavit setting forth her firm conclusion that Mr. Gates had mental retardation.

George and I submitted Dr. Drake's affidavit to a state post-conviction court. The State submitted nothing in opposition. The post-conviction judge found our submission sufficiently persuasive to create a genuine issue for trial on the issue of whether Mr. Gates was mentally retarded.

#### *Activities During the Years Before Trial*

Although that order was issued in 1992, it was not until 2003 that the trial on Mr. Gates' mental retardation occurred. Why? First, after the case was sent back to Columbus, it was assigned to a judge who was a member of all-white clubs and had otherwise acted in ways that raised questions about his impartiality in a case such as this. George, myself, and our new co-counsel, former Columbus State Senator Gary Parker, asked this judge to recuse himself. When he refused to do so, we filed for *mandamus* in an appeals court. Second, while that was pending, a scandal arose in Columbus when it was disclosed that the District Attorney's office had been determining which judges got selected to preside over important criminal cases. Not long thereafter, an order was issued that reassigned Mr. Gates' case to Judge John

Allen—the Muscogee County District Court’s only African-American judge. Several years had elapsed by this time.

A substantial amount of time then elapsed because of our effort to get Judge Allen to decide whether, and to what extent, he would allow evidence about the killing of Ms. Wright to be introduced at the trial concerning Mr. Gates’ mental retardation. We said that it would put us in an impossible situation to either (a) have an expert whom we would retain evaluate Mr. Gates and find him mentally retarded *without* considering the crime evidence, only to have the judge thereafter decide that it would be admissible or (b) have the State expert evaluate Mr. Gates and find him not mentally retarded *after* considering the crime evidence, only to have the judge thereafter decide that it would be inadmissible. In the former situation, our expert could be attacked for “conveniently” adhering to a conclusion already reached before considering the crime evidence. In the latter situation, we could not mount a similar attack on the state expert, since by doing so we would be revealing the very crime evidence that, in that scenario, the judge would have excluded from consideration. We urged the judge to have a hearing in which experts who would not be appearing at the trial could testify about the relevance, or lack thereof, of the crime evidence in this case.

Judge Allen ultimately ruled (in 1997) that he would not hold such a hearing and that he would not at that time make a decision about the admissibility of the crime evidence. He ordered that we decide and announce whether or not we were going to present an expert witness within several months. In making this order, Judge Allen said that an expert witness could put things into or out of his or her mind and reach a new conclusion based on consideration of new evidence or exclusion of previously considered evidence.

We then were in a great quandary, because Dr. Drake was not available to testify. She was no longer a practicing psychologist, and when she had moved from one house to another, she had discarded all of her records about Mr. Gates. Fortunately, she had provided George with copies of most of her records on Mr. Gates, and George had retained them.

In a very short amount of time, we had to find a new expert and have her undertake new testing of Mr. Gates, review the documents we had obtained (now including extensive prison files), and meet with a substantial number of people who had known Mr. Gates prior to age eighteen. Sadly, our best witness in that regard, Roberta Robinson, who had cared for Mr. Gates extensively when he was a child, had recently died. Thanks to the work of Elizabeth Adams, an investigator based in New York who took over from Lee Coykendall, we had located many additional useful witnesses. Moreover, I had met several times with Maedel Chandler, Mr. Gates’ sister who lived in Los Angeles, and had learned a great deal from her.

We heard about Dr. Catherine Boyer, who had recently moved from Arizona to Alabama, from Stephen Bright, Executive Director of the Southern Center for Human Rights. Dr. Boyer was an experienced psychologist, who had particularly great expertise in evaluating prisoners. She had done work for numerous prosecutors, including in death penalty cases, while sometimes testifying (although never before in a capital case) for defense counsel. In addition to her private practice, she worked part-time at a hospital in Columbus and often did evaluations at the request of the court or of the District Attorney’s office. From meeting with

her, it was apparent that she was extremely knowledgeable, had an engaging personality, and was a “straight shooter.” This presented both an opportunity and a potentially fatal danger for us. Since we had had to go to Judge Allen to seek permission for her to examine Mr. Gates, she was, as a practical matter, the only expert we could credibly use. Yet, if she were to obtain an I.Q. score for Mr. Gates that was above the current range for mental retardation, or were to conclude he was not mentally retarded, presenting her as a witness would be disastrous for our case.

We were exceedingly pleased and relieved when, in December 1997, Dr. Boyer reported that after administering to Mr. Gates (among other things) the newly-revised version of the most widely used adult measure of I.Q., she had calculated his I.Q. at 69—three points lower than Dr. Drake’s calculation after using the previous version of that test. Dr. Boyer also concluded, based on her testing of the documentation and witness interviews, that Mr. Gates had mental retardation. We reported this conclusion to Judge Allen and the District Attorney early in 1998.

It was not until almost four years later that we learned of the opinion of the State’s experts. Almost two years were lost due to the State’s insistence that Mr. Gates be evaluated for two full weeks at Central State Hospital—far greater access, both in time and degree, than Dr. Boyer had been granted. Eventually, the Central State psychologist decided he was too busy to evaluate Mr. Gates, and the District Attorney chose to use two psychologists who had previously worked at the same Columbus hospital where Dr. Boyer worked part-time (indeed, one of them, Dr. Karen Bailey-Smith, had hired Dr. Boyer to work there), and who now headed up Georgia’s bureaucracy for dealing with mentally disabled people. These psychologists (the second of whom, Dr. Christine Gault, had been certified to practice only months before) decided that they would test Mr. Gates in the same location as had Dr. Boyer.

Although they tested Mr. Gates in March 2000, and later claimed that their conclusion that he was not mentally retarded was based solely on their testing and school records that they already had by that time, they did not advise the District Attorney, the Court, or us of their conclusion until December 2001. At that point, we got their report in which they stated that when they administered to Mr. Gates the same I.Q. test that Dr. Boyer had administered, his score had been 84, well above the generally accepted range for mental retardation. In view of this, plus the score of 77 when Gates was in the eighth grade and scores from standardized tests that Gates took in kindergarten, the first grade, and the second grade, they claimed it was obvious that he was not mentally retarded and that inquiry into his adaptive behavior was irrelevant. Therefore, they had not interviewed *anyone* about Mr. Gates, except for Mr. Gates himself. They proceeded to speculate that he was failed by his family and the school system and not by any significant cognitive impairment.

Thereafter, the pre-trial court proceedings mainly concerned the issue we had tried to resolve in 1996-97: what, if any, crime evidence would be admissible. At two separate hearings, the District Attorney asserted that the State’s experts had told him that the crime evidence was highly relevant. This District Attorney claimed the way that Mr. Gates answered questions in the videotaped confession and also the way in which he purportedly committed the crime were evidence that he was not mentally retarded. We argued, among other things, that it was unfair to admit the



videotaped confession and police officer testimony—even assuming they might somehow be relevant—because we could not present evidence that contradicted them. This was because, as we showed at a hearing in early 2003, the state crime lab claimed to have destroyed all of the physical evidence in 1978, including semen evidence on which DNA analysis might now have been done. The lab witness asserted that this happened after the lab had notified the police that this evidence would be destroyed unless the lab was told not to do so within a specified time frame. The lab had heard nothing in response. Judge Allen stated on the record that he believed that he had never before heard of crime evidence being destroyed so shortly after a capital trial and that its destruction quite likely had violated Mr. Gates' right to due process of law. But he nonetheless allowed the State to present the videotape and other crime evidence.

#### *Final Trial Preparations and the Trial*

After adjournments to see if the Georgia Supreme Court would change the burden of proof in view of recent United States Supreme Court decisions<sup>22</sup> (it did not do so), the trial began on November 3, 2003. In the weeks before that date, I engaged in a whirlwind of travel, working with several witnesses.

We first learned of Dr. Suzanne McDermott thirteen days before trial, and I flew down to South Carolina to meet her the following night. We had concluded that we had to find a “set-up” expert, who could explain to the jury that which George and I had learned years earlier from Dr. Luckasson: that one can be mentally retarded and still be generally capable; the nature of mental retardation, particularly what used to be referred to as “mild” mental retardation, which is what most mentally retarded people have; how one determines whether a person has mental retardation; and the causes, and more often, the lack of known causes, of mental retardation. Dr. McDermott, although not a psychologist, is one of less than 100 members of the most prestigious group in the field of mental retardation. She has authored a chapter that will be part of the American Psychological Association's forthcoming revised manual on mental retardation and teaches about mental retardation to medical students, special education teachers, and other teachers in courses at the University of South Carolina. We were extraordinarily lucky that someone else to whom we had been referred, who did not have relevant expertise, mentioned Dr. McDermott. Dr. McDermott's only prior testimony had been given several decades ago when she presented statistical evidence about the life expectancy of a man with cancer if he had not been killed in a car accident.

Through my preparation of Dr. McDermott, Dr. Boyer, and Dr. Pamela Jennings, I realized that we were now in a position to prove persuasively that Dr. Boyer's I.Q. result, not that of the State's experts, closely approximated his actual cognitive intelligence. Their testimony would show that it is not correct to say that one cannot ever get an I.Q. score on a validly administered test that is higher than one's “true” I.Q., and that what one needs to do is try to get as much information as possible about each such test over time, and see if one can find a range within which fall the

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22. See *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the State must prove to a jury's satisfaction every fact that is a precondition to eligibility for the death penalty).

predominance of the I.Q. test results. Our experts were also prepared to say that, particularly in a case of major consequence, it was most unwise to fail to look into adaptive behavior, particularly since it could help answer questions about differing I.Q. scores.

Also, during my final preparation of Dr. Boyer, I learned that she had undertaken a special experiment to determine how it was that Mr. Gates' prolific "writings" while in prison, including numerous letters of complaint using sophisticated legal terms, came to be written even when he was in "isolation." She knew that he said he had been aided by other prisoners, and that when in isolation he had been helped with this writing by guards. She also saw a sort of dictionary he had developed in which he listed words organized by the letters with which they began, although not in alphabetical order, even though many were misspelled and he did not know the meanings of many of these words. Her experiment was to ask Mr. Gates to sit down with a piece of paper and write a paragraph about his childhood and a paragraph about his life in prison. She saved these paragraphs, which were of a *much* lower quality than the prison "writings" on which the State was going to rely.

After George, Gary, and I arrived in Columbus on the weekend before trial, a key question was who was going to do the examination of our three expert witnesses. I strongly resisted doing it because, although I had prepared them and knew what they were going to say far better than my colleagues, I had never examined a single witness of any kind about anything during a trial. Nonetheless, George and Gary insisted that I do these examinations at the trial. I reluctantly agreed to do so.

Our hope was that through the experts we might nullify the adverse impact of the State's experts so that, although the jury might not understand any of the experts, we might win the case based on the testimony of the witnesses who had known Mr. Gates prior to age eighteen. These included family members, a former sister-in-law, former schoolmates, a school speech therapist, and a school principal. From them, the jury—which this time had nine African-Americans—learned about Mr. Gates' slow development and other problems.<sup>23</sup>

Nonetheless, despite the strength of this testimony, we came to believe that without the testimony of our experts, we might not have persuaded the jurors that Mr. Gates had mental retardation. Dr. McDermott, who testified as the trial's opening witness, did a masterful job in creating the proper context for all that followed, including our adaptive behavior witnesses and Dr. Boyer, as well as the State's witnesses (whom she discredited through her answers to hypotheticals based on what we knew the State's witnesses would say). Then, after we had presented most of our fact witnesses, I called Dr. Boyer to testify. George and Gary both felt that the jury was, indeed, understanding the essence of our experts' testimony.

After Dr. Boyer's testimony, we presented one more fact witness and then closed our case. The two State experts testified that afternoon and both said on *direct*

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23. The evidence included Mr. Gates' being put in the sixth grade in the last seat of the "dumb" row; his having extreme problems with hygiene, including wetting his pants in bed as late as the seventh grade and wearing the pants to school; his inability to learn the song that his class sang at the end of every day; his putting his shoes on the wrong feet as late as age 12; his acting recklessly; his being treated "like a monkey" by neighborhood boys who would ask him to climb up in trees and get things for them; his having been cheated by a storekeeper due to his inability to count change; and much more.

examination that the videotaped “confession” was either of no relevance or of extremely little relevance. Since this was the *opposite* of what the District Attorney had twice represented that they would say, George and Gary prepared a motion to preclude introduction of any crime evidence. Meanwhile, I finished working with Dr. Jennings on her rebuttal testimony. Although Judge Allen ultimately overruled the motion, he reiterated in open court (outside the jury’s presence) that the State’s destruction of all of the physical crime evidence had probably denied Mr. Gates due process. And, after viewing again the videotaped “confession,” he stated (again outside the jury’s presence) that it made absolutely no sense, and that no one would commit a crime in that manner.

When the jury was brought in, it viewed the videotape. I carefully observed the jurors’ reactions to it, and it appeared not to make much of an impression. Our experts’ testimony about how people with mental retardation, including children, can learn scripts, act in plays, and answer rehearsed questions quickly and in detail may have helped undercut whatever force the State hoped the videotape would have. Of course, it helped that *every* expert witness on *both* sides had already testified that the videotaped confession was either completely, or almost completely, irrelevant to a determination of mental retardation.

The State’s final witnesses were prison guards and a prison counselor. They were presented in an effort to show that whatever Mr. Gates’ problems before age eighteen may have been, he now could function well in a structured prison setting—no longer putting his shoes on the wrong feet, no longer wiping his nose with his shirt sleeve, helping to clean the prison, and keeping a clean cell. This went over “like a lead balloon,” particularly because both Dr. McDermott and Dr. Boyer had clearly explained why one could not determine someone’s adaptive behavior by considering how someone functions in an extremely structured prison setting, where so much is provided by others.

We were on what was probably Gary Parker’s final cross-examination question of the State’s last witness, a prison counselor, when the witness gave an answer that caused a mistrial. Earlier in the trial, Judge Allen had specifically ordered counsel for both sides to stress to each witness they called that they should not reveal that Mr. Gates was on Death Row or that the mental retardation issue would determine whether or not he could be executed. The judge had told counsel that if a witness were to blurt this out, he would order a mistrial. Nonetheless, when Gary asked the counselor whether he had ever met Mr. Gates prior to his eighteenth birthday, the counselor responded that Mr. Gates was already on Death Row when the counselor first met him. The counselor seemed completely befuddled by the uproar that resulted from this answer. My guess is that the District Attorney had not prepared him much, if at all, since his answers on direct examination were more helpful to us than to the State.

In any event, Judge Allen declared a mistrial.<sup>24</sup>

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24. See generally *Gates IX*, Transcript of Nov. 12, 2003 court session.

*The Settlement*

At that point, we renewed our numerous prior requests that the District Attorney consider settling the case in a way that would have Mr. Gates receive a sentence that did not exist at the time of the trial: life without possibility of parole. Given the fact that we were winning the trial (as we were told by several unbiased observers), that a re-trial would add further expense, and that the only way in which Mr. Gates could ever be subject to execution would be if a jury *unanimously* found that he was not mentally retarded, the District Attorney finally agreed to this.

Getting our client to agree proved even more difficult, because despite his cognitive limitations, the one thing from which he had drawn comfort when sitting through this trial was that he could tell we were winning. We ultimately persuaded him, provided that we could get removed from the settlement agreement a provision under which he would never be allowed to challenge his conviction. When we made clear to the District Attorney that that would be a deal-breaker, he agreed to remove it.

Why did we agree to the settlement when we had been winning the trial? There were three reasons. First, although we were winning the trial, that did not necessarily mean that if it had gone to verdict we would have gotten all twelve jurors (one of whom was a member of the same church as the District Attorney and at least one of his predecessors) to vote that Mr. Gates was mentally retarded. Had the jury not been unanimous, there would have been a mistrial. Second, at a retrial, unlike this trial, the State would have the benefit of already knowing what our witnesses would say, or some of our witnesses might die or become incapacitated in the interim,<sup>25</sup> so there might be a mistrial at a second trial. Third, unless we were somehow able to succeed in challenging Mr. Gates' conviction, it would have been virtually impossible for him to be paroled even if he had gotten a life sentence *with* possibility of parole. He will, in any event, be eligible for parole consideration when he reaches age sixty-two, which is fourteen years from now.

*Conclusion*

This was an experience unlike any other I have had. The outcome was at least as professionally rewarding as winning in the United States Supreme Court on behalf of my first death row client.<sup>26</sup> I certainly had greater personal satisfaction this time, because I had gotten to know Mr. Gates and members of his family so well, I had met several of our fact witnesses, and I had managed to help our experts present their testimony in a way that the jury could understand. At the same time, I am painfully aware that Mr. Gates remains in prison, under a life without parole sentence, for a crime that my co-counsel and I are confident he did not commit. Moreover, I sadly recognize that there are many others with mental retardation already on Death Row or facing capital trials who will not receive the kind of

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25. Indeed, although we did not call him as a witness, Mr. Gates' brother died in the month after the trial.

26. *Francis v. Franklin*, 471 U.S. 307 (1984).

representation that we provided Mr. Gates, much of it uncompensated, and who will be put to death because of inadequate representation.

## DEATH PENALTY IN LOUISIANA

Thomas S. Fraser, John M. Koneck, and Clinton E. Cutler\*

WE never intended to take a death penalty case, it just happened. The first call came in 1986 when a Minnesota lawyer who had emigrated to Louisiana to work on death penalty cases called to look for volunteers. We were civil litigators, inexperienced in criminal law and reluctant to begin a criminal defense career with a death penalty case. The second call from the transplanted Minnesotan came a year later. She said that another lawyer who had volunteered had not followed through, and the client's execution was ten days away. We agreed to help.

The three of us—a commercial litigator, a real estate litigator, and a bankruptcy litigator—knew nothing about habeas proceedings or Louisiana procedure. Calling on the expertise of the Louisiana Death Penalty Resource Center, we swiftly prepared pleadings seeking a stay of execution to allow us time to prepare a petition for a writ of habeas corpus. The Louisiana state court judge granted the motion.

Then what were we supposed to do? We had no idea what the law was, what documents had to be filed, what rules governed, or even what our client was like. We quickly learned.

Our client was Dobie Gillis Williams, a 24-year-old African American man from a small town in north central Louisiana.<sup>1</sup> We later learned that this area was

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1. The story of Dobie Gillis Williams began with a murder conviction in an unreported decision in the 35th Judicial District Court in Grant Parish, Louisiana [hereinafter *Williams I*]. A direct appeal to the conviction to the Louisiana State Supreme Court was unsuccessful. *Louisiana v. Williams*, 490 So. 2d 255 (La. 1986) [hereinafter *Williams II*]. A petition for certiorari to the United States Supreme Court was denied as well. *Williams v. Louisiana*, 483 U.S. 1033 (1987) [hereinafter *Williams III*]. The Supreme Court also denied petitioner's request for a rehearing in *Williams v. Louisiana*, 483 U.S. 1056 (1987) [hereinafter *Williams IV*]. A post-conviction hearing for ineffective assistance of counsel during the penalty phase of the trial was sought and granted in *State ex rel. Williams v. Butler*, 520 So. 2d 759 (La. 1988) [hereinafter *Williams V*]. The Louisiana Supreme Court remanded the case to the trial court to conduct an evidentiary hearing based on potentially ineffective assistance of counsel during the penalty phase of the prior proceeding. The trial court affirmed the conviction in an unreported decision [hereinafter *Williams VI*]. The trial court's affirmance was directly appealed to the Louisiana Supreme Court in *Williams v. Butler*, 543 So. 2d 2 (La. 1989) [hereinafter *Williams VII*] and was denied. The petitioner applied for a Supervisory and/or Remedial Writ with the 35th Judicial District Court in Grant Parish and was denied. *In re Williams* [hereinafter *Williams VIII*]. On appeal, the writ was also denied by the Louisiana Supreme Court. *State ex rel. Williams v. Butler*, 618 So. 2d 402 (La. 1993) [hereinafter *Williams IX*]. Short-term success was achieved in *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996) [hereinafter *Williams X*], where the Federal District Court vacated the death penalty and remanded the case for resentencing. The District Court's decision was appealed and reversed by the 5th Circuit Court of Appeals in *Williams v. Cain*, 125 F.3d 269 (5th Cir. 1997) [hereinafter *Williams XI*]. A stay of execution was granted by the United States Supreme Court pending its decision whether to grant certiorari. *Williams v. Cain*, 524 U.S. 934 (1998) [hereinafter *Williams XII*]. However, certiorari was eventually denied in *Williams v. Cain*, 525 U.S. 859 (1998) [hereinafter *Williams XIII*], and so was the final request for a rehearing. *Williams v. Cain*, 525 U.S. 979

considered a “no man’s land” in the 1800s, a lawless place between Louisiana and Texas. Williams was convicted of murdering a Caucasian woman, allegedly in the course of committing a burglary and a rape. The victim was in the bathroom when her attacker stabbed her repeatedly. She staggered out of the bathroom into her husband’s arms, saying “a black man killed me.” The victim died shortly thereafter.

The sheriff rounded up all local African Americans with criminal histories and began questioning them. Our client fell within this category. Having been previously convicted of burglary, he happened to be on a furlough from prison and in town that hot Fourth of July weekend in 1984.

The police roused him from bed in the middle of the night and took him to the police station. Detectives interrogated him for many hours through the night and finally, according to their later testimony, extracted a confession from him near dawn. According to the detectives, Williams’ initial attempts at a confession were inaccurate—it could not have happened the way Williams said it did. Further information was supplied by the police until the confession came out as desired. The chief detective conducting the interrogation said he recorded the confession, but when he later went to play it back, he found that nothing had been recorded. The chief detective claimed he must have forgotten to push the record button. The police also claimed to have videotaped parts of the interrogation and confession. By coincidence (according to the police), the videotape machine malfunctioned. As a result, the only evidence of what happened during the interrogation and the details of the confession came out of the mouths of the police.

Williams told us that during the interrogation, the police removed his clothes so that they could check his body for telltale scrapes. He was nearly naked for most of the interrogation in the windowless basement office and was surrounded by half a dozen officers, most of whom had guns. The officers repeatedly told him that if he confessed, he would not get the death penalty. He explained his whereabouts that evening, but denied that he confessed.

No physical evidence tied Williams to the scene. There were no fingerprints, even on the murder weapon, which was determined to be a kitchen knife that the victim’s husband said he left in the bathroom after he made gumbo in the kitchen. Black hairs in the bathroom pointed to an African American man with a rare kind of hair similar to that of our client. After a brief trial, Williams was convicted of murder in the course of a rape or attempted rape. The latter are aggravating factors a jury may consider in deciding to impose a death sentence.

The penalty phase commenced immediately and was over quickly. The prosecution called the warden of the prison from which our client had been on furlough. Caught unaware, our client’s attorney had not prepared for the penalty phase. He called no witnesses and made only a brief closing statement.

The direct appeal to the Louisiana Supreme Court, mandatory in death penalty cases, was unsuccessful,<sup>2</sup> as was the petition for certiorari to the United States Supreme Court.<sup>3</sup> The “round up” by the local sheriff seemed to be without probable cause and therefore a Fourth Amendment violation. The law, however, does not

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(1998) [hereinafter *Williams XIV*].

2. *Williams II*, 420 So. 2d at 255.

3. *Williams III*, 483 U.S. at 1033.

accord prison inmates the same Fourth Amendment rights as others and, although he was on furlough, our client was still considered to be a prisoner with diminished Fourth Amendment rights.

These were essentially the facts we knew when we began reading the files sent to us from Louisiana. We soon learned that we had barely scratched the surface in terms of both the facts and the law.

One of the obvious post-conviction claims to raise was ineffective assistance of counsel during the death penalty phase. We learned that our client's defense counsel had never tried a capital case before and did not understand what was required to defend in the penalty phase. It turns out that he prepared only for the guilt/innocence phase and not the penalty phase. To investigate the viability of the ineffective assistance of counsel claim, we needed to determine what evidence could have been presented in the penalty phase had counsel done a thorough investigation. We were stunned by what we found.

We visited our client's family in their home. To get there, we literally crossed the railroad tracks into the poor section of town, an area with unpaved roads and few vehicles. The family home was a small building sitting on cinder blocks. We met our client's brother, who was on medication for severe emotional problems. Another brother was institutionalized after he broke into a church, claiming that auditory hallucinations—a conversation with God—told him to do so. His father's brother and others on his father's side had severe emotional problems. Our client himself was examined and found to be a paranoid schizophrenic with an IQ at the borderline retarded level. As a child, he was abused physically and emotionally by relatives. His parents separated early in his life and never reconciled. Our client's upbringing was epitomized in an anecdote related by his mother. When our client was very young, his parents had a fight. His mother picked up a shotgun and aimed it at her husband, who in response picked up our then two-year-old client, using him as a human shield.

During his teenage years, our client sniffed gasoline, which we learned was a cheap means of getting high. Medical experts told us that gasoline was also used as a form of self-medication to dull the senses—a means of dealing with mental and emotional illness. We learned that all of this evidence, combined with impassioned pleas from family members, could have been presented as “mitigating” evidence by a reasonably competent defense counsel and could have given the jury reason to spare our client's life.

In the course of the numerous post-conviction hearings, we came to meet the trial judge, who introduced us to Louisiana history. He was from Winnfield Parish in north central Louisiana, the hometown of Huey Long. The judge's father had been a friend of Huey Long, and in the course of our many meetings with the judge, we learned about the impact of the Long family on Louisiana history and politics. The judge told us about Long's effectiveness as an orator. Long used to rail against the fat cats in their \$300 suits, but nobody noticed he was also wearing a \$300 suit. We learned about the tension, both politically and culturally, between New Orleans and the rest of Louisiana. This populist view catapulted Huey Long into power in the early 1900s. The political and social divide still exists, at least in the minds of some outside of New Orleans.



The prosecutor was the district attorney in this parish and an adjoining one. He knew our client because he had represented him as a criminal defense attorney in an unrelated matter before his election as district attorney. He personally believed in our client's guilt and was under political pressure to enforce the death penalty. In fact, he used this case as campaign material in his first election to office. The case received quite a bit of attention in the local papers. In fact, the pretrial publicity had been so extensive that the trial judge had changed the trial venue. Before one post-conviction hearing, we were shocked to pick up the local paper and see the headline, "Local Killer to Get Another Hearing."

Throughout our representation, we were assisted by experts from the Death Penalty Resource Center in New Orleans. We were continually amazed at the devotion and dedication of those talented attorneys who spent all their time working on death penalty cases. They are under constant pressure with caseloads most lawyers would consider impossible to meet, and their daily schedule is determined by execution dates. We learned that capital cases in the South are often handled by court-appointed counsel who are paid woefully inadequate rates to handle some of the most complicated and challenging cases. Court funds limit the amount of money defense counsel can obtain to investigate and prepare the case. As a result, the Death Penalty Resource Centers had more business than they could handle simply working on appeals and post-conviction writs.

We were instructed that in a claim of ineffective assistance of counsel, it is sometimes necessary to present evidence of an expert criminal defense lawyer on what should have been done in the trial. The Resource Center helped us locate that expert. Mike Small, a well-known criminal defense attorney in Alexandria, Louisiana, had handled dozens of capital cases and none of his clients had ever been executed. He was the perfect expert witness because few attorneys had handled more capital cases. He agreed to help us pro bono. Coincidentally, he had just completed a similar post-conviction proceeding where he had been in our role. The transcript of that hearing proved invaluable as a guide.

Mike Small was not a passive expert. He visited our client's family with us, reviewed the medical, school, and social service records we accumulated, and read the entire trial transcript. His resulting opinion was definite. In his judgment, our client had received ineffective assistance of counsel at the penalty phase, and he had no doubt that if the jury had learned of his borderline retardation, abusive upbringing, emotional problems, and otherwise non-violent background, the jury would have spared his life. At a three-day hearing before the original trial judge, we presented all of the evidence that we found. In addition, we raised numerous other issues. Our expert testified extensively and, we thought, effectively.

One day during the hearing, we noticed a gentleman sitting in the audience. Our expert recognized him as the prosecutor from another parish who had a reputation for putting more people on Death Row than any other prosecutor in the state. This prosecutor was called to testify as an expert for the prosecution. We had no opportunity to prepare for his testimony. In civil litigation of the sort we customarily handle, experts and their opinions must be disclosed in advance. Regardless of the amount of money involved, extensive discovery is available in the form of interrogatories, request for admissions, production of documents, and

depositions. None of that is available as a matter of course in post-conviction proceedings, which are a hybrid of criminal and civil procedure.

When the opposing expert took the stand, it was literally trial by ambush. Although his opinion was predictable, we had no information on him beyond what our expert witness happened to know. He testified that all of the mitigating evidence upon which we relied would not have made a difference to the jury and that while all defense attorneys try to humanize their client, few succeed to the extent of avoiding the death penalty. This last comment, however, provided some ammunition for cross examination. By conceding that every defense counsel tries to humanize his client, the expert had unwittingly agreed that our trial counsel had failed to meet professional norms and that this humanization tactic sometimes succeeded.

We felt that the hearing could not have gone much better. Our expert performed well, we had a mountain of mitigating evidence that was commonly introduced in penalty phases, and we had an affidavit from trial counsel that he had never handled a capital case before and did not know what he was supposed to do in the penalty phase. We felt confident that the judge would see it our way and vacate the death sentence.

We were wrong. The judge sided with the prosecution and found that all of the evidence we had unearthed would not have changed the result.<sup>4</sup> Therefore, even though counsel's performance could be considered deficient, the judge found that such deficiency was not prejudicial—the mitigating evidence would not have made a difference to the jury.<sup>5</sup>

We appealed the decision to the Louisiana Supreme Court which, by a vote of 4-to-3, declined to hear the appeal.<sup>6</sup> Meanwhile, an interesting development occurred. Apparently one of the detectives who had been involved in obtaining the confession had told an assistant district attorney and others that the tape of the confession existed. He also admitted that he had made promises of leniency to our client during the interrogation and stated that he does what he needs to in order to obtain a conviction. To his credit, the district attorney obtained a search warrant and, together with the sheriff, searched the detective's office and other locations where this tape might be found. They found nothing. Nevertheless, the district attorney properly disclosed this potential exculpatory evidence.

These revelations led to another hearing before the judge. We cross examined both the detective and the former assistant district attorney, who was then a sitting judge. Again, the court ruled against us and found that the detective had been "popping off" or bragging.

Meanwhile, we filed another habeas petition with additional claims, including claims of racial discrimination in the selection of the grand jury foreperson and defective jury instructions regarding the aggravating factors in a capital case. The court allowed us some discovery on the issue of racial discrimination in the selection of grand jury forepersons. In Louisiana, the forepersons were selected by judges. As a result, we had the unique opportunity to take the depositions of the two judges

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4. *Williams VI* (unreported).

5. *Id.*

6. *Williams VII*, 543 So. 2d at 2.

who had been sitting in this parish at the time. We examined how the judges selected grand jury forepersons. By using statistics from the courthouse, we were able to show that since the Civil War, no black person had ever been appointed foreperson of the grand jury, despite the substantial black population in the parish and judicial district. From a statistical standpoint, we calculated that the odds of a black not being appointed under these circumstances was one in many millions. This, we felt, made a *prima facie* showing of discrimination, which was actionable under federal case law. In fact, a federal magistrate had recently found such discrimination in a Louisiana state court case. Once our petition was filed and moved along in the court system, we heard that many other inmates in prison, including those on Death Row, were filing similar petitions.

Again, we had a multi-day hearing before the trial court. The former judges testified regarding their selection of grand jury forepersons. An unusual evidentiary problem developed at one point. We were trying to prove the population and racial breakdown of residents in the local parish, but our reference to census figures and use of copies of census tracts were challenged by the prosecutor on "best evidence" grounds. The judge sustained the objection. We offered to obtain the original census book, which proved harder to accomplish than we thought. After several unsuccessful attempts at local libraries and local agencies, we finally contacted United States Senator Paul Wellstone's office, obtained the appropriate census book from the Library of Congress, and sent the book to Louisiana by Federal Express.

After the hearing, the court ruled against us, finding no discrimination.<sup>7</sup> The Louisiana Supreme Court denied review.<sup>8</sup> Another execution date was set. The Death Clerk from the Fifth Circuit began calling us and asking when we were planning to file in federal court. By now, it was 1996, and the Anti-Terrorism and Effective Death Penalty Act had just been passed, which severely narrowed federal review.<sup>9</sup> We scrambled to file our federal habeas petition and preserved an argument that it was filed or commenced a day or two before the effective date of the Act.

The federal petition was filed in the United States District Court for the Western District of Louisiana, in Alexandria, Louisiana. We knew it was not going to be easy when our unopposed motion for admission *pro hac vice* was denied! These motions are normally routinely granted. Nevertheless, they were denied by the federal district judge, apparently on the ground that he was concerned about paying funds under a federal defender's statute for more than one petitioner's counsel.

We decided that we could not improve on our state post-conviction record and did not seek a new evidentiary hearing. After extensive briefing, the district court judge, a Republican appointee, took the matter under advisement. Many months later, we were elated to receive a thorough opinion from him concluding that our client effectively had no lawyer at all in the death penalty phase and that the death penalty must be vacated.<sup>10</sup> After about nine years of effort, we had finally achieved the relief we were seeking. Our client was shocked with disbelief.

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7. *Williams VIII* (unreported).

8. *Williams IX*, 618 So. 2d at 402.

9. 28 U.S.C. §§ 2261-2266 (2000) (modifying various other sections of the code as well).

10. *Williams X*, 942 F. Supp. at 1101.

Sister Helen Prejean, a Roman Catholic nun in the Sisters of St. Joseph of Medaille, was surprised as well. She focuses her special ministry to Death Row inmates. Sister Helen was our client's spiritual advisor. She came to virtually every court hearing we had and was indefatigable in her opposition to the death penalty. She explained to us that she ministered both to the family of the defendant as well as the family of the victim, although in this case the victim's family refused to have much contact with her.<sup>11</sup>

The prosecution, of course, appealed to the Fifth Circuit.<sup>12</sup> We drew a panel that consisted of two Clinton appointees and one Reagan appointee. At the oral argument in the Great Courtroom in the Federal Courts Building in New Orleans, the setting was different but the circumstances were similar to what we had seen in the past. On one side of the courtroom were members of the victim's family, sitting behind the prosecution. On our side of the courtroom were representatives of the defendant's family and his defense team. Unfortunately, except for Sister Helen, who tried to move back and forth between both factions, the faction sitting behind the prosecution was all white and the faction sitting behind our defense table was all black.

At the oral argument, we were grilled on the ineffective assistance claim, which was one of three claims that we raised. One judge questioned the alleged abuse, appearing to downplay it. When asked for an example of the abuse, we told him about a family member whipping our client with a wet rope. The judge suggested that perhaps this was simply a form of discipline. The other judges asked a few questions, but did not seem to telegraph any views.

Several months later, the court issued its decision. The decision unanimously reversed the federal district court and reinstated the death penalty.<sup>13</sup> We were stunned because the federal district judge had written a solid opinion and had a reputation for being a conservative jurist. Moreover, one of the judges on the Fifth Circuit panel was formerly a state court judge from a nearby parish in Louisiana. We had nowhere to go but up, so we filed a petition for writ of certiorari with the U.S. Supreme Court.<sup>14</sup> Meanwhile, the state trial court issued another execution date. We applied to the U.S. Supreme Court for a stay of execution.

On June 18, 1998, our client was scheduled to die at 6:00 p.m. Our petition for certiorari and our motion to stay the execution had been filed, and we were assured by the Death Clerk at the U.S. Supreme Court that a decision on the motion to stay would be made that day. None of us could do any work. We sat in Minnesota by

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11. During our long sojourn in state courts in the early to mid-1990s, Sister Helen wrote a book, *Dead Man Walking*, which was a composite of her experiences with various death penalty prisoners and cases. HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1st ed. 1993). She laughingly told us that we were part of the role model for the defense counsel in the book. That book was later made into the movie of the same name, starring Susan Sarandon and Sean Penn and directed by Tim Robbins. *DEAD MAN WALKING* (Paramount Pictures 1995). Susan Sarandon and Tim Robbins came to know Sister Helen and later toured with her speaking out against the death penalty. Sister Helen is one of the most articulate and energetic spokespersons we have ever encountered and was an incredible source of support to our client throughout his stay on Death Row.

12. *Williams XI*, 125 F.3d at 269.

13. *Id.* at 284-85.

14. *Williams XII*, 524 U.S. at 934.

the phone, talking repeatedly to our local counsel in Louisiana, who in turn spoke often to the Death Clerk, a person he had come to know over the years.

As our client was walking down the hall to his last supper, which he is obliged to spend with the warden (although our client was allowed to choose the menu for the first time during his incarceration), we received word from the Death Clerk that the Supreme Court had granted a stay—a mere two hours before the scheduled execution!<sup>15</sup> We were told by the Supreme Court's Death Clerk that we could expect a ruling on the petition for certiorari on the first Monday in October. We were optimistic because obviously at least one of the three issues we had raised in the U.S. Supreme Court had attracted the attention of a sufficient number of justices, or a stay would not have been granted.

On the first Monday in October, we received the decision: petition denied.<sup>16</sup> We were stunned and wondered what had happened in the interim.

Thereafter, we enlisted the help of Barry Scheck of O.J. Simpson fame and were able to conduct DNA testing based upon an alleged jailhouse confession by another inmate. The DNA testing was inconclusive. Another execution date was set. In the days before that execution date, we filed additional appeals in numerous courts and received rejections almost by return fax.

On January 8, 1999, we had our last conversation with our client. Gathered around a speakerphone in Minnesota (we declined the opportunity to witness the execution in Louisiana), we told him it had been a privilege to represent him and that we were sorry we could not do anything more. He told us how much he had appreciated our work. He seemed much calmer about his impending execution than we did.

At 6:00 that evening, our client was executed by lethal injection, the electric chair having been eliminated in Louisiana at some point during the eleven years we represented our client. Sister Helen was there with him to the end.

We will never forget that day. A year later, we took our second death penalty case.

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15. *Id.*

16. *Williams XIII*, 525 U.S. at 859.

## WHAT JUSTICE TAKES

*Edwin Matthews, Jr.\**

This is what you shall do: Love the earth and sun and the animals, despise riches, give alms to everyone that asks, stand up for the stupid and crazy, donate your income and labor to others, hate tyrants, argue not concerning God, have patience and indulgence towards people, take off your hat to nothing known or unknown or to any man or number of men, go freely with powerful uneducated persons ..., re-examine all you have been told at school or church or in any book, dismiss whatever insults your own soul ....<sup>1</sup>

### *A. An Outlaw Biker on Death Row<sup>2</sup>*

**B**Y an irony of ironies, his name is Paradis(e). Born 1947 in Fall River, Massachusetts. Adopted. In trouble from an early age. Twenty-nine prior convictions: theft, drugs, assault, concealed weapon, reckless driving, trespass,

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\*. Of counsel in the New York office of Coudert Brothers LLP.

1. WALT WHITMAN, *Preface to the First Edition* of LEAVES OF GRASS (1855). I found these words in 1995 hand written on the wall of a phone booth at the Flying M Cafe in Boise, Idaho. In 1855, when Walt Whitman wrote these words and LEAVES OF GRASS first went on sale at Fowler and Wells on lower Broadway in Manhattan, down the street three young lawyers called Coudert were busy starting my law firm, which they called Coudert Brothers.

2. Don Paradis was originally convicted of first-degree murder and sentenced to death in Idaho state court in Kootenai County. *State of Idaho v. Paradis*, No. F29468 (Kootenai County Dist. Ct. 1981-82) [hereinafter *Paradis I*]. His conviction and death sentence was affirmed at *State v. Paradis*, 676 P.2d 31 (Idaho 1983) [hereinafter *Paradis II*], *cert. denied*, 468 U.S. 1220 (1984) [hereinafter *Paradis III*]. Don's first petition for state post-conviction relief was denied at *Paradis v. State*, 716 P.2d 1306 (Idaho 1986) [hereinafter *Paradis IV*]. He then sought federal habeas relief which was denied. *Paradis v. Arave*, 667 F. Supp. 1361 (D. Idaho 1987) [hereinafter *Paradis V*]. On appeal, the Ninth Circuit Court of Appeals affirmed the denial of relief on the guilt phase, but reversed denial of habeas corpus relief in the sentencing phase because the court determined that the sole aggravating circumstance upon which the death penalty was based, "utter disregard for human life," was unconstitutional. *Paradis v. Arave*, 954 F.2d 1483, 1495 (9th Cir. 1992) [hereinafter *Paradis VI*]. The United States Supreme Court vacated and remanded the decision in *Arave v. Paradis*, 507 U.S. 1026 (1993) [hereinafter *Paradis VII*]. On remand, The Ninth Circuit denied Paradis' petition for habeas relief. *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 1994) [hereinafter *Paradis VIII*], *cert. denied*, 513 U.S. 1117 (1995) [hereinafter *Paradis IX*].

During the habeas litigation, Don filed a second petition for post-conviction relief which was denied. *Paradis v. State*, No. SP8977037 (Kootenai County, August 25, 1994) [hereinafter *Paradis X*]. The state court decision was affirmed at the Idaho Supreme Court at *Paradis v. State*, 912 P.2d 110 (Idaho 1996) [hereinafter *Paradis XI*]. On May 17, 1996, the Clemency Commission of the State of Idaho recommended that Paradis be granted clemency. Following the recommendation, the Governor of Idaho commuted Paradis' death sentence to life imprisonment without possibility of parole. Meanwhile, Don filed a second federal petition for habeas relief which was denied. *Paradis v. Arave*, No. CV-95-00446-S-EJL, (D. Idaho 1996) [hereinafter *Paradis XII*]. The Ninth Circuit Court of Appeals partly reversed the district court's denial in *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997) [hereinafter *Paradis XIII*]. On remand, the United States District Court for the District of Idaho granted Paradis' request for relief. *Paradis v. Arave*, No. CV-95-0446-S-EJL (D. Idaho 2000) [hereinafter *Paradis XIV*], *aff'd*, 240 F.3d 1169 (2001) [hereinafter *Paradis XV*].

speeding. Former Gypsy Joker outlaw biker. Now 37, Idaho State Correctional Institution prisoner No. 18,362, Donald Manual Paradis, awaiting execution for first degree murder.

I am his new lawyer. It is 1985. I am waiting in a windowless, white-walled, locked room at the Idaho prison to meet my client for the first time. In bursts Paradis, 300 pounds, gasping for breath, shackled with handcuffs and leg irons, struggling not to lose his grip on a large, decomposing box of files all tangled up in a scraggly three foot pony tail and chains. Looking away and without ceremony, he passes me a loose, sweaty paw. He speaks aggressively in foul words. On his arm he bears a tattoo of a raised middle finger and the words "Fuck You!" He feigns command of his desperate plight. He endlessly argues. The world is against him. His fellow bikers betrayed him with their crime. The cops were out to get him because he was a biker. The prosecutor and the judge hated him. He didn't want the lawyer appointed to defend him; he was brainless and inept. The list goes on and on. I listen, but do not know how to believe him. I am not going to like this man.

I am a New York lawyer and generally not a litigator. I have never been near a death penalty case. I had volunteered to take the Paradis case for no fee because I believed in the principles of due process that I first learned in law school. The execution by Texas and other states of condemned prisoners who did not even have lawyers, much less an adequate defense, had shocked these beliefs. But to Don Paradis, I was just another lawyer who would sell him out, only this time it looked like a naïve, ivy league neophyte was going to do the selling. I told myself that I did not have to like this man and had to take him as I found him. However, even though I had never tried to navigate the labyrinth of habeas corpus jurisprudence, I was his last chance. I did not then suspect that in the process of defending Don Paradis over 16 years this angry man would enrich my life and become my friend.

Whatever my impression of Don Paradis, I felt the dreadful apprehension of losing a capital case and watching powerless while my client was put to death. This fear visited in odd moments: in a New York subway crowd, while walking in Central Park, during a dinner in the Connecticut country-side with friends, during late night negotiations for a corporate acquisition, and early mornings in the shower. As Don lost in one court after another and his execution got closer and more probable, my own conviction that our legal system aims to serve justice was shaken. I even wondered if my defense of this man only served to enable the State of Idaho to use the legal system to kill him and if my client might not be better off without my inadequate efforts. Perhaps the outrage of executing Don Paradis without a lawyer might be too embarrassing for even the State of Idaho to go ahead. It was as if, in taking this case, I was now implicated, although legally and with professional blessing, in another killing.

My firm, Coudert Brothers, is a large international law firm. Most of my corporate practice in the New York office was about money or property, not human life. The firm was initially opposed to my taking a *pro bono* death penalty case. Indeed, my partners reacted with unconcealed disbelief to my proposal that we take a death penalty case: "You are not a criminal lawyer." "Our firm doesn't represent murderers." "We should bill more hours and make the firm more profitable, and then we might afford to take a case like this." "What are we doing in Idaho?"

“Why not a death penalty case in New York?”<sup>3</sup> I answered that our firm does defend criminals, at least the white-shirted variety. Allow us to give purpose to our labors, and we will love being lawyers and work harder, I added. If we are to be a great firm, let us be great in all ways, including the *pro bono* defense of indigent defendants. Anyway, what I do with my extra time is my business. The arguments continued. I almost gave up.

Then, to my surprise, without prompting, the Chairman of our Executive Committee called me one day to say that the Committee, after reconsidering my proposal, had decided that I should take the case. He said the Committee and the firm had only one request: “Win!”

From 1985 until the case was over in 2001, we never looked back. I quickly came to appreciate that I could not handle Don’s case alone. Over 16 years, many lawyers at Coudert Brothers, who had become concerned by Don Paradis’ (and read my) plight, worked thousands of hours on the case, giving up nights and weekends to meet one deadline after another. Year after year, significant disbursements were willingly written off. Without the silent, unsparing help of other lawyers in my firm, as well as those lawyers working with the NAACP Legal Defense Fund, which had referred the Paradis case to us, Don Paradis would have been executed. He would now be dead.

We even received help in Idaho. Early in the case, I had realized that I would get nowhere without the help of an Idaho lawyer. On one of those early days, when I was filing papers in the Idaho Supreme Court—I was after all from Idaho—I boldly called upon one of the Justices, who, after a polite chat, invited me to lunch. I asked him to recommend a local lawyer to help in my case, and luckily he recommended Bill Mauk, a trial lawyer in Boise. When I first called Bill I told him I needed help filing papers in a *pro bono* death case. With open reluctance, after some persuasion, he agreed to be just a mailbox, reminding me that he was not taking any responsibility for the case and would not agree to be part of a last ditch, eleventh hour effort to stop an execution. Bill filed papers for us and continued to file more papers and more papers and, before the case was over, handled hearings beautifully and gave Don decisive assistance. Over the years Bill Mauk more than assumed the responsibility he was careful initially to decline. Without Bill Mauk, Don Paradis would have been executed. He would be dead.

Turning first to the transcript of the original trial, I began to work on Don’s case without realizing that the struggle would last 16 years and that it would be a life defining experience. The transcript revealed that in 1980 Don Paradis was charged with having strangled a young woman, Kimberly Palmer, along a remote mountain stream in North Idaho.<sup>4</sup> By a strange coincidence, I grew up in that very country and in college had worked summers in a sawmill near the stream site, which was to prove useful in ways I could never have predicted. Hopefully, I said to myself as I started to read the transcript, my years of international corporate practice hadn’t totally erased what I learned of Constitutional law. I did not then suspect that the case, as with the administration of the death penalty throughout our country, would

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3. Of course, forgetting entirely that in 1985 New York had not had a death penalty for over twenty years.

4. Transcript at 15, *Paradis I*, No. F29468.



be more about politics than the law and that politics, not the legal system, would save Don's life.

The transcript further revealed that Kimberly Palmer was killed because she had been a witness to the murder of her boyfriend, Scott Currier. The Currier murder occurred earlier the same night at Don Paradis' house in Spokane, Washington.<sup>5</sup> Don Paradis and two others, all wired, dirty-haired, smelly-shirted, unkempt, fearsome bikers, had driven from Spokane to Idaho with Currier's mutilated body and Palmer allegedly alive. Currier's body was left in the woods nearby and then, the prosecution claimed, the men chased the escaping Palmer through the woods to the stream where she was strangled and left to die. The State's hired pathologist, Dr. William Brady from Portland, testified that Palmer's lungs were about 500 grams too heavy and wet, that she had inhaled water from the stream when she was alive (accounting for her heavy, wet lungs) and she therefore had died in the Idaho stream where her body was found, not in Spokane. A witness established that the men were present at the stream site for less than thirty minutes. Don and the two other men were identified near the site by a policeman who took their driver's license numbers. One of the other three bikers, Thomas Gibson, was tried before Don. Both Gibson and Paradis were found guilty and the trial judge sentenced them both to death.<sup>6</sup> The third, Larry Evans, went into hiding for five years.

The trial judge assigned William Brown to represent Don. Like many counsel assigned to defend death penalty cases in this country, Brown was abundantly inadequate to the task.<sup>7</sup> Only six months out of law school, he had never tried a jury case. He did not know how to introduce evidence during the trial or how to object to the prosecutor. The jury laughed at him. He barely investigated the facts, and the court allowed him only a small budget to do so. I don't believe he ever understood the evidence. For instance, even though the police identification irrefutably placed Don near the scene, Brown challenged that Don was present by having one of Don's girl friends testify to his "alibi." Her testimony was obviously false and easily discredited by the prosecutor. Despite his inadequacies, even more shocking is that while he was Don's lawyer, Brown was also a policeman in the same county where the trial occurred.

Although the Fifth Amendment guarantees defendants effective assistance of counsel, I was disillusioned when the Idaho Supreme Court later found Brown's shameful defense "superb."<sup>8</sup> The Federal Courts also found Brown to be constitutionally "effective" and were untroubled by Brown's conflict of interest as a policeman.<sup>9</sup> From this, it is clear that the standards for effective assistance of counsel in death penalty cases are shamefully low, to say the least. No court in any commercial matter would appoint counsel with such a conflict or tolerate such incompetency. These court holdings on Brown are examples of court assisted homicide in America.

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5. *Id.*

6. *Paradis I*, No. F29468, at 17.

7. See, e.g., Joseph Tydings, *Execution of Death Row Innocents and the Failure of America's Legal Profession*, 35 U. TOL. L. REV. 655 (2004).

8. *Paradis IV*, 716 P.2d at 1316.

9. *Paradis V*, 667 F. Supp. at 1370; *Paradis VI*, 954 F.2d at 1490-92.

When I first read the transcript and thought about the State pathologist's testimony about aspiration of water, I was at home for Christmas. I happened to have a 500 cc jam jar, which I filled with 500 grams of water. As I stared at the glass, I could not imagine how someone could inhale that much water. This was my first doubt that Kimberly Palmer had died in that stream.

We later noticed another curious and significant fact that Brown had not mention to the jury. Dr. Brady's autopsy report, which Brown failed to try to introduce into evidence until too late, recorded a 1½" long cut in the victim's genitals "with no evident vital reaction."<sup>10</sup> These words, we later learned from Dr. Brady himself, meant that this wound did not bleed. But, Dr. Brady explained further, had such a wound been inflicted even within an hour or more after the victim's death, it would have bled profusely. Had Palmer died in the stream as the prosecution argued? Or had she died much earlier and then her body dumped in the stream? Since the men were at the stream site for less than thirty minutes, at the time I simply wondered how this cut, which was in a highly vascular area of the body and apparently did not bleed, could be reconciled with the prosecution's case.

Next, I went to Coeur d'Alene, Idaho to look at the physical evidence in the case. I went because one must be thorough, not because I expected to find anything. I remember sifting through a box of gruesome artifacts, blood soaked towels, and graphic pictures of the two corpses. When I picked up the jeans Kimberly Palmer had been wearing in the stream, I noticed they had a dramatic cut exactly in the place of her genital wound and that the cloth, which must have covered the wound when it was inflicted, was soft and unstained, showing no trace of blood. Before really thinking about the significance of what I had found, I felt a cold shiver go up my spine. Something didn't fit. It took me a while to understand what was wrong. The absence of blood stains in the jeans proved that the wound did not bleed, and if the wound did not bleed, it had to have been inflicted some time after death, in which case, because the men were at the site for only a few minutes, Palmer must have been killed with Currier in Spokane and been dead a long time before her body was placed in the stream. These facts were not presented to the Paradis jury.

My intellectual understanding of the significance of the absence of blood came slowly. However, my involuntary shiver came from my realization at that moment that my client might very well be innocent. The case was no longer about abstract principles. I was now responsible for saving the life of someone who was not guilty. If we did not win this case, another innocent human being would be killed. The stakes had shot up immeasurably. I was scared!

In the course of the following years, we obtained a fuller understanding of the significance of the unexplained absence of blood, as well as other forensic evidence available in the case, none of which had been presented to the jury. We found five people who had seen Kimberly Palmer dead in Don's house in Spokane, Washington (and not Idaho). More importantly, they also claimed that Don was not home when Palmer and Currier were killed. We learned that, in the middle of the night, Currier and Palmer had turned up at Don's house in Spokane, accusing the drunken and doped up bikers of stealing Currier's guns. As the confrontation intensified, Currier drew a gun and a terrible fight began. Then Don left, angry at

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10. *Paradis XV*, 240 F.3d at 1175.

the lot for trashing his house. While Don was away, the fight resumed, and Currier was beaten to death. Because she was a witness to the Currier murder, it appeared that Thomas Gibson then strangled Palmer in the house. When Don returned home later, he found everyone departing, leaving him with two dead bodies. Panicking, Don, Gibson, and Evans then drove the bodies from Spokane, Washington to the Idaho stream site.

For thirteen years we presented these facts and the rest of Don's case to over a dozen courts and two dozen judges, in both state post conviction petitions and in two federal habeas petitions. Our petitions were based upon a dozen claims that Don Paradis had not received a fair trial and that his death sentence was unconstitutional. Our legal claims relating to Don's conviction included insufficient evidence to find him guilty, Brown's incompetence and conflict of interest, jury bias, prejudicial small-town publicity, prosecutorial misconduct, and the improper introduction of evidence of Currier's murder (which Don had previously been acquitted in the State of Washington). We also argued that Idaho's death penalty statute was unconstitutional on several fronts: it allowed the judge, not a jury of the defendant's peers, to make the factual findings required to impose the death sentence and that the aggravating circumstance found in Don's case was vague. The federal courts up through the U.S. Supreme Court were not sympathetic to our claim that the Constitution requires that the factual findings required for a death sentence be imposed by a jury.<sup>11</sup> As was our duty as counsel, we included every credible claim we could think of. In each filing, in each argument, at every opportunity, however, we explained in the clearest possible terms why Don could not possibly be guilty of Palmer's murder. To my repeated disbelief, all of our claims were denied. No court seemed to be interested in the execution of an innocent man. Don's execution got closer and closer.

We faced another obstacle. Under Idaho law, a defendant must raise all challenges to a conviction or sentence, including new evidence, within 42 days after judgment, unless the claims were not known and reasonably could not have been known within this time period.<sup>12</sup> In 1996, the Idaho Supreme Court held, even though this law was adopted four years after the Paradis conviction and although Paradis could not have complied with the law, that Idaho's 42 day rule barred consideration of his claims.<sup>13</sup>

Federal law provided no reprieve from the 42 day rule since federal courts in habeas corpus matters accord a presumption of correctness to state court findings of fact, unless the state court finding is rebutted by clear and convincing evidence.<sup>14</sup> If the state courts made no finding of fact or the state court finding resulted from unfair procedures or is plainly wrong, the federal court must make its own finding.<sup>15</sup> This demanding standard appeared to be have been established in our case. We

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11. This past year the Supreme Court held that the Constitution so required, thus, invalidating all Idaho's death sentences which had not yet been carried out. *Ring v. Arizona*, 536 U.S. 584 (2002). Had Don Paradis been executed, this decision would have been too late.

12. See IDAHO CODE § 19-2719 (Michie 1997 & Supp. 2003).

13. *Paradis XI*, 912 P.2d at 114.

14. 28 U.S.C. § 2254(e)(1) (2000).

15. See 28 U.S.C. § 2254(d)-(e) (2000).

learned in *Paradis*, however, that even if a Federal court has plenty of room to overturn state court findings, federal courts are extremely reluctant to do so.

The legal side of our journey, marked by relentless attacks in numerous courts with clearly exonerating evidence, highlighted an unfortunate reality in death penalty law: both state and federal courts are more concerned about limiting their review of lower court decisions than about doing justice or about not killing innocent death row inmates. This approach and our consistent courtroom failures, to me, seemed counterintuitive. Call me idealistic, but before I became involved in death penalty law, I would have thought, in the face of a strong showing of innocence as in Don's case, any judge, state or federal, would find some way to do justice rather than, as if this were a Kafka novel, allow the state to kill an innocent human being based upon its interpretation of some formal rule. After all is held and written, the law should be about doing justice. Sadly, when it comes to the death penalty, it is not. The state and federal rulings here are illustrative of this fact because, effectively, they condoned Brown's failure to develop the evidence of Don's innocence.

#### *B. The Human Side of Our Journey*

As we suffered one failure after another in court, Don became increasingly angry at the judges, at the state, and at me.<sup>16</sup> I could not explain to him, in rational, human terms, why the courts turned a deaf ear to his claims of innocence. He often took my intense frustration as my disbelief in his case and in him. His anger and frustration consumed him and many of our conversations. When we talked, he always argued his case. He had too much time to think about his case. I had too little. He could not understand, with his life at stake, why a court of appeals would not question obviously erroneous findings of fact by lower courts or why court imposed deadlines had to be arbitrary, or why there was a page limit to briefs that pled for his life. When the third biker, Larry Evans, was caught and tried with the same evidence introduced against him, but who, with a good defense lawyer, was acquitted, Don could not understand why his case was not reopened. Nor could I. Several times his frustration led him to fire me. But each time, I refused to go.

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16. Despite these courtroom failures, at one point, we were able to convince the Ninth Circuit Court of Appeals to declare unconstitutional the sole aggravating circumstance under the Idaho statute which the sentencing judge had found in order to impose Don's death penalty. *Paradis VI*, 954 F.2d at 1495. This aggravator was that in the commission of the murder, the defendant had "exhibited utter disregard for human life." *Id.* We argued that one could not commit first degree murder, which under the law must be willful, deliberate and premeditated, without utter disregard for human life and, therefore, "utter disregard" did not, as required by Supreme Court decisions, permit a principled distinction between those convicted of first degree murder that deserved the death penalty and those that did not. *Id.* The Ninth Circuit Court of Appeals agreed, and Don was released from solitary confinement into "general population." He organized bible classes for other prisoners, got his high school diploma, and in prison had the semblance of a life. *Id.* Then one day when he was playing softball, a posse of guards came onto the field, put him back in chains and marched him to his cell. The U.S. Supreme Court had split semantic hairs to find that "utter disregard" was not vague and meant killing "without feeling or sympathy." *Paradis VII*, 507 U.S. at 1026; *Arave v. Creech*, 507 U.S. 463 (1993). Who kills with feeling and sympathy for the victim? Worse than empty abstractions, these words play mind games with lives.

While I could understand his frustration with the courtroom failures, the frustration and emptiness he felt from his daily life was unimaginable. On Death Row, he was confined to his six by twelve foot cell alone all day and night, year after year. He was only permitted a weekly visit to the law library, a shower, and opportunities to exercise. However, during each of these activities he was either shackled down or placed in an iron cage. Meals were passed to him through a narrow spy slot in the door. Human contact was limited to weekly calls, usually to me 2,000 miles away, and visits from his pastor separated by thick glass and whatever conversation could be had with other death row inmates at night through ventilation ducts. Several times Don called upset to tell me that he could not stand the torture of his confinement and impending execution anymore, instructing me to withdraw his appeals and get it over with. Of course, each time I refused.

Despite these horrific living conditions and a life filled with disappointments, Don did, at times, show signs of humanity. On occasion, we would talk of other things, of our hopes and feelings about the world. Sometimes Don would even joke. "I have to hang up now, Don." "No Death Row jokes," he would reply.

His humanity, I eventually learned, was not merely a facade; it was genuine. One day, to my amazement, after Don had been on Death Row for fifteen years and I had known him for ten, a sheaf of papers from the prison tied with a plain white string appeared on my desk. It was a book of poems he had written, entitled "From Within." I had not known he wrote anything. As I read his words, I realized that I had little understood this condemned man. Don had been writing these while all alone for 5,000 nights trapped in a warehouse for the damned waiting for others to decide what day he would die. As I read his poems, I realized that anger was but one small dimension of Don Paradis. I saw that in his ultimately alien world a smile came to his tear-filled eyes. He wrote of mounting the wind to fly. Prison, he wrote, is just a house. Your spirit can still fly the universe, ride solar flares to the other side of the sun, swim with dolphins off Easter Island, hear the forest orchestra, and smell small flowers along a mountain stream. In his cell he could see a butterfly floating in the breeze of a mountain meadow, and he could fly from his tiger cage.

Don's spirit, explained through his poems, reminded me that life is always worth the trouble. That despair is a sin. That we are often our own jailers. That there is magic all around. For Don, Death Row was a time for terrible enduring, but it was also a time for strength and searching and even peace. With these poems that fell on my desk, ironically this Gypsy Joker gave me hope. He told me never, never to give up!

One of the turning points for Don's life came when he was partially reunited with his birth mother. Don never really had the quintessential American childhood. He was adopted and had never known his birth mother or father. His adoptive setting was no better. His adoptive mother cruelly criticized him. He left home early for reform school, angry with his life. Being aware of all of this, one day, my wife, decided to try to find his real parents. Through friendly moles in the open adoption network, she was able to gain access to his birth records in Massachusetts. From this search, Don learned that his real name was Fortado, not Paradis. More importantly, his birth mother was found, and, after several months of waiting, Don sent her a letter. He told her where he was. She called. She told him that a day had

never passed in her life when she didn't think of him. She went on to sing him the song she sang every year to herself on his birthday.

After Don spoke with his mother, he called me and cried. His mother was old and very sick, and she died soon after. Don never saw her. However, his discovery was evidently transformative. It was as if he had found himself. We noticed his anger began to quiet. His clenched fists seemed gradually to relax. There was more and more humor and thoughtfulness in his person. More often, I looked forward to his weekly calls.

Strangely, in retrospect, I realized that "anger" was not solely a feeling that Don and I shared throughout our journey. Anger permeates the entire process. We had worked on Don's case in the face of great anger; the anger that drives the death penalty in America. Of course, the death penalty expresses society's anger against the worse of crimes and its thirst for retribution. This I had expected. But at every stage, I found the judges angry, the lawyers for the State angry, the prison officials angry. Much of that anger was directed at me, not just my client. Before I took Don's case, I had naively thought I would be thanked for serving justice. I had even supposed that once I explained the facts of Don's innocence to the Idaho Attorney General, the state would at least agree to drop his death sentence. Instead, the judges resented the complicating issues we raised. The Idaho Attorney General's office was bitter because they could not kill Don Paradis quickly without judicial ceremony.

I would like to believe that all this anger comes from the reaction of human beings to killing their own. But, I now believe that the judges and the state want simply to prevail and that legal issues, whenever introduced by petitioner's counsel, frustrate their exercise of power. In our adversary system, a marginal, alienated, indigent biker has little chance to be judged fairly. Indeed, capital defendants are confronted by an angry, desensitized, almost single-minded juggernaut, with a thirst for victory and a seeming blindness to justice. The only thing standing between this Machiavellian goliath and Don's death was my law firm. We represented his last chance and we were, in light of defeats explained above, becoming desperate. At one point, getting nowhere in court and facing a reinstated death sentence, Bill and I went to see Al Lance, Idaho's Attorney General. As we painstakingly went through the evidence of Don's innocence, Lance appeared careful not to reveal any sign of human emotion. In my own innocence, I told the Attorney General that I was sure that the State of Idaho would want no part of the execution of an innocent man. Indeed, at the conclusion of our meeting, Lance promised he would ask one of his aides, a retired Army general who he said was tough as they come, to meet with us and review the evidence in detail. We were hopeful. But we never heard from the general or saw anyone else from the Attorney General's office. We were out of options. Therefore, we turned to the only remaining venue: the public. Don and the public turned out to be strange bedfellows.

### *C. The Politics of Justice*

With the exception of a dogged, but lone, reporter in North Idaho, Don had absolutely no public support. The newspapers all clamored for enough of our appeals on technicalities and for his quick execution. But, in 1995, after more than

ten years of failure, Don's execution was looming. At this moment, I turned to my wife, Patricia.<sup>17</sup> As a television news and political campaign producer, she appreciated, as a lawyer I did not, that public opinion can determine the course of human events, including court decisions. With her experience, Patricia saw clearly that we had two tasks. One was to change the public view of the Paradis case. The other was to get State of Idaho officials, who were fighting to execute Don as fast as they could, to look at the evidence of his innocence. Patricia was fundamental in saving his life.

Patricia understood that we had to lay the ground work in the public forum for any relief, something for which she had a strategy. Since the Idaho newspapers were openly hostile, we began close to home. The way to get the folks in Idaho to look objectively into the Paradis case was to draw national attention to the case. We used all of our resources and spoke about the case to everyone we knew. We wrote memos and letters and releases about the injustice of Don's conviction. We contacted television producers, journalists, and writers. Some were interested for a while, but then backed out. Don's involvement in hiding the bodies and his biker connections confused them. This was not a black and white story. Many declined straight away, saying they "had already done a death penalty story."

Finally, the media took the bait. In March 1995, ABC's news magazine show, *Day One*, agreed to run a fifteen minute profile of the case.<sup>18</sup> That month, the *New Yorker Magazine* also published a long article, *A Night at the Beast House*, on the case.<sup>19</sup> Before that, a courageous reporter in a Spokane television station, one of the many whom Patricia had contacted, did her own local story, which gave us something to show prospective reporters.<sup>20</sup> And an article appeared in the *Boise Weekly*—"Paradis Lost: Is Idaho preparing to kill an innocent man?"<sup>21</sup> All of this coverage raised serious questions about Don's guilt, pointing to his unfair trial and the inconsistencies in the State's case.

This awakened the interest of the leading Idaho press and led to dramatic local media attention. *The Idaho Statesman*, Idaho's principal newspaper, which had been urging Don's execution, was brought to inquire into this case by the national attention. It assigned a diligent, smart reporter to look into the merits, and we opened our files to him. The paper published a several part analysis of the case—*Death and Doubt*<sup>22</sup>—which pointed to a possible grave mistake of justice. The paper changed its editorial policy to urge serious review of the case. From this, other newspaper coverage questioning the state's case followed.

However, still having nightmares about what Don's execution would do to her husband, as well as Don Paradis, Patricia did not stop. She contacted others who would listen. We endlessly sent summaries of the evidence to local media and political figures. Some contacts backfired. For instance, one prominent actor she

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17. Through the years, at close range, she could not escape my intense frustration, and she shared with me the dreadful apprehension of Don's execution.

18. *Day One* (ABC television broadcast, Mar. 1995).

19. Alec Wilkinson, *A Night at the Beast House*, *NEW YORKER MAG.*, Feb. 13, 1995, at 52.

20. Kerry Tomlinson (ABC affiliate KXLY, Spokane, Wash. 1994).

21. David Madison, *Paradis Lost: Is Idaho Preparing to Kill an Innocent Man?*, *BOISE WKLY.*, July 27, 1994, at 4.

22. Marty Trillhaase, *Death and Doubt*, *IDAHO STATESMAN*, Apr. 28, 1996, at 4A.

contacted obligingly wrote Idaho's new Attorney General, whose office then promptly accused us publicly as New Yorkers trying to sabotage Idaho's death penalty.

But other contacts were fruitful. Another well known actor, as well as local political figures, wrote Idaho's governor, Cecil Andrus, with whom Bill Mauk and I were able to schedule a one hour meeting. Not just another trip to Boise.

Early in the meeting I told the governor I had grown up in North Idaho. We spoke of fly fishing on North Idaho rivers for nearly the full hour. As we were running out of time, I offered to meet further with the Governor or his staff to review the evidence of innocence in addition to the written material sent him. After pleading on behalf of Don to deaf ears for years and years, I could not believe his answer: "That will not be necessary, Mr. Matthews. I will see what I can do and call you tomorrow." Unfortunately, Andrus was to end his term shortly and had no legal power to grant any relief. But he did call, explaining that he had written Idaho's Clemency Commission (which must recommend clemency before the governor can act) recommending a hearing in Don's case. Thankfully, the outgoing Governor did not stop there. He also appeared on local television the next day to announce his letter and say that the case was disturbing. Cecil Andrus' intervention may also have saved Don's life. In May of 1996 we got a clemency hearing.

With this victory, we remained relentless. We also sought out radio support. Patricia contacted Johnny Duane, the soft talking, down home host of *Idaho Today*, Boise's leading talk show. Johnny Duane began regularly to interview Bill Mauk and me, who he cast as an "Idaho boy," on his morning show. I would call in to the show from my office in New York and patch in Don when he called me from the prison, and the two of us would answer questions from listeners. One day, Idaho's Solicitor General made the mistake of calling the show and found himself in a voice to voice debate with Don Paradis from Death Row. Don held his own very well. The Solicitor General did not risk calling again to be confronted by a condemned inmate.<sup>23</sup>

Right up to the clemency hearing, we kept reaching out. We contacted every religious leader in Idaho. Don's pastor, Tom Blackburn, had knelt in prayer in open court at Don's hearings and, according to the Episcopal Bishop of Idaho, had "carried Don's heart in his heart for 12 years." With Blackburn's good work and reputation in the community, thirteen churches signed on to hold an ecumenical service for Don. The church members were moved by the fact that religion was an important part of Don's life in prison. Before the clemency hearing, the *Idaho Statesman* published on its first page under a large Paradis headline a color picture of Blackburn, his eyes closed and arms raised, praying for Don.<sup>24</sup> The Methodist minister declared: "We call out to those whose hearts can still hear, whose heart and mind is still open, let Donald Manual Paradis be heard."<sup>25</sup> This was a great way to begin the clemency hearing.

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23. After that, the Idaho prison prohibited patching in an inmate. When you now call the prison, a recording says that if you try, you will be cut off.

24. Bill Robert, *Religious Leaders Gather to Pray for Paradis' Life*, IDAHO STATESMAN, May 6, 1996, at 1A.

25. *Id.* (quoting Jon Brown, First United Methodist Church associate pastor).



*D. The Turning Point: The Clemency Hearing*

Bill Mauk and I prepared for the clemency hearing as if it were a trial for Don's life, because it was. We wrote up the evidence before the hearing and presented it to a focus group in Boise to be sure it was convincing. To show what had never been considered by the jury or by any court, we constructed and presented charts of all the exculpatory evidence and detailed summaries of the trial transcript.

While preparation was important, witness selection was also crucial. First, we needed someone to testify that there was no scientific basis for Dr. Brady's testimony regarding inhaling of water. We convinced four recognized medical examiners from around the country to come without fee to Boise to testify about the forensic evidence. Their testimony directly controverted Dr. Brady's. All four testified that strangulation victims, not drowning victims, exhibited heavy, wet lungs, and that the wound on the victim's body was post-mortem and inconsistent with her death in Idaho.

In addition to medical testimony, we needed an expert who could explain to the commission the ramifications that our previous legal defeats should have on its decision. For this, we recruited a retired justice of the Idaho Supreme Court, who had ruled on Don's appeal. He opened our hearing by explaining to the commission that it was not bound by any prior court decision. The Justice continued, that, had he known then what he knew now, he would not have voted to uphold Don's conviction.

We buttressed our case with live eyewitness accounts of what took place. First, although scared to death, Don told the commission his story of the fateful night. Second, we obtained testimony from independent parties to substantiate Don's story. We brought a former Gypsy Joker to the hearing, who I had sought out one early morning in Salem, Oregon as he got out of jail and before he got to the nearest bar. He had since cleaned up his life. This former biker explained how he had walked into Don's house in Spokane that night and seen two bodies on the floor which he knew were dead because he "knew them when he seen them cause [he] was in the business." And there was another witness in the house who testified, but only after Don's trial, that she saw Thomas Gibson strangle Kimberly Palmer in the Spokane house when Don was not home. Most importantly, Thomas Gibson read a statement accepting responsibility for Palmer's murder and exonerating Don.<sup>26</sup>

The State did not back down. It displayed pictures throughout the room taken nearly twenty years before of Don Paradis and other bikers looking like gorillas. It stationed Kimberly Palmer's bereaved family in the first row, staring at the commission, urging his execution. The State countered our medical testimony. The Solicitor General had Dr. Brady show volumes of his prior testimony and repeat stale generalities. Another pathologist for the state testified that the blood could have washed out of Palmer's jeans. (The state had previously argued at different times that the wound was caused by the police when they recovered her body or by sticks falling in the night!) Through all this and while the State's Solicitor General ranted, Bill was impressively reserved and convincing.

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26. The letter he read was consistent with a letter he had sent without effect to the judge before Don's trial.

We had in reserve Dr. John Thornton, one of the world's best known blood detection experts. On minutes notice, John Thornton flew overnight to Boise to rebut the State's new expert. Thornton explained that it was impossible for blood to have washed out of the jeans and that the test for blood used on the jeans could detect a shot glass of blood in a tank car of water. His testimony was damaging to the State's case. In fact, after Thornton's unexpected testimony, the State's expert asked to return to the stand to correct his statements, because, he acknowledged, Thornton was the expert.

In the early morning hours after the close of the hearing, Bill Mauk banged loudly on our hotel room door to tell us that the commission had voted 3-to-2 to recommend clemency to the governor. After so many desperate losing years, this seemed an unbelievable dream. The next week, this dream became a reality after presenting our evidence again to Idaho's new Governor, who commuted his death sentence to life without parole.<sup>27</sup>

But our victory was not truly apparent until I called Don. When I told him the news, there was a painfully long silence and barely inaudible sobs, both his and mine. He then said: "Thanks." We hung up. When I sat on my porch the next morning, I became aware of a strange relief and realized that after twelve years my own sentence had also been lifted.

#### *E. The Surprise Package: A Legal Claim*

As glorious as avoiding the death sentence was, in 1996, after 14 years on Death Row, Don was still in prison for life without any chance of ever getting out. His initial habeas petition had been finally dismissed after years of litigation.<sup>28</sup> His successor petition had also been dismissed by the state and federal courts.<sup>29</sup> Successor petitions are viewed with great hostility by the courts, and I didn't expect much from ours. However, our work was not finished.

The successor petition raised several legal claims that we were never able to include in the initial federal habeas petition because, when we got Don's case, they had not been considered by the state courts, which under rules of comity they must be. These claims happened to include a claim under *Brady v. Maryland*<sup>30</sup> that the prosecution had failed to preserve and disclose to defense counsel before the trial evidence favorable to the defense. While I thought this claim weak at the time, fortuitously it was the claim that gave us a legal vessel for new facts we were about to discover.

In early 1996, fifteen years after Don's arrest, another surprise package of papers had appeared on my desk. A lawyer for Thomas Gibson, whose appeals were years behind Don's, had visited the North Idaho prosecutor's office and had been allowed

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27. This is quite an achievement since Governor Batt was a tough talking former onion farmer who, it was said, was "not known for his mercy." See Bob Herbert, *In America: What If You're Not Guilty?*, N.Y. TIMES, Apr. 16, 2001, at A19.

28. *Paradis V*, 667 F. Supp. at 1396; *Paradis VI*, 954 F.2d at 1495; *Paradis VII*, 507 U.S. at 1026; *Paradis VIII*, 20 F.3d at 960, cert. denied, *Paradis IX*, 513 U.S. at 1117.

29. *Paradis X*, No. SP8977037, at 5; *Paradis XI*, 912 P.2d at 114; *Paradis XII*, No. CV-95-00446-S-EJL, at 2; *Paradis XIII*, 130 F.3d at 400.

30. 373 U.S. 83 (1963).

to copy their files. These were files that I had subpoenaed ten years before, but, knowing full well what they would disclose, the Solicitor General had objected on the ground that the files were confidential “work product.” The federal judge agreed with the state and quashed our subpoena. To our astonishment, in these papers we found copies of notes taken by the prosecutor before Don’s trial containing statements from Dr. Brady to the effect that, contrary to his testimony at trial, Kimberly Palmer was dead when her body was placed in the stream. When I told Professor Tony Amsterdam at NYU Law School, who had generously advised us, that we had received the prosecutor’s notes, he said that he would want me as part of any death penalty defense team, because there was always room for someone who was lucky.

We again entered the state and federal courtrooms that had once before ignored our pleas. When we presented this new exculpatory evidence to the Idaho Supreme Court before clemency, however, it angrily denied relief: “How many trials do you want. Two, Three ... when will this end.”<sup>31</sup> The U.S. District Court was no more sympathetic, denying our claim based upon the notes.<sup>32</sup> Consequently, we appealed to the Ninth Circuit,<sup>33</sup> which was a problem because under the court of appeals rules, subsequent petitions in death penalty cases always go before the same judges that considered the first petition. These judges had already ruled against us and had even found, based upon an egregious misreading of the evidence, that blood could have washed out of the victim’s jeans. But thankfully, as a result of the clemency, Don’s case was no longer a death penalty case. We moved to disqualify the previous panel. Our motion was granted and we got new judges. Because Don had received clemency, the rules of justice had changed.

In an opinion that showed that they had finally understood the evidence, in 1997 this new panel of the Ninth Circuit held that the district court had abused its discretion, reversed its dismissal of our petition and ordered a hearing on the withheld notes which it found contradicted Dr. Brady’s testimony given at trial.<sup>34</sup> The court also found, after all our years of failure to get any court to pay attention to Don’s claim of innocence, that there was exceedingly strong medical evidence that Kimberly Palmer was dead before her body was placed in the stream and there was no evidence that she died in Idaho.<sup>35</sup> The court noted that there appeared to be no rational explanation for how the victim’s wound could have been inflicted before or around death and leave no trace of blood in the victim’s jeans or body.<sup>36</sup> Therefore, the court further reasoned that she would have to have been dead before the three men brought her to the Idaho stream site.<sup>37</sup>

I have no explanation as to why it took seventeen years and over a dozen proceedings to get a court to appreciate our evidence of innocence except that, because judges care more about limiting review of jury findings and other judges’

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31. This exchange occurred at a hearing before the Idaho Supreme Court. It issued its decision at *Paradis XI*, 912 P.2d at 110.

32. *Paradis XII*, No. CV-95-00446-S-EJL, at 2.

33. *Paradis XIII*, 130 F.3d at 385.

34. *Id.* at 400.

35. *Id.* at 398-99.

36. *Id.*

37. *Id.* at 399.

decisions than they do about doing justice, they are willing to turn a blind eye to the claims of those on Death Row. It seemed that only when Don was no longer on Death Row and his execution was no longer being delayed by our appeals, that the courts took seriously the evidence of his innocence. Although the withholding of the notes by the prosecutor violated our client's constitutional rights to a fair trial and would have been highly useful to his defense, the notes provided no essential information beyond what we had been shouting and crying for years.

Back in the federal district court, we learned further in discovery that a police officer, and not Dr. Brady, came up with the inhaling of water theory and that Dr. Brady had actually found in his autopsy that the victim's lungs contained only a small amount of water, i.e., were not especially wet. Following our hearing, the same federal district judge who had previously denied all relief and had been willing to allow Don to be executed, found that the work product doctrine did not protect the notes from disclosure and that the suppression of the notes prejudiced the defense and undermined confidence in Don's conviction.<sup>38</sup> The judge ordered that Don be retried within 60 days or released.<sup>39</sup>

Determined to the end to deny justice to Don Paradis, the State of Idaho again appealed.<sup>40</sup> In 2001, after more briefing and argument and state maneuvers to delay the proceedings further while Don waited and began his twenty-first year in prison, the Court of Appeals finally affirmed the order for his release or retrial.<sup>41</sup>

Bill Mauk and I then began negotiations with a new North Idaho prosecutor who had replaced the prosecutor who had withheld the notes. It was the new prosecutor who had made the principled decision to allow Gibson's lawyer to copy the notes. Initially, he asked that Don plead guilty to second degree murder and serve some additional time. To Bill and me this offer seemed tempting, because, as we explained to Don, as he was convicted once in a small town in North Idaho there was a risk, albeit small, that in that small town he could again be convicted and sentenced to death. However, contrary to our advice, Don Paradis, no less principled than the current prosecutor, told us that he would never plead guilty to anything he did not do.

With Don's instructions in mind, we argued to the prosecutor how his principal witness, Dr. Brady, was discredited, that we were eager to retry the case and how expensive for the county a retrial would be. The prosecutor was convinced. He agreed to Don's immediate release as long as he would plead guilty to concealing evidence of a crime, for which Don willingly accepted responsibility, with credit for time served. To his credit, the prosecutor recognized and stated publicly that there was not sufficient evidence to justify a retrial.

#### *F. Our Client Released*

On April 10, 2001 in Coeur d'Alene, Idaho, the same North Idaho judge who had sentenced Don Paradis to death twenty years earlier pronounced his release. Don,

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38. *Paradis XIV*, No. CV-95-0446-S-EJL, at 31.

39. *Id.*

40. *Paradis XV*, 240 F.3d at 1169.

41. *Id.* at 1181.

Bill Mauk, and I walked out of that court room together. Don no longer wore his orange prison suit. He wore a tweed jacket I had brought him from New York, which didn't fit. When outside, Don first reached down and hugged my brother's Labrador which gave Don the usual canine wet tongue greeting. We then drove to the cabin on Coeur d'Alene Lake where I had grown up. There Don and I slowly walked together along the lakeshore where I had towed model boats over fifty years before. We just stared at the gray-green water, not quite believing that we were there.

Later we had a small dinner for Don in Boise at a modest, old Basque sheepherders' restaurant. An Idaho newspaper publisher, who for years had given us loyal support, came with two dozen red roses. Don's pastor who had visited him every week for twenty years, was there with his family.

That next week, the *New York Times* ran two op ed pieces on Don's extraordinary case. One, *What if You're Not Guilty*, was on the high cost to get the innocent off Death Row.<sup>42</sup> The other, *Death Row Survivor*, focused on Don's wrongful conviction.<sup>43</sup> Sometime later, *60 Minutes II* covered the story.<sup>44</sup> But the end of our ordeal still seemed unreal until I learned, some time later, that Don had bought a horse named Blessing and that they went swimming together in the Boise River.

Don insisted on coming right away to New York to thank our law firm. During the sixteen years that we had fought for his life, almost everyone at Coudert Brothers had come to know of Don Paradis. His death sentence had shocked our souls. Scores of us had shared in his nearly endless struggle: secretaries had typed his briefs late into the night, telephone operators had fielded his frantic collect calls, paralegals had organized and bound thousands of pages of exhibits, messengers had rushed motions to court, and dozens of lawyers, old and young, had labored many thousands of hours trying to make our legal system work. When Don finally arrived in our office at Midtown Manhattan, screams of joy and recognition greeted him as he walked through the office, and he was hugged and hugged. Through our desperate fight to save his life, his struggle, his agony had in part been ours, and in a way we had become his improbable family.

We had a celebration for him that day and toasted this former outlaw Gypsy Joker with fine champagne. After years and years of heartbreaking defeat and desperation and fear of losing him forever, his life had been saved from the failing administration of the death penalty. Don stood before us that afternoon quite alive, but he seemed almost an unbelievable mirage. Although in the course of the atrocity of his death sentence and confinement for life, much of Don's life had been lost, he had ennobled ours. As Don Paradis graciously thanked us all, his humanity and the miracle of his survival moved to happy tears two hundred people in a New York City law office that extraordinary day.

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42. Herbert, *supra* note 27, at A19.

43. Bob Herbert, *In America: Death Row Survivor*, N.Y. TIMES, Apr. 12, 2001, at A29.

44. *60 Minutes II* (CBS television broadcast, June 5, 2002).

# HOW STEVE ROACH, OF STANARDSVILLE, VIRGINIA, AND KINGMAN BREWSTER, PRESIDENT OF YALE UNIVERSITY, COMBINED TO TEACH ME ABOUT THE MEANING OF DEMOCRACY

*Steven M. Schneebaum*\*

AT approximately 9:30 p.m. on December 3, 1993, Steve Edward Roach of Stanardsville, Virginia, fired a single unprovoked shotgun blast, at point-blank range, at his neighbor, Mary Ann Hughes, killing her instantly. It was the first and only violent crime of his life. Ms. Hughes had been one of Steve's few friends. She was over 70 years old. He was 17.

I represented Steve Roach for about three years after his conviction for the capital murder of Ms. Hughes, beginning with the habeas corpus petition filed on his behalf in the United States District Court for the Western District of Virginia.<sup>1</sup> And I was with him when he walked from his cell at the Greensville Correctional Facility to his death, on January 13, 2000.<sup>2</sup>

Steve was neither my first nor my last death penalty client. My law firm, Patton Boggs LLP, whose members are far from unanimous on the issue of capital punishment, provides unwavering support, both moral and material, to the Pro Bono Program that I have run for a quarter of a century. We serve clients who would otherwise be unable to afford to defend their legal rights. Steve was a firm client in all senses of the word, and we spared no effort that we would have used in representing any other individual or corporation.

Death penalty advocacy affects those who undertake it in many ways, including some that are intensely personal. I do not limit my reference to those lawyers who actually befriend their clients, and who may believe deeply and truly that those men

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1. See *Roach v. Angelone*, No. 97-0693-R, 1998 U.S. Dist. LEXIS 22492 (W.D. Va. July 29, 1998).

2. The citations to the *Roach* case are as follows. Roach's original conviction and sentence is at *Roach v. Virginia* (Greene County Cir. Ct. May 9, 1995) [hereinafter *Roach I*]. The affirmance of his conviction and sentence by the Virginia Supreme Court is reported at *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996) [hereinafter *Roach II*]. The United States Supreme Court denied certiorari. *Roach v. Virginia*, 519 U.S. 951 (1996) [hereinafter *Roach III*]. Roach then filed a petition for writ of habeas corpus in the Supreme Court of Virginia. The state habeas petition was disposed of in unreported orders, and the U.S. Supreme Court denied Roach's petition for writ of certiorari at *Roach v. Angelone*, 522 U.S. 1057 (1998) [hereinafter *Roach IV*]. We then sought habeas relief in federal court. The decision of the Western District is at *Roach v. Angelone*, No. 97-0693-R, 1998 U.S. Dist. LEXIS 22492 (W.D. Va. July 29, 1998) [hereinafter *Roach V*], and the affirmance by the Fourth Circuit is at *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999) [hereinafter *Roach VI*], *cert. denied*, 528 U.S. 965 (1999) [hereinafter *Roach VII*]. Finally, we made a last-ditch second appeal to the Commonwealth Supreme Court on a procedural issue, which was denied by the Court in an opinion at *Roach v. Dir., Dep't of Corrs.*, 522 S.E.2d 869 (Va. 1999) [hereinafter *Roach VIII*].

(for they are virtually always men) are innocent victims either of a legal process gone awry, or of a social background that diminishes, even annihilates, their personal culpability. I confess at the outset of this essay that this is not my perspective, although I am a categorical opponent of the death penalty. I believe that the death penalty is indefensible on any level (including the theological), that its use demeans us as a society, and that it undermines the rule of law. But however a lawyer approaches the task of representing the condemned, and whether or not she or he shares my views on the unacceptability of capital punishment in general, this work tests us as lawyers as no other kind of case ever will. It causes us to observe from very close-up the awesome coercive power of the law, and the mechanisms that the law deploys to see that its will is done. And it gives us a unique opportunity to test claims about the foundations of the law and the democratic principles to which we all pay homage.

For me, the most dramatic and most meaningful events in connection with the Roach representation occurred on the day of the execution. That is the story I want to tell here. But a little background is required.

The arguments that my team and I made in support of Roach's federal habeas petition were standard weapons in the anti-death penalty arsenal. Our main focus was proportionality. Our client was sentenced only on the basis of future dangerousness. The County Attorney's proffer on vileness was turned away by the trial judge, who nearly refused the future dangerousness aggravator as well (he called the case "on the far spectrum," finally considering, in a half-hearted double-negative, that the fact that there was very little evidence of Steve Roach's future dangerousness "does not mean that it is not a jury question").<sup>3</sup> At trial, not one witness, opinion or lay, testified that Steve was dangerous. He had no record of criminal violence, and he was 17 years of age at the time of the homicide. It was hard to argue that he was the hardened, irredeemable career criminal for whom even its defenders maintain that the ultimate penalty should be reserved.

In addition to this critical issue, there had been a number of lapses during the trial, the first capital case presented to a jury in rural Greene County, Virginia, in more than five years. These lapses included a patently erroneous instruction concerning the need for unanimity at the penalty phase,<sup>4</sup> as well as other defects, such as an incoherent and inconsistent charge on the future dangerousness aggravator. Realistically, however, we had little confidence that these arguments could avoid tripping over the uniquely high procedural hurdles erected in Virginia. Unfortunately, we were right. We had a very sensitive federal district court judge in Chief Judge Samuel Wilson. Chief Judge Wilson was obviously troubled by this case and said four times in his 20-page opinion denying the writ that, had he been a member of the Greene County jury, he would not have sent Steve Roach to his

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3. *Roach I.*

4. The judge instructed the jury that its verdict for a death or life sentence had to be unanimous, when as a matter of law, a lack of unanimity for the death penalty would result in a life sentence by default.

death.<sup>5</sup> Yet he nevertheless found that the State procedural bars closed his courtroom to us on collateral review.<sup>6</sup>

After Chief Judge Wilson turned us down, we received the usual treatment from the Fourth Circuit, and our petition to the Supreme Court for certiorari was denied.<sup>7</sup> We assumed that our only remaining recourse lay with the Executive and began preparing our petition for clemency. None of this was a surprise, nor was it even much of a disappointment. We knew the long odds we faced as a matter of strictly-construed jurisprudence, but we had long believed that the unique facts of our case made it an attractive one for the use of clemency powers by any Governor, even one as eagerly pro-death penalty as James S. Gilmore.

I spent considerable time, both on the phone and on Death Row in Sussex, going over the clemency strategy with Steve, giving Steve an opportunity to talk through a number of issues of great importance to him. There are many aspects of our conversations that I am not today prepared to discuss in public. But at the end of our sessions, and with the usual high-quality input of my Patton Boggs team, we decided on a plan of action.

Meanwhile, we stumbled onto one of the very few pieces of good luck ever to come our way in the *Roach* case. In the spring of 1999, the Virginia Supreme Court decided the case of *Commonwealth v. Baker*,<sup>8</sup> in which it held that before a juvenile may be transferred for trial as an adult in Virginia, *both* of his parents must be provided with actual written notice of the hearing on the prosecutor's intention to do so.<sup>9</sup> Steve Roach's parents had not been living together at the time of his arrest, and his mother was not personally informed of the juvenile court hearing on the Commonwealth's motion for his transfer to adult court.

Although our submission was taken seriously, it ultimately failed. At oral argument, however, I felt that the Virginia Supreme Court, like Chief Judge Wilson in Roanoke, seemed uneasy executing a 17-year-old, with no substantial criminal record, for a single-shot, unpremeditated murder. It was clear to my team and me that, like Chief Judge Wilson, Justice Barbara Milano Keenan, the author of the unanimous Virginia Supreme Court opinion,<sup>10</sup> was implicitly inviting Governor Gilmore to give earnest consideration to using his clemency power in this case.

The final decision of the State Supreme Court came down in the first week of November, 1999,<sup>11</sup> and our execution date had been set for January 13, 2000. We had about ten weeks. Pursuant to my discussions with the client, we prepared our clemency petition not in the form of a legal brief, with citations to authority, but as a letter. The letter was on law firm letterhead, single-spaced, addressed "Dear Governor Gilmore," and ended not with "Respectfully submitted," but with "Yours sincerely." My thinking was that this was how the system should work. The courts, after all, had done their job, and had concluded (whether rightly or wrongly is no longer relevant) that there was nothing they could or would do to forestall Steve

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5. *Roach V*, No. 97-0693-R, at \*2, \*18, \*21, \*34.

6. *Id.* at \*34.

7. *Roach VI*, 176 F.3d at 226.

8. 516 S.E.2d 219 (1999) (per curiam).

9. *Id.* at 220.

10. *Roach VIII*, 522 S.E.2d at 869.

11. *Id.*



Roach's death. Although trained as a lawyer, the Governor was not a judge, and his job was to determine not whether the execution was permissible as a matter of law, but whether it was appropriate and right. Even the format of a typical legal brief, as well as its stilted style, could be helpful to our case only if, on some level, the Governor were to be persuaded that the courts had gotten it wrong. And I was not confident of our ability to demonstrate such a thing to a State elected official well-known for political and social conservatism.

I wrote Governor Gilmore a very deliberately non-legalistic, personally-inflected letter, of some 26 pages, reviewing the crime, canvassing Steve's life, and explaining how this teenager came to commit an act that resulted in his being sentenced to death. We attached 12 exhibits, detailing and documenting all of the factual statements that we thought might be questioned, and expressing the support of a number of organizations. One of these was the conservative Rutherford Institute, whose president, John Whitehead, took a personal interest in this case. I was not especially critical of trial or appellate counsel in my letter, although I believe to this day that literally fatal errors of judgment were committed at trial. At this late stage in the proceedings, it seemed to me simply inappropriate—and, more importantly, unhelpful—to make such arguments. These arguments might have been appealing to someone whose mind was open to the suggestion that the system had failed, but I did not believe that was a productive approach to James S. Gilmore, Governor of Virginia.

The Old Dominion has a number of quaint legal customs. I do not know of another State in which counsel for a death row inmate are given the opportunity for what is in effect an oral argument on their clemency petition before the Governor's legal staff. I was greatly encouraged when I received notice that we would be heard in the office in the State House next to the Governor's own office.

My friend and associate, Willa Perlmutter, the long-suffering second chair in this case, and I drove to the Governor's office in Richmond on the morning of January 5, 2000, eight days before the scheduled execution. We were simply amazed by our reception. We were met by four highly articulate lawyers, each of whom appeared to be intimately familiar with our client's case and with our submissions on his behalf. Not only were our interlocutors knowledgeable and interested, but each seemed extremely sympathetic. Three or four times, one of the Governor's lawyers preempted us and answered a question addressed by another of them to Willa or me, using virtually the same words and citing the same parts of the record that we would have deployed.

We emerged from the Richmond meeting, each afraid to say what we were thinking: if we had not just won the case, it could not be won. As I walked into my office in Washington, the phone was ringing. It was Steve, calling collect from Death Row. I tried very hard to manage the expectations I might be creating, but I could not help communicating to him that we were, for the first time, cautiously optimistic.

The point we had seemed to convey, and that the Governor's staff seemed to have internalized, was the absence of violent crimes in Steve's past. His entire record consisted of the burglary of an unoccupied house and two joy-riding incidents, in which he had stolen cars with keys left in the ignition, driven them a short distance, and abandoned them. It was also clear and undisputed that the Commonwealth's

and Greene County's attempts to provide Steve and his dysfunctional family with any sort of counseling or psychological or social service never left the starting blocks. Those efforts were laughably incompetent, to the extent that they can be said to have existed. Not even the basics of intervention, such as the attention of a County Social Services agency, were ever provided by the Commonwealth, despite ample evidence provided by numerous of its members that the Roach family was in serious trouble.

Now, I happen to own both a car and a home, and I would strongly prefer not to have the former stolen or the latter burglarized. These incidents were not pranks, and they were not harmless. But neither were they violent. Most assuredly, these crimes did not show the level of depravity or irremediability that demonstrates future dangerousness or that characterizes a vicious criminal worthy of society's ultimate punishment.

After the burglary, which was handled in the juvenile justice system, Steve was put on a form of probation that forbade him to carry a weapon for a number of months. Everyone, including the Police in Greene County (population 15,000<sup>12</sup>) treated that requirement as a formality unworthy of any attention at all. Steve, apparently along with nearly all male teenagers in that part of the Commonwealth, owned and was proud of owning firearms. In Steve's case, as in most, the firearm owned was a shotgun used for hunting. So lax and cavalier were the authorities that, just weeks before the murder of Ms. Hughes, there had been a rumor in town that some young men were sawing off the barrels of their shotguns to below the legal limit. Steve took his gun to the Sheriff's office to show that his was legal. A uniformed deputy on duty, who obviously knew Steve's situation including the terms of his probation, examined the gun, confirmed that its configuration was legal, and handed it back to him without further comment.

Given these facts, my team believed we had good reason to be hopeful. The trial judge, the author of the State Supreme Court opinions in the case, as well as the Chief Judge of the Federal District Court obviously had serious misgivings about the wisdom of executing Steve Roach. We believed that this was the perfect situation for the exercise of the executive's discretion to extend mercy. As we soon learned, we were, of course, deluding ourselves.

In Virginia, death row inmates are housed at the Sussex Correctional Facility, but they are not killed there. Executions take place 20 miles away, in a dedicated building in the middle of the enormous campus of the Greensville Correctional Center at Jarratt, just north of the North Carolina line, off Interstate 95. The process is uncannily scripted, and I am certain that all branches of our armed services would be green with envy at the efficiency and professionalism with which the Commonwealth dispatches its condemned prisoners.

I had been well prepared by Michelle Brace and her wonderful colleagues at the Virginia Capital Resource Center. I knew in outline how the day of the killing of Steve Roach—January 13, 2000—would proceed. I knew there was virtually no chance that we would hear anything from the Governor before that day. I knew that

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12. In 2000, the population of Greene County, Virginia was 15,244. U.S. Census Bureau State and County Quick Facts, Green County Virginia, *available at* <http://quickfacts.census.gov/qfd/states/51/51079.html> (last modified July 15, 2003).

executions take place at 9:00 p.m. I knew that I should plan to arrive at the prison after 3:00 p.m., because that is the time at which the family must take their final leave of the prisoner. Steve had been married while on Death Row, and I knew that his wife, Elasa, would want every possible moment with him.

While we were aware that the Governor would not issue a decision on the clemency petition before the day of the execution, no one had any idea at what time during the day we might hear from Richmond. I made sure that Governor Gilmore's office had my cell phone number, and I bought a device to keep the phone charged in my car. My loyal assistant back in the office—Sarah Sawle, today a graduate of the Georgetown University Law Center, who spoke with Steve by phone nearly daily over the last months of his life—never strayed from her desk. I set out for Jarratt at around 11:00 a.m. On the way down, I checked into a motel in Petersburg that was close enough to the prison to make a drive after the execution bearable, yet far enough away to be able to escape from the other participants in this drama. There was no word from the Governor during the long drive south. I pulled into the Greensville parking lot just after 3:00 p.m., in time to exchange quick words with Elasa and her family as they were leaving. We were less than six hours from the scheduled execution.

I was very familiar with the screening procedures on Death Row. I dutifully left all of my belongings, except for a pen, a pad of paper, my identification, and keys, in my car outside the main gates of the prison. I cleared security, together with Rev. Wendell Lamb, Steve's pastor and longtime friend, and Marta Kahn, a superb, committed attorney from the Resource Center who had known Steve since before I took the case. The prison staff were typically polite and respectful. They had a job to do, and they were excellent at doing it.

The holding facility for prisoners about to be executed consists of four cells and a common area. Steve was the only prisoner in residence, since his friend Christopher Thomas, another juvenile offender, had been executed three days before.<sup>13</sup> The common area included plastic bucket chairs for visitors, and a guard's desk, with the usual trappings. There was a telephone mounted on the wall just behind the desk.

Between 3:00 p.m. and 7:00 p.m., the phone must have rung 25 times. Each time, Wendell, Marta, and I jumped out of our chairs. Each time, the call was one of jarring mundaneness. We heard several discussions of the dinner menus the various guards would have when their shifts were over. And yes, they would stop off at the grocery on the way home. Meanwhile, we continued our conversations. We talked about sports. Wendell read to Steve from the Bible, and they prayed together. We reminisced about earlier visits, and Wendell and Steve got into a long and complex comparison of their memories of a church trip they had both gone on years before.

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13. In the entire decade of the 1990s, it is unlikely that 20 individuals below the age of 18 at the time of their offenses were executed in the world. In the first two weeks of 2000, the Commonwealth of Virginia committed this outrage not once, but twice. See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973–June 30, 2003, at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> (last corrected July 1, 2003). No more than five countries currently provide for the capital punishment of juvenile offenders. James Alan Fox, *Take Death Penalty Off Table for Teen Murderers*, USA TODAY, Feb. 9, 2004, at 17A. All but one are fundamentalist Muslim regimes applying *sharia* law; the other is the United States.

We never lost the feeling that there was still hope; we had not heard from Governor Gilmore, but the phone would surely ring for us in just a moment.

At around 6:00 p.m., the guards asked Steve if he was ready for the traditional last meal. As I knew he would, Steve invited Wendell, Marta, and me to share it with him. Wendell and I accepted. Marta, understandably, was unable even to consider eating. The meal was French-bread pizza, cold by the time it arrived, and fried potatoes, with foil packets of ketchup. There was a pitcher of sweet tea and lemon pie for dessert. Steve commented that it had lived up to his hopes: it was the best meal he had had in his more than six years behind bars.

When the plastic plates were cleared, Steve wanted to talk with me alone. He told me that the guards would shortly take from his cell the cardboard box containing all his earthly goods. By prison rule, he would have to put his wedding ring in the box. He had inquired whether he could give the ring to Elasa during her visit earlier in the day, but the answer was a typically arbitrary and unequivocal negative. He was unsure whether he could rely on the promises that his belongings would be delivered safely to his family, and he really wanted Elasa to have the ring.

Evidently, Steve had also asked the guards what would happen if he gave the ring to his attorney, and they responded simply that they do not search lawyers as they leave the prison. Would I be willing to carry the ring to Elasa, on the assumption that our clemency petition was unsuccessful? Of course I would. I put the gold ring in my pocket. We continued to talk and to wait.

At 7:00 p.m., according to standard operating procedures, visitors must leave the Greensville Death Row for an hour, so that the prisoner can be prepared for his execution. The preparation includes a shower, a medical examination, and a new set of clothes (apparently the Commonwealth considers it unseemly to oversee the deliberate killing of someone who is dirty, ill, or wearing faded jeans), as well as the administration of a powerful sedative. Marta, Wendell, and I were required to leave not only the building in which the Row is housed, but the prison compound itself. We were taken by minivan to the main entrance, where the press and protesters were beginning to assemble.

The Governor had still not called. By now, our excuses were wearing extremely thin. A reprieve at the eleventh hour would make no sense in this case except as some kind of cruel trick. I wandered outside the building into the parking lot, and then, after pacing for awhile, reentered the lobby, which looks very much like the lobby of a cheap and busy motel. It was going to be a long hour of waiting.

Just as I was walking in, I heard the phone ringing on the main desk, next to the security guard's station. The attendant who answered the phone was obviously having trouble understanding the name of the person the caller was trying to reach. I heard a few "What's" and "Huh's," with annoyance and frustration. I have had a German name, difficult to pronounce, for many years, and I am used to this. I knew at once that this was the call from Richmond; the Governor's staff was asking for the prisoner's attorney.

I approached the desk and gave the attendant my name. The receiver was handed to me. The voice identified itself as belonging to Governor Gilmore's counsel. He made certain that I was who I said I was, and in a single sentence, delivered the message from Richmond: the Governor was declining to intervene. The execution would go forward as scheduled, in less than 90 minutes. I asked if I could see the

statement that Governors of Virginia traditionally issue in such cases. After some discussion, it was agreed that the statement would be faxed to me as soon as someone showed up who was able to operate the machine. But that would not happen right away—it would be ready for me to see after Steve Roach was dead.

Immediately, I called the Patton Boggs team, especially Willa and Sarah, waiting by the phones back in Washington. I thanked them on my behalf and Steve's, and I told them to go home. Their work was finished. We had exhausted our legal options. I then attempted to persuade the guards to let me back into the prison, although it was not yet 8:00 p.m. I invoked the call from Richmond, as if it gave me some kind of special status. Evidently, it worked. The guards showed me into the security area, and then went back to get Wendell and Marta, who were still sitting in the lobby.

I was halfway through the search when I suddenly remembered that I had Steve's wedding ring in my suit jacket pocket. I could not leave it in my car, since I had to have it with me to give back to Steve if we had gotten clemency. But I would surely not be permitted to take it into the prison now. I had to think fast. I slipped the wedding ring of my client, who would be dead in just over an hour, onto the middle finger of my right hand. No one noticed it. I was cleared to enter, with Wendell and Marta right behind. Not one word was spoken as we were driven to our destination.

Steve was on the phone with Elasa when I entered the cell block. I insisted that Wendell and Marta wait at the door. I approached the bars and told Steve that we had heard from the Governor and that our last hopes to save his life had been snuffed out. I then walked away, so that he and his wife could talk privately. The sedative had worked. He was heavily drugged, and I could hardly hear him, although Elasa clearly could. They began to sing hymns together, connected by the telephone line.

I can remember virtually every minute of the next hour, but I am not prepared to write about them. I will say that Steve had many times during my representation told me of his religious faith, which I happen not to share. He said that if he were to be executed, he would consider it to be not an end, but a beginning. He had always claimed that he would not want to say good-bye, and so, as the last of the 60 remaining minutes ticked away, I did not say good-bye to Steve. At five minutes to nine, he thanked me and my team for our work. We shook hands. I wished him well, although, in the context, I hardly knew what my own words might mean.

Just before 9:00 p.m., Steve was taken out of his cell by guards, specially dressed for the occasion in black, with neither name tags nor even insignia of rank on their uniforms. He shook their hands as they led him into the death chamber. I am told that this does not usually happen.

The execution itself was nearly an anticlimax. Steve's last words were a recitation of the 23rd Psalm with Rev. Lamb, his minister. He died quickly and undramatically, four minutes after he was strapped down onto the gurney. The public witnesses, the press, and everyone in attendance were somber and respectful.

Wendell and I wordlessly returned to our assigned minivan to take us back to the prison entrance. Steve and I had decided to issue a statement to the press in the

event of his execution, which I then did, reading it to the assembled media in the parking lot outside the main gate.<sup>14</sup>

At last, I was given a copy of the Governor's decision. It read, in full, as follows:

On December 3, 1993, while on probation, Steve Edward Roach brutally murdered Mary Ann Hughes during the course of a robbery. A jury convicted Roach of capital murder, robbery, and use of a firearm in the commission of murder, and sentenced him to death. Upon review of the case, the trial judge imposed the jury's sentence. The convictions and death sentence were upheld on multiple appeals.

Mrs. Hughes was a 70-year-old grandmother who lived alone and had befriended Roach, who was her neighbor. Roach admits that he shot Mrs. Hughes in the chest at point-blank range with a shotgun, walked past her body, and proceeded to steal her purse and car. The Virginia Supreme Court carefully considered the case and concluded that Roach's case presented substantial aggravating factors justifying the death penalty. The Court considered the fact that Roach had been found guilty of four felonies in the seven-month period prior to the commission of this offense, carried a gun in violation of the terms of his probation, and that all rehabilitative efforts had failed.

Upon a thorough review of the Petition for Clemency, the numerous court decisions regarding this case, and the circumstances of this matter, I decline to intervene.

The clemency process had been a sham. There had been no independent executive review. There was simply the unconsidered response of a politician committed to vengeance as a political principle.

The key half-sentence here—the only portion that does anything except recite the uncontested record—is this: “Roach had been found guilty of four felonies in the seven-month period prior to the commission of this offense, carried a gun in violation of the terms of his probation, and that [*sic*] all rehabilitative efforts had failed.” Virtually every word of this is false, and the record before the Governor demonstrated conclusively that it was false. His lawyers, with whom Willa and I had met and who had listened to us so carefully, surely knew this.

There were not “four felonies” of which Steve had been “found guilty.” In fact, there were none. To be guilty of a felony in Virginia, a juvenile must be tried as an adult. Steve Roach not only was not tried as an adult for the two joy-riding incidents and the breaking-and-entering (to bulk up his justification, the Governor considered this last episode to count as two felonies, since property had been stolen), but he was not tried at all. He pleaded out, and was given probation. He had not been “found guilty” of anything. While it is true that the carrying of the shotgun was a violation of the terms of the probation, Governor Gilmore's staff knew that the County Sheriff had been well aware that Steve had a shotgun and did nothing to stop or to deter him. The authorities on the scene considered this “violation” to have been trivial. Nor had he ever used any firearm in the commission of a crime, before

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14. The statement we issued is an Appendix to this essay. Steve and I also prepared a statement that he was going to release had we received clemency. I read that latter statement to the congregation at the memorial service for Steve, at Rev. Lamb's church in Charlottesville, on the following day.

the fatal night of December 3, 1993. The portrayal of Steve as a hardened and unreconstructed felon was a lie.

But what brought tears to my eyes, as I read it in the lobby of the Greensville Correctional Center, was Governor Gilmore's statement that "all rehabilitative efforts had failed." Over the course of his brief life, the Commonwealth of Virginia made absolutely no effort to "rehabilitate" Steve Roach, or to address the severely dysfunctional circumstances in which he lived. It did nothing to address the abusive conduct of his father, who happened to be an occasional employee of the Commonwealth. It did nothing to prevent his removal from school at age 15. It did nothing to address the periodic physical abuses of members of the family, many of which were properly reported to the police. It did nothing to provide counseling or support, or to show awareness of any kind, even after Steve had his early run-ins with the law, and even when the juvenile court in Greene County directed that Social Services pay attention to this family. His parents simply did not want to cooperate with Social Services, and the issue was never pursued.

That was, even giving the Governor the benefit of the doubt, the totality of the "rehabilitative efforts" whose failure Governor Gilmore proclaimed, as he authorized the killing of Steve Roach. Something failed—it is true—but it was not the "rehabilitative efforts" to which the Governor referred. Whatever it was that motivated James Gilmore to approve Steve Roach's execution, it was not that he was a career felon impervious to redemption. The decision could not be justified this way. Anyone with a passing familiarity with the facts of this case had to know that.

Steve Roach was not a model citizen. He stole cars and broke into a house—serious crimes. And, in a single moment one evening in December, 1993, for no apparent reason, he pulled the trigger of the shotgun he regularly carried with him. He deserved to be severely punished for what he did, and he knew that. He did not deserve to be executed for it. But the cynical, political approval of the execution by the Office of the Governor teaches the lesson I want to communicate in these pages.

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I had the good fortune to attend one of America's great universities—Yale—at a time of great turmoil and great excitement, graduating in 1969. In his Baccalaureate Address to my class, President Kingman Brewster (later President Carter's Ambassador to the Court of St. James) expressed some understandable frustration with our years together, but he also celebrated our shared experiences. I will never forget one part of that speech, words that as a lawyer I have tried always to keep in the front of my mind. He spoke to us of the importance of the rule of law, and defined that term for my class this way: "The essence of the rule of law is that authority can be asked to give reasons for its behavior. These reasons, in turn, can be held up to the light of the general understanding of the community whose constitution authorized the power."<sup>15</sup>

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15. Kingman Brewster, Jr., *The Morality of Reason*, Baccalaureate Address to the Yale College Class of 1969 (June 8, 1969), *reprinted in* *The Class of 1969: 25th Reunion Book* at 25-29.

This is, I think, as good a definition of the democratic ideal as I have ever encountered. What was most appalling about the execution of Steve Roach was precisely that authority did not give reasons—at least, it did not give true reasons—for permitting the killing to take place. Yet there is no vehicle for constitutional scrutiny of that decision in our system: executive clemency is discretionary, and no one can argue that it is ever owed as a matter of constitutional right. That breadth of discretion is tolerable only in a society entitled to be confident that its leaders will tell the people the truth.

In the death of Steve Roach, someone who took a human life for no reason, authority acted without regard to reason. That this should have happened in Mr. Jefferson's Virginia, "the Cradle of American Democracy,"<sup>16</sup> is all the more unsettling. And yet this illustrates more clearly than anything else the necessity that we members of the Bar take on these cases, that we ensure that the advocacy system is given the best opportunity to work efficiently, and that we insist with all of our ability, skill, and energy that Kingman Brewster's maxim be honored. At all times, but especially when it takes the ultimate measure of terminating the life of one of its citizens, a government must act deliberately and consciously, and must give due consideration to the justification and the consequences of its actions.

When Steve Roach shook the hands of his jailers on January 13, 2000 (leaving at least one near tears), and walked into the room in which lethal chemicals supplied by the Commonwealth of Virginia would be pumped into his veins, it was far too late for him to think about, much less to further, these goals. But it is not too late for those of us who saw what was happening, who were unable to prevent it, and who are now charged with learning, implementing, and passing on its lessons. Our obligation to do this will not be finally discharged until our country ceases the practice of killing people to show other people that killing people is wrong; a practice that we, nearly alone among developed nations, perversely continue to perpetrate in the name of justice and virtue, in the end betraying both.

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16. See Edwin Anderson Alderman, *Virginia: An Address Delivered in Response to the Toast "Virginia" at the Banquet Given by the Citizens of Petersburg, Virginia to the President of the United States and the Governor of Pennsylvania on May 19, 1909*, available at <http://www.ls.net/~newriver/va/alderman.htm> (last visited Feb. 9, 2004) (reinforcing the term as a common nickname).



## APPENDIX

Statement of Steven M. Schneebaum  
Counsel for Steve Edward Roach  
Greensville Correctional Center  
Jarratt, Virginia  
January 13, 2000

Steve Edward Roach was put to death tonight by the Commonwealth of Virginia. He died at 9:04 p.m., Eastern Standard Time, on January 13, 2000. He was 17 years old when he committed the crime that led to his execution, and 23 when he died: the youngest person to be executed by the Commonwealth in modern times. As his lawyer, I witnessed his death. Steve asked me to make this public statement, which we discussed earlier this week at length, on his behalf.

It was important to Steve Roach that he be remembered, not just as the boy who killed Mary Ann Hughes, but also as the man who married Elasa Roach; not just as the teenager who committed a horrible crime, but also as the adult who accepted responsibility for it and begged the forgiveness of those he caused to suffer; and not just as someone who ended a life for no reason, but also as someone whose own life was ended to no one's benefit.

As Steve faced death, his thoughts were first of his wife, now his widow. They were then of Mary Hughes, his neighbor and friend, and of her family and community. They were of other young people, very much like Steve himself, who might have been saved from the consequences of broken youths by his participation and his example. He sincerely wished that James Gilmore, Governor of Virginia, had found it in his heart to spare his life, so that he might have been able to make some small effort to help to save the lives of others.

But the Governor chose not to intervene. So be it. Steve wanted to be certain that the reports of his death at the hands of the Commonwealth also reflected four of the beliefs that he carried with him to the very end: his love for and gratitude toward those who selflessly tried to prevent this from happening; his genuine remorse for the terrible act he committed; the confidence that in life he had secured the forgiveness of his God, even if he never quite persuaded himself that he was worthy of that forgiveness; and the certainty that the deliberate, methodical killing of children is inconsistent with the values of any civilized society. He knew that his apology, however heartfelt, would not fill the void left by Mary Hughes, but neither will his death.

Steve died without bitterness, but with a great deal of regret. He never understood what really happened in the instant in which he took the life of someone who loved him. And he was unable to grasp, even to his last breath, why we kill people to teach other people that killing people is wrong. The principal lesson he wanted his own death to communicate is that this makes no sense. Killing kids makes no sense, and it must be stopped. It is too late to save Steve Roach; it is not too late to save

the life of the next young man or woman who, in a moment of bewildered rage or utter confusion, commits an act totally out of character in its violence and awful in its result, yet which does not place its perpetrator forever beyond the power of redemption in this life.

Mary Hughes did not deserve to die. But Steve Roach wanted us who live after his death to know that he was not a monster: he was a human being, a young man, with flaws and with promise, who deserved to live.

## EXECUTION OF DEATH ROW INNOCENTS AND THE FAILURE OF AMERICA'S LEGAL PROFESSION

*Joseph Tydings\**

IN early 1987, at the suggestion of partners in the Washington law firms of Covington & Burling and Arnold & Porter, I agreed to undertake the Post Conviction, Death Penalty defense of Walter Correll,<sup>1</sup> with a young colleague, Robert Pokusa. Correll's case illuminates the problems endemic in the criminal justice system, problems that have been partially caused by and, therefore, should be confronted and solved by the institution most capable of remedying them: the legal profession. Yes, the legal profession itself, full of experienced and talented individuals, can be the catalyst for changing a system corrupted by inefficiencies and inequities. But to effectuate this change, the legal profession must reaffirm the values and commitments that once made our profession respected and even revered. Certainly Walter Correll's story will solidify these claims.

Walter Correll was a very young seventeen-year-old mentally retarded resident of Roanoke, Virginia who had been tried for robbery and murder without a jury, convicted, and sentenced to death by Judge B. A. Davis, III, in the Franklin County Circuit Court.<sup>2</sup> The conviction was the product of a constitutionally infirm confession and a defense counsel who was tragically the epitome of constitutionally ineffective defense counsel.

### *A. Edwards Violation*

In addition to withholding information from Correll's family or friends of his arrest, no attorney was provided for any of the many interrogations carried out by two separate teams of questioners over two days, after which the confession which

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\*. Washington, D.C. office of Dickstein, Shapiro, Morin & Oshinsky LLP.

1. The citations to the *Correll* case are as follows. Correll was originally convicted and sentenced in the Franklin County Circuit Court on March 5, 1986 [hereinafter *Correll I*]. The conviction and sentence of Correll by the Virginia Supreme Court is reported at *Correll v. Commonwealth*, 352 S.E.2d 352 (Va. 1987) [hereinafter *Correll II*]. The U.S. Supreme Court denied certiorari. *Correll v. Virginia*, 482 U.S. 931 (1987) [hereinafter *Correll III*]. Correll filed a petition for writ of habeas corpus in the Franklin County Circuit Court on August 15, 1987 [hereinafter *Correll IV*]. A plenary hearing was held as to Correll's claim relating to ineffective assistance of counsel in the Circuit Court of Danville on August 15, 1989, and Correll's petition for writ of habeas corpus was dismissed. [hereinafter *Correll V*]. In an unreported decision, the Virginia Supreme Court denied Correll's appeal [hereinafter *Correll VI*]. Correll's petition for writ of certiorari with the U.S. Supreme Court was denied. *Correll v. Thompson*, 498 U.S. 1041 (1991) [hereinafter *Correll VII*]. However, Correll petitioned for writ of habeas corpus in federal district court, and his petition for habeas corpus was granted. *Correll v. Thompson*, 872 F. Supp. 282 (W.D. Va. 1994) [hereinafter *Correll VIII*]. On appeal, the Fourth Circuit concluded that the district court erred in vacating Correll's convictions and sentences, therefore, the court reinstated Correll's convictions and sentences. *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995) [hereinafter *Correll IX*], *cert. denied*, 516 U.S. 1035 (1996) [hereinafter *Correll X*].

2. *Correll VIII*, 872 F. Supp. at 285.

was admitted into evidence was finally obtained. The actual confession was given during an interrogation conducted away from the Roanoke jail in violation of rules requiring approval from the judge for such a trip.<sup>3</sup> It was taken by the sheriff of Franklin County after Correll had been taken to Appomattox, Virginia, for a lie detector test, some 50 hours after Correll's arrest. Further, the Franklin County Sheriff's office did not enter or record Correll's visitation at their detention center as required by rules of the center.<sup>4</sup>

To pin this crime on Correll, the authorities had to do more than merely coerce an incriminating statement out of him. Their efforts became necessarily more complex and calculated in light of the two co-conspirators involved in this crime. That is, Correll was not alone during the robbery. The crime was committed with two other older persons who had criminal records and bad reputations. Both were older than Correll, both were represented by competent counsel, and both successfully plea bargained with the District Attorney. At the time of their arrest, they gave conflicting statements over the two-day period on the circumstances of the robbery/murder. After repeated interrogations by the arresting officers, they finally agreed on statements blaming everything on Correll. The reason for the three different statements taken from Correll was to systematically revise each Correll statement to conform with the changing statements of the other two defendants. The other two defendants received jail sentences as a result of their plea bargain.

U.S. District Judge Turk of the Western District of Virginia, Roanoke Division, after two separate hearings, handed down a carefully written opinion on August 24, 1994.<sup>5</sup> He granted the "Great Writ" and ordered either a new trial or the release of Walter Correll.<sup>6</sup> In this opinion, Judge Turk summarized the inadequate protection afforded Correll during his various encounters with police:

This court cannot imagine a more deliberate and egregious violation of *Edwards* than exists in this case. The petitioner invoked his right to counsel shortly after his arrest on August 16; however, that request was ignored. In the fifty hours following the petitioner's request for counsel, police officers from two jurisdictions conducted three taped interrogations, one polygraph examination and an unknown number of unrecorded interrogations. At no time during these interrogations was the petitioner's right to an attorney honored.<sup>7</sup>

Unfortunately, a three-judge panel of the United States Circuit Court of Appeals, which included the Chief Judge of the Circuit, summarily reversed the District Court's issuance of the Great Writ.<sup>8</sup> Thus, Correll's hopes of a new trial were shattered. Even more devastating, the possibility of avoiding the death penalty was much less likely. The court's opinion held that the third confession was valid because, the court reasoned, Correll voluntarily responded to a Sheriff's comment

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3. *Id.* at 289.

4. *Id.*

5. *Id.* at 284-98.

6. *Id.* at 298.

7. *Id.* at 291.

8. *Correll IX*, 63 F.3d at 1293.

about his lie detector test.<sup>9</sup> The court's holding completely ignored the improper and unlawful removal of Correll from the Roanoke jail to the Franklin County Sheriff's office.<sup>10</sup>

*B. Ineffective Assistance of Counsel*

The Walter Correll case was a tremendous labor-intensive project for my young colleague, Robert Pokusa, and me. In addition, Lynn Florence, a Federal investigator with 20 years experience in criminal investigations for the EPA and other federal agencies, "volunteered" his spare time. Florence's initial involvement was more fortuity than anything else. He happened to be in Roanoke on an EPA investigation on the dates when Correll was originally convicted and later sentenced. After listening to TV accounts and reading the paper, Florence realized that the trial and conviction did not pass his "smell test." After a little personal investigation of his own, Florence was satisfied that justice had not been served. When we entered our appearance in the case, he called us to volunteer his free time.

Over a *seven-year* period, the three of us committed weekends and vacation time to the cause, not to mention the substantial hours of office time Bob and I committed. We completed the investigative work that should have been done prior to the original trial before Judge Davis. We covered the Rocky Mount and the Roanoke regions locating and interviewing witnesses, retracing events leading up to, and following, the crime, as well as locating death-scene evidence. Our efforts were "welcomed" and encouraged by Judge Davis, whom I believed was genuinely concerned that he had not been presented with all the facts. We also were initially assisted by the original defense counsel.

The evidence we found was substantial and determinative. It could have and should have been found prior to the trial. Unfortunately, defense counsel failed to conduct even a basic investigation. In fact, Correll's attorney made no real effort to find or interview the key witnesses whose testimony was material to the defense, nor did he make a serious attempt to find the evidence which was vital and material to the defense.

Defense counsel's meager performance was presumably not attributable to his abilities since he was an experienced lawyer with criminal trial experience. Instead, it should probably be chalked up to the fact that he had been pressured by the local court to defend a client he did not want to represent. Whatever his motivations, or lack thereof, sadly, if Walter Correll had been a wealthy client able to retain and pay his lawyer, I do not believe this case would have ever reached trial. If it had, trial counsel would have requested a jury trial, prepared the case, and Correll would have very likely been acquitted.

Tragically, however, Correll's attorney was never interested in the case—not even remotely interested. He never understood or related to his client, a young mentally

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9. *Id.* ("The record does not support a conclusion that the third confession was obtained in violation of *Edwards* or that it was inadmissible because tainted by earlier involuntary confessions.").

10. *Correll VIII*, 872 F. Supp. at 289. According to the custodial transportation order, Correll was to return to Roanoke immediately following the polygraph exam. *Id.* However, Detective Ferguson took Correll to the Franklin County Jail instead of Roanoke after the examination. *Id.*

retarded seventeen year old who had been sent from one welfare agency to another for most of his growing up years. He did not prepare for trial and, when trial actually arrived, he made no real effort to defend his client.<sup>11</sup> He failed to cross examine the sheriff's deputies on the circumstances of Correll's confession. He bent over backward to be accommodating to the sheriff's deputies who testified on behalf of the prosecution. Correll's defense counsel's opening statement covered less than half a page of transcript. His closing argument was only a few pages. When questioned by Judge Davis as to why the defendant was not asking for a jury trial, counsel deliberately misled the judge when he told him the case was too complicated for a jury to understand—an unfounded and ridiculous assertion for the most simple and basic criminal case.

Defense counsel then followed up by failing to introduce any evidence to challenge the State's case. Defense counsel, moreover, failed to put Deputy Sheriff Ferguson on the stand as a Correll witness. Deputy Ferguson could have destroyed the State's argument that the third confession (taken at the sheriff's office in Franklin County on Sunday after taking a lie detector test in Appomattox) was voluntary. Remember, the Fourth Circuit found that Correll asked to talk with the sheriff, therefore, making his third confession voluntary. However, this conclusion would clearly have been different if Deputy Ferguson had testified that, despite lacking a court order, he was commanded by his superior not to return Correll to the jail in Roanoke, but instead to divert and deliver him to the sheriff's office in Franklin County. The court's conclusion would have certainly been altered if Deputy Ferguson had further testified that he informed Correll of the problems with the polygraph, and that he had no recollection of Correll ever asking to see the sheriff.

In short, defense counsel barely "went through the motions." If Correll had been represented by any senior at the University of Virginia Law School or the University of Toledo Law School, he would have been ten times better served.<sup>12</sup>

While I was shocked by the true inadequacies of Correll's defense counsel, I was absolutely dismayed by the attitude and position taken by the Virginia Attorney General's representatives. During my prosecutorial years as the U.S. Attorney in Maryland, one of my responsibilities included protection of the innocent (as well as prosecution of the guilty). This concept seemed foreign indeed unacceptable to Virginia's Attorney Generals. I was dumbfounded by Virginia's Attorney General's "knee jerk" refusal to consider any of the newly discovered evidence and witnesses we found.

Not only was the Attorney General's office not interested in determining whether "Justice had miscarried," they were willing to resort to unethical and reprehensible tactics to uphold the death penalty verdict. For instance, they intimidated a witness

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11. It should be mentioned that Correll's defense counsel had a close personal relationship with both the Franklin County District Attorney who prosecuted the case and the sheriff's office who investigated the case.

12. In our State habeas corpus hearing before Circuit Judge Ingram in Danville, Virginia, after almost ten consecutive hours of a hearing bitterly contested by the Virginia Attorney General's office, Judge Ingram adopted Virginia's proposed findings of fact verbatim and our ineffective assistance of counsel evidence was accordingly never subject to review by Judge Turk in U.S. District Court. *Correll VIII*, 872 F. Supp. at 285.

to prevent us from introducing evidence which would have upset the death penalty.<sup>13</sup> The Virginia Deputy Attorney General also threatened to have Lynn Florence, our Pro Bono investigator, censored or fired by the EPA for working in defense of a Virginia criminal defendant. Thus, the Deputy Attorney General of Virginia, having successfully intimidated and prevented a key witness from testifying, tried his hardest to prevent a second witness, our investigator, Lynn Florence, from testifying. The court at my request ordered the Virginia Deputy Attorney General not to carry out his threat.

After we had challenged the illegal police practices, the shameful effort made by Correll's original defense attorney, and the draconian maneuvering by the Virginia Attorney General's Office, George Allen, who was then Governor of Virginia, decided that he could not yield to our arguments for commutation of the death sentence to life imprisonment. He allowed the execution to go forward. Walter Correll's execution was the saddest day of my legal career.

### *C. An Internal Solution*

How can our states continue to allow similar tragic breakdowns in our criminal justice system? Why do so many powerful and affluent lawyers and law firms today decline to undertake the defense of unpopular, indigent, and for the most part, mentally retarded and minority defendants on Death Row? The bar and bench have equal access to all the statistical surveys that show how many defendants are innocent and are on Death Row principally because they were not represented in court by a competent and willing lawyer. Unfortunately, the failure of the defense counsel in this case to conduct even a basic investigation is too often mirrored in death penalty cases in almost every state in our Nation.

At the risk of raising the ire and animosity of many of my peers in the legal profession, I believe that one reason we have this situation today is because of the failed relationships and responsibility of practicing attorneys to their communities.

Public opinion surveys today consistently indicate that the only "professional" viewed with greater disrespect and antipathy than the lawyer is the journalist or the politician. I submit that the latter two professions are disliked because of the unpopular stories they expose and write about or the unpopular actions or votes they frequently take. But these professionals represent efforts or causes that make our democracy function. In other words, the dismay that they produce derives from the nature of their jobs in our constitutional system and under our Bill of Rights, not the unsatisfactory way in which they discharge the responsibilities of their jobs.

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13. The sheriff's office staggered the first two confessions over a two-day period in order to make Correll the "triggerman," which under Virginia law makes him eligible for the death penalty. VA. CODE § 18.2-31 (2003). The actual triggerman, who pleaded, bragged that he had stabbed the victim and that Correll was too timid to touch the knife. (When we brought a witness from the prison in Powhatan to testify to this before Judge Ingram in our State Habeas Corpus trial, the witness was visited by the Deputy Attorney General, without our permission and without us present, and threatened to have the jail sentence for which he was serving time re-opened and have him prosecuted again. The witness was frightened and then declined to testify. I protested vehemently but unsuccessfully at Judge Ingram's hearing.)

The legal profession in the 51 years since I was admitted to the bar, once garnering great respect, has continued to fall in public esteem. This incremental loss of respect for the legal profession is arguably due to so many of our most financially successful law firms and lawyers failing to take their responsibility as officers of the court half as seriously as their role as business rainmaker—or money maker.

In 1954, when I was first elected to the Maryland Legislature from rural Harford County, Maryland, one of my strongest qualifications was the fact that I was an attorney practicing law in Maryland. In fact, over 50% of Maryland's legislature at that time were lawyers, who, for the most part, served at a financial sacrifice (\$1,800 a year for 90 days), committing a substantial portion of their time to help govern and oversee the management of our State. Our constituents generally appreciated our service and thanked us for it.

The sense of commitment during that time went beyond simply being engaged in local and regional politics. When I first practiced law, to be a court-appointed lawyer or to defend, or even to help a senior court-appointed lawyer defend a criminal defendant was considered a praiseworthy recognition of legal competence and achievement. The finest law firms, large and small, in Baltimore City and our twenty-three counties, recognized the court-appointed (basically pro bono) criminal defense of unpopular indigents as a responsibility of our profession. Every such defense was viewed as a legal positive in a lawyer's career.

Unfortunately, over the last half century, too many members of our profession have drifted away from a sense of obligation and service to their community. Today, in too many cases, we see the focus of our profession quietly shifting to billable hours, profit per partner, portable business. Frequently, the pro bono committees in many law firms fail to have the real support and personal participation of the leaders of the firm (partners with the major billings).<sup>14</sup> Too often, young, willing lawyers hear the quiet comments, "We have built up a strong practice and are trying to improve our client base—how would these clients feel if they saw us in court defending an unpopular client in a notorious criminal appeal?"

Even more disheartening today we find contemporary legal practices drifting away from a commitment to an "officer of the court" standard of years past. Instead, we find powerful attorney groups spending millions of dollars lobbying in legislative corridors for special legislation benefiting their client base. Some of the most financially successful lawyers in the nation, brazenly play crass "money" politics in the election of state judges favorable to their clients' point of view. In at least one state, corruption of the State's highest court by a lawyer special interest group and the manner in which judges are selected are the focus of serious censure and concern. In another state, there are many counties whose local judges either are or appear to be so contaminated with lawyers' campaign contributions that a competent lawyer will drop a major party in a lawsuit to make certain he can litigate in a federal court venue on "an even playing field." Why risk "rolling the dice" in a state court where local counsel do not hesitate to "advise potential clients of their large campaign contributions to local judges with clear inference that the outcome

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14. I am fortunate to practice in a firm which honors its commitment as officers of the court and prides itself on service to the community and rewards its associates and partners for pro bono work.



of cases tried in their state courts can be influenced by their ability to ex parte the local judge?"

The tragic situation in too many states involving innocent defendants awaiting execution should be a wake-up call to the lawyers of our nation, including those who have been financially successful. When the Governor of the State of Illinois commutes every defendant sentenced to death because of the failure of the Illinois criminal justice system, it should be a clarion wake-up call to us all. I am afraid, however, that if we did an honest headcount, we would find that over half of the lawyers who practice in our Nation's 300 largest law firms have never helped their firm fund the representation of an indigent defendant in a criminal case, let alone undertake a personal pro bono defense. I further warrant that over 75% of this same group have never represented an indigent criminal defendant in any part of the proceedings of a capital murder case.

Our profession should give the highest priority to strengthening and reforming our legal system so that defendants in all death penalty cases have effective representation at all stages of our criminal justice system. Our profession should mobilize to ensure that every state and our federal government will provide adequate financing for such legal representation.

In states where the governor and legislators refuse to provide funding necessary for a viable legal defense for indigents charged with capital crimes, successful lawyers and law firms nationwide should support the American Bar Association Death Penalty Project and contribute to these defenses regardless of the venue.

Today, every lawyer admitted to practice should either personally volunteer to serve as pro bono or court-appointed counsel for an independent capital murder defendant at least once during his or her legal career or, in the alternative, help fund such a defense by another competent lawyer. The failure of our national, state, and local criminal justice system is a failure of every lawyer and judge in our Nation.

# COMMENTS

## WAIVER OF JUVENILE JURISDICTION AND THE EXECUTION OF JUVENILE OFFENDERS: WHY THE EIGHTH AMENDMENT SHOULD REQUIRE PROOF OF SUFFICIENT MENTAL CAPACITY BEFORE THE STATE CAN EXACT EITHER PUNISHMENT

*Robert E. Searfoss III*

[D]raconian punishments on juvenile offenders, up to and including the death penalty ... [are] an embarrassment to the civilized world.<sup>15</sup>

### I. INTRODUCTION

EVERY jurisdiction in the United States deals with the issue of juvenile justice. The systems have exclusive jurisdiction over juveniles to determine delinquency, commit them into state custody, and provide rehabilitative services. This exclusive jurisdiction, however, can be waived without proof of the juvenile's conduct or mental capacity. Where jurisdiction is waived, juveniles are transferred to the adult criminal courts and treated as adults. Consequently, waiver of juvenile jurisdiction subjects juveniles to the stigma associated with criminal convictions and the much harsher sentences of the adult system. In other words, waiver can mean the difference between a sentence of five years imprisonment and execution. Because of the punitive nature of this transfer, waiver ought to be considered a form of punishment. As a form of punishment, waiver of juvenile jurisdiction falls within the purview of the Eighth Amendment's prohibition of cruel and unusual punishment. Accordingly, waiver of juvenile jurisdiction should be considered cruel and unusual punishment, and violative of the Eighth Amendment, unless the state can prove beyond a reasonable doubt that the juvenile is at least as morally culpable, measured by individual mental capacity, as the average adult.

Presently, the Eighth Amendment of the United States Constitution prohibits those punishments that offend the "evolving standards of decency that mark the progress of a maturing society."<sup>16</sup> There is concern that this evolving standard will change with nothing more than the personal, subjective predilections of the Supreme

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15. Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121, 121 (2003).

16. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

Court Justices.<sup>17</sup> For this reason, the Court has attempted to find objective indicators that this constitutional standard has actually evolved, reflecting the “progress of a maturing society.”<sup>18</sup> Most commonly, the Court is guided by the various state legislatures and their jury sentencing patterns to help determine if the standards of Eighth Amendment cruel and unusual punishment have evolved. Justice Antonin Scalia has posited that these two objective indicators constitute the sole measure of the evolving standards and that the Eighth Amendment analysis starts and ends with their consideration.<sup>19</sup> A majority of the Court, on the other hand, would consider a host of indicia beyond legislative enactments and jury sentencing patterns such as whether the retributive and deterrence goals of penology are furthered by the punishment, the positions of professional organizations (national and international), the practices of other developed countries, and other laws that treat the particular class of juveniles differently.<sup>20</sup>

Case law suggests that legislative enactments and jury sentencing patterns are to be considered first when determining whether a given punishment rises to the level of cruel and unusual.<sup>21</sup> But considering first these two objective indicia obscures one fundamental principle: these are meant to confirm the judgment of the Court, not control it.<sup>22</sup> In other words, the Court need merely be guided by legislative enactments and jury sentencing patterns. Often this difference between correlation and causation is lost, particularly in the opinions of Justice Scalia. Scalia has argued that in every case where the Court found a punishment cruel and unusual, the Court also found that legislative enactments and jury sentencing patterns formed a national consensus against the particular practice.<sup>23</sup> The suggested conclusion is that these two objective indicia either cause the Eighth Amendment to prohibit a punishment as cruel and unusual or to condone it.<sup>24</sup> But limiting the Eighth Amendment’s prohibitions to only those punishments that have a national consensus set against them is to limit the protections of the Constitution to majoritarian rule. Instead, a better rule has emerged from the Court’s death penalty jurisprudence: though the position of the objective indicia may correlate with the Court’s ultimate finding, it does not cause it.<sup>25</sup> Legislative enactments and jury sentencing patterns are merely road signs on the constitutional highway. They do not steer the judicial car.

This note argues for a better measure of the “evolving standards of decency” under the Eighth Amendment vis-à-vis juvenile offenders. Comparing the culpability of an individual juvenile against the culpability of the average adult murderer should be the proper constitutional inquiry as to what is prohibited by the Eighth Amendment. Legislative enactments and jury sentencing patterns cannot be the sole measure, the first measure, or even a significant determinant of the “evolving standards of decency” because such an approach subordinates the

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17. *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

18. *Id.* at 101.

19. *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (plurality opinion) (Scalia, J.).

20. *See generally* *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

21. *Id.* at 822-23.

22. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (White, J.).

23. *Stanford*, 492 U.S. at 379.

24. *See Id.*

25. *Thompson*, 487 U.S. at 822-23.

Constitution to the will of the majority. Like the mentally retarded in *Atkins v. Virginia*,<sup>26</sup> juveniles possessing an inferior mental capacity should be spared capital punishment in the last instance, and transfer to the adult criminal system in the first instance. Consequently, when a juvenile has not been proven at least as morally culpable as the average adult, his transfer out of the juvenile system, and any sentence of death, must be found cruel and unusual under the Eighth Amendment.

Part II of this note recounts the relevant death penalty cases, with a focus on how the Court has interpreted the Eighth Amendment prohibition of cruel and unusual punishment. Additionally, this part highlights Supreme Court jurisprudence dealing with the waiver of juvenile court jurisdiction, as well as the definition of punishment. Part III then analyzes this jurisprudence through the voice of *State ex. Rel. Simmons v. Roper*.<sup>27</sup> This Missouri Supreme Court case found the execution of seventeen-year-old offenders, as a class, cruel and unusual despite the contrary Court holding in *Stanford v. Kentucky*.<sup>28</sup> The United States Supreme Court has granted certiorari to settle this controversy.<sup>29</sup> Part IV then argues for a constitutional standard based on proportionality, specifically, that the Eighth Amendment should prohibit any punishment that is disproportional to the individual culpability of the defendant. This part applies this proposition to distinct situations. First, juveniles who are less culpable than the average adult cannot be executed. Second, juveniles who are less culpable than the average adult cannot be transferred out of the juvenile system. Part V concludes with a solution to the issue raised in *State ex. Rel. Simmons v. Roper*.<sup>30</sup> This solution is twofold: first, the case should be remanded for a determination of Simmons' mental capacity, relative to the average adult, at the time of the offense. Second, a finding of less capacity, thus less culpability, should require re-sentencing. Or conversely, a finding of equal or greater capacity should affirm the death sentence.

## II. BACKGROUND

### A. The Eighth Amendment Standard

The current Eighth Amendment standard will be analyzed as follows. First, the constitutional analyses and concerns of *Weems v. United States*<sup>31</sup> and *Trop v. Dulles*<sup>32</sup> will be explored, exposing the original standard. Second, the restriction of the original standard will be highlighted by *Woodson v. North Carolina*<sup>33</sup> and *Coker v. Georgia*,<sup>34</sup> generally, and specifically applied to juvenile-offender death sentences

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26. 536 U.S. 304 (2002).

27. 112 S.W.3d 397 (2003).

28. 492 U.S. 361 (1989).

29. *Roper v. Simmons*, No. 03-633, 2004 WL 110849, \*1 (Jan. 26, 2004).

30. 112 S.W.3d 397 (2003).

31. 217 U.S. 349 (1910).

32. 356 U.S. 86 (1958).

33. 428 U.S. 280 (1976).

34. 433 U.S. 584 (1977).

by *Thompson v. Oklahoma*<sup>35</sup> and *Stanford v. Kentucky*.<sup>36</sup> Third, the proper role of moral culpability will be discussed in the context of *Atkins v. Virginia*.<sup>37</sup>

### 1. Early Death Penalty—"Evolving Standards of Decency"

In 1910, *Weems v. United States*<sup>38</sup> found the Eighth Amendment prohibited the imposition of a fifteen-year prison term of hard labor for the falsification of government documents.<sup>39</sup> The *Weems* Court reasoned that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."<sup>40</sup> It further reasoned "that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment."<sup>41</sup> Moreover, in drawing the constitutional line, the judiciary must "[contemplate not only] what has been, but ... what may be."<sup>42</sup> Constitutional "principle[s], to be vital[,] must be capable of wider application than the mischief which gave [them] birth."<sup>43</sup>

Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value[,] and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.... The meaning and vitality of the Constitution have developed against narrow and restrictive construction.<sup>44</sup>

Later, in *Trop v. Dulles*,<sup>45</sup> when considering the punishment of expatriation for the crime of desertion, the Court elaborated: "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."<sup>46</sup> Recounting the holding in *Weems*,<sup>47</sup> the

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35. 487 U.S. 815 (1988).

36. 492 U.S. 361 (1989).

37. 536 U.S. 304 (2002).

38. 217 U.S. 349 (1910).

39. *Id.* at 362-63.

40. *Id.* at 367.

41. *Id.* at 368 (citing *McDonald v. Commonwealth*, 173 Mass. 322 (1899)).

There are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny, and other crimes.

*Id.* at 380.

42. *Id.* at 373.

43. *Id.*

44. *Id.*

45. *Trop v. Dulles*, 356 U.S. 86 (1958).

46. *Id.* at 100.

47. *Id.* ("But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the

*Trop* Court articulated the current Eighth Amendment standard as “the evolving standards of decency that mark the progress of a maturing society.”<sup>48</sup> That is, the Eighth Amendment prohibits punishment that offends “evolving standards of decency.” In describing this standard, the *Trop* Court stated that the Constitution requires the proper “exercise of judgment, not the reliance upon personal preferences.”<sup>49</sup> But this judgment must derive from the “vital, living [constitutional] principles that authorize and limit governmental powers”<sup>50</sup> because any other derivative would reduce the Constitution to mere “good advice.”<sup>51</sup> Applying this standard to the facts of that case, the Court found that expatriation, as punishment for a crime, was cruel and unusual because it was “offensive to cardinal principles for which the Constitution stands.”<sup>52</sup> The Court supported its conclusion by advertent to international practices: “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>53</sup> In other words, the *Trop* Court found that the Eighth Amendment prohibited expatriation as a punishment for crime, however, *in accord* with, not *because of* international practices.<sup>54</sup>

## 2. “Evolving Standards” Indicated by National Consensus

In 1976, in *Woodson v. North Carolina*,<sup>55</sup> a bare three member plurality opinion suggested the following with respect to determining the evolving standards of decency under the Eighth Amendment: “The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society [are] jury determinations and legislative enactments....”<sup>56</sup> The next year, when considering the imposition of a death sentence for rape, the Court in *Coker v. Georgia*<sup>57</sup> concluded that “if the ‘most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*,”<sup>58</sup> then the fact that only three states re-enacted rape as a capital offense, when seventeen had included rape pre-*Furman*, is a “telling datum.”<sup>59</sup> In other words, *Coker* found that this legislative response, or lack thereof, was indicative of “evolving standards of decency” supporting an Eighth Amendment prohibition against capital punishment for rapists.<sup>60</sup> The *Coker* Court added that “it is [also] important to look to the

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penalty was cruel in its excessiveness and unusual in its character.”).

48. *Id.* at 101 (“The Court recognized in [*Weems*] that the words of the Amendment are not precise, and that their scope is not static.”).

49. *Id.* at 103. *See Weems*, 217 U.S. at 378-79 (“In such case[,], not our discretion[,], but our legal duty, strictly defined and imperative in its direction, is invoked.”).

50. *Trop*, 356 U.S. at 103.

51. *Id.* at 104.

52. *Id.* at 102.

53. *Id.* at 102.

54. *Id.* at 103 (“In this country the Eighth Amendment forbids [expatriation] to be done.”).

55. *Woodson v. North Carolina*, 428 U.S. 280, 280 (1976) (plurality opinion) (Stewart, J.).

56. *Id.* at 293.

57. *Coker v. Georgia*, 433 U.S. 584, 584 (1977) (plurality opinion) (White, J.).

58. *Id.* at 594 (citing *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976)).

59. *Id.*

60. *Id.* at 596 (“The current judgment with respect to the death penalty for rape is not wholly

sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.”<sup>61</sup> Consequently, *Woodson* and *Coker* stand for the proposition that objective indicia of “evolving standards of decency” must include legislative enactments and jury sentencing patterns.<sup>62</sup>

The constitutional inquiry, however, must not stop there. Instead, these objective measures “do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>63</sup> In other words, legislative enactment and jury sentencing patterns do not cause, nor condone, an Eighth Amendment prohibition because the Court’s constitutional inquiry will be “brought to bear,” independently and decisively. Ultimately, the *Coker* Court found “that death is indeed a disproportionate penalty for the crime of raping an adult woman.”<sup>64</sup> Again, the constitutional question was answered by the principle of proportionality<sup>65</sup> *in accord with*, not *because of* the objective indicia of legislative enactments and jury sentencing practices.<sup>66</sup>

More recently, in *Thompson v. Oklahoma*,<sup>67</sup> the Court “confront[ed] the question whether the youth of the defendant—more specifically, the fact that he was less than 16 years old at the time of his offense—[was] a sufficient reason for denying the State the power to sentence him to death.”<sup>68</sup> The Court then employed the “evolving standards of decency that mark the progress of a maturing society”<sup>69</sup> to determine the level at which a punishment becomes cruel and unusual under the Eighth Amendment.<sup>70</sup> In ascertaining this critical mass, the Court enumerated a three-step analysis: “first[,] review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency *confirm our judgment* ...”<sup>71</sup> Specifically, in *Thompson*, the Court considered legislation barring these executions,<sup>72</sup> other laws drawing a line at age

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unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”).

61. *Id.*; *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”).

62. *Coker*, 433 U.S. at 596; *Woodson*, 428 U.S. at 293.

63. *Coker*, 433 U.S. at 597.

64. *Id.* See also *Woodson*, 428 U.S. at 305 n.40 (“Our determination that the death sentences in this case were imposed under procedures that violated constitutional standards makes it unnecessary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate to the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments.”).

65. *Coker*, 433 U.S. at 597; *Weems v. United States*, 217 U.S. 349, 368 (1910).

66. *Coker*, 433 U.S. at 597 (finding not that the objective indicia determines the constitutional standard but that it “strongly confirms our own judgment.”). See also *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (finding an Eighth Amendment prohibition not because of, but “along with most legislatures and juries.”).

67. *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988).

68. *Id.* at 822.

69. *Id.* at 821 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

70. *Id.*

71. *Id.* at 822-23 (emphasis added).

72. *Id.* at 829 (“When we confine our attention to the 18 States that have expressly established

sixteen,<sup>73</sup> the frequency of death sentences for fifteen-year old offenders,<sup>74</sup> national and international organizations' positions,<sup>75</sup> and the goals of penology.<sup>76</sup>

The *Thompson* Court used the goals of penology,<sup>77</sup> retribution and deterrence, as constitutional principles to determine whether the execution of a fifteen-year-old violated the "evolving standards of decency."<sup>78</sup> Retribution, though "not 'inconsistent with our respect for the dignity of men,'"<sup>79</sup> is "simply inapplicable to the execution of a 15-year old offender"<sup>80</sup> because of "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children."<sup>81</sup> Deterrence was found "equally unacceptable"<sup>82</sup> for two reasons.<sup>83</sup> First, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."<sup>84</sup> Second, the dearth of juvenile-offender executions in the twentieth century can hardly be found to deter "such a cold-blooded calculation by a 15-year-old ...."<sup>85</sup> The *Thompson* Court held, because execution of fifteen-year-old offenders does not further the goals of penology, vis-à-vis capital punishment, "[i]t is ... 'nothing more than the purposeless and needless imposition of pain and suffering' ... and thus an unconstitutional punishment."<sup>86</sup> Importantly, the *Thompson* Court again stressed the difference between correlation and causation: "Although the judgments of legislatures, juries, and prosecutors

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a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.").

73. *Id.* at 824 ("Other than the special certification procedure that was used to authorize petitioner's trial in this case 'as an adult,' apparently there are no Oklahoma statutes, either civil or criminal, that treat a person under 16 years of age as anything but a 'child.'").

74. *Id.* at 831 ("In fact, the infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying our judgment in *Furman v. Georgia* ... that the death penalty, as then administered in unguided fashion, was unconstitutional.") (citing *Furman v. Georgia*, 408 U.S. 238, 249 (1972)).

75. *Id.* at 830 (finding a consistent position "[has] been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.")

76. *Id.* at 838 ("In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve.").

77. *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (Stevens, J.)).

78. *Id.* at 833 (The Court "consider[ed] whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty.") (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

79. *Id.* at 836 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (Stevens, J.)).

80. *Id.* at 837.

81. *Id.* at 836-37.

82. *Id.* at 837.

83. *Id.*

84. *Id.*

85. *Id.* at 838.

86. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (Stevens, J.)) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").



weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty' on one such as petitioner who committed a heinous murder when he was only 15 years old."<sup>87</sup>

One year later, however, Justice Scalia, writing for a plurality in *Stanford v. Kentucky*,<sup>88</sup> wholly rejected this distinction.<sup>89</sup> Scalia stated that the Eighth Amendment inquiry was limited to whether there exists a national consensus—either in legislative enactments or jury patterns—against the challenged practice.<sup>90</sup> Any further inquiry into proportionality or the goals of penology<sup>91</sup> would work only “to replace judges of the law with a committee of philosopher-kings.”<sup>92</sup>

In his dissent in *Stanford*, Justice Brennan reaffirmed precedent: “Our judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined, by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries.”<sup>93</sup> Justice O'Connor, the swing vote, agreed with Justice Brennan's dissent by arguing

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87. *Thompson v. Oklahoma*, 487 U.S. 815, 832 (1988) (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

88. *Stanford v. Kentucky*, 492 U.S. 361, 363 (1989) (plurality opinion) (Scalia, J.). Justice Scalia's opinion was joined in whole by Justices Rehnquist, White, and Kennedy. O'Connor concurred in judgment and joined in Parts I, II, III, and IV-A only. Parts IV-B and V deal with whether legislative enactments and jury practices are dispositive of the Constitutional question. *Id.* at 363.

89. *Id.* at 379.

90. *Id.* at 378 (“The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the “evolving standards of decency”; to determine, not what they *should* be, but what they *are*.”); *id.* at 379 (“All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty.”).

91. *Id.* at 379 (noting that the Court has never held that a punishment is unconstitutional based solely on “whether [it] makes any ‘measurable contribution to acceptable goals of punishment’”) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (plurality opinion)).

92. *Id.* at 379. Some would agree with Scalia and go a step further, arguing that the only measure should be legislative enactments. Mark Alan Ozimek, Note, *The Case for a More Workable Standard in Death Penalty Jurisprudence: Atkins v. Virginia and Categorical Exemptions Under the Imprudent “Evolving Standards of Decency” Doctrine*, 34 U. TOL. L. REV. 651, 684 (2003) (“The answer to this controversial issue should have had as its only appropriate place for resolution the country's legislative bodies.”). Others would take a step back, arguing that Scalia is only concerned with whether a challenged punishment is cruel and unusual within the meaning of the Eighth Amendment's language as it was understood in 1791. Shawn Burton, Note, *Justice Scalia's Methodological Approach To Judicial Decision-Making: Political Actor or Strategic Institutional*, 34 U. TOL. L. REV. 575, 579 (2003) (citing *Atkins v. Virginia*, 536 U.S. 304 (2002), for “Scalia's [textual originalism] in application”). Burton trumpets the following conclusion: “[b]ased on his historical understanding of these works, Scalia concluded that ‘execution of the mildly mentally retarded would [not] have been considered “cruel and unusual” in 1791’ and, for that reason, there should exist no contemporary constitutional prohibition against Virginia doing so.” *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting)) (second alteration in original). But even Scalia abandons textual originalism in *Atkins*, finding that “[t]he Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the ‘evolving standards of decency that mark the progress of a maturing society.’” *Atkins*, 536 U.S. at 341 (Scalia, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

93. *Stanford*, 492 U.S. at 383 (Brennan J., dissenting) (citing *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

that “[i]n my view, this Court does have a constitutional obligation to conduct proportionality analysis.”<sup>94</sup> It seems, therefore, with five Justices in agreement, that the constitutional definition of cruel and unusual punishment under the Eighth Amendment is to be determined by constitutional principles (i.e., proportionality, deterrence, retribution), which are defined in *accord with, not because of*, the objective indicia of legislative enactments and jury sentencing patterns. Indeed, in 2002, a six-member majority in *Atkins v. Virginia*<sup>95</sup> declared: “Thus, in cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>96</sup>

### 3. Role of Moral Culpability

The Eighth Amendment not only “protect[s] the condemned from fear and pain without comfort of understanding, [but also] the dignity of society itself from the barbarity of exacting mindless vengeance ....”<sup>97</sup> Accordingly, the Eighth Amendment prohibits the execution of the insane.<sup>98</sup> *Atkins* largely dealt with the lesser mental capacity of the defendant, and thus the lesser moral culpability, in considering the imposition of the death penalty on the mentally retarded.<sup>99</sup> *Atkins* held that “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct”<sup>100</sup> and that “the lesser culpability of the mentally retarded offender surely does not merit”<sup>101</sup> the imposition of death.<sup>102</sup>

The constitutional principle of proportionality requires a comparison of the punishment and the individual defendant’s conduct.<sup>103</sup> As such, the judiciary must

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94. *Id.* at 382 (O’Connor J., concurring in part and concurring in judgment).

95. *Atkins v. Virginia*, 536 U.S. 304 (2002).

96. *Id.* at 313 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

97. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

98. *Id.* at 409-10. The Court based its holding on a two-part analysis. First, it noted that such a prohibition existed at common law. *Id.* at 406 (“The bar against executing a prisoner who has lost his sanity bears impressive historical credentials.”). Furthermore, the Court stated, current state laws have not indicated a departure from such a prohibition. *Id.* at 408-09 (“It is clear that the ancient and humane limitation upon the State’s ability to execute its sentences [against the insane] has as firm a hold upon the jurisprudence of today as it had centuries ago in England.”).

99. *Atkins*, 536 U.S. at 307 (determining “whether [executions of the mentally retarded] are ‘cruel and unusual punishments’ prohibited by the Eighth Amendment to the Federal Constitution”).

100. *Id.* at 306 (so holding even though “[t]hose mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes”). *See also id.* at 318 (“Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”).

101. *Id.* at 319 (“If the culpability of the average murderer is insufficient to justify [imposition of death], the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”) (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

102. *Id.* at 321 (holding that “such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender”) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

103. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (“The question before us is not the

consider the individual's culpability "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,'<sup>104</sup> which means that we must focus on 'relevant facets of the character and record of the individual offender.'"<sup>105</sup> But *Thompson* and Scalia's *Stanford* plurality, both dealing with juvenile defendants, took opposite positions in judging individual juvenile offenders on Death Row. In *Thompson*, the Court held "that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult"<sup>106</sup> and imposed an Eighth Amendment prohibition against the execution of fifteen-year-old or younger offenders, as a class.<sup>107</sup> Justice Scalia, in his *Stanford* plurality opinion,<sup>108</sup> sought to remove the proportionality analysis all together.<sup>109</sup>

The punishment is either "cruel and unusual" (*i.e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be, but what they *are*.<sup>110</sup>

The rule seems to be somewhere in the middle, however, as *Stanford's* four-member dissent and O'Connor, together forming a majority on this issue, both held the proportionality analysis not only proper, but constitutionally required.<sup>111</sup> Justice

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disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct.").

104. *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

105. *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

106. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

107. *Id.* at 838 ("concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense").

108. Justice Scalia authored the majority opinion of the Court "with respect to Parts I, II, III, and IV-A." *Stanford v. Kentucky*, 492 U.S. 361, 364 (1989). Scalia's opinion "with respect to Parts IV-B and V" was joined by only three other justices. *Id.*

109. Scalia argues:

Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.

*Id.* at 377.

110. *Id.* at 379 (declining to even consider proportionality because "[a]ll of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty.").

111. *Id.* at 393 (Brennan, J., dissenting) ("There can be no doubt at this point in our constitutional history that the Eighth Amendment forbids punishment that is wholly disproportionate to the blameworthiness of the offender."). "Proportionality analysis requires that we compare 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's culpability, with 'the harshness of the penalty.'" *Id.* at 394 (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)); *id.* at 382 (O'Connor, J., concurring in part and concurring in judgment) ("In my view, this Court does

Brennan was particularly harsh in his discussion of Justice Scalia's plurality opinion in *Stanford*: "The promise of the Bill of Rights goes unfulfilled when we leave '[c]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit, as is the case under Justice SCALIA's positivist approach to the definition of citizens' rights."<sup>112</sup> Consequently, after *Stanford*, evidence beyond legislation and jury patterns is necessary to, "[determine] whether a punishment is unconstitutionally excessive, either because it is disproportionate given the culpability of the offender, or because it serves no legitimate penal goal."<sup>113</sup> This is particularly relevant to waiver because waiver is a form of punishment exacted on juveniles without sufficient consideration of their lesser moral culpability.

### *B. The Eighth Amendment Vis-à-vis Juveniles*

As seen above, the Eighth Amendment has been found to accord protection against the imposition of the death penalty to juvenile offenders under the age of sixteen. There are those, however, who would extend this protection to all juveniles. First, the movement to exempt all juveniles from the death penalty will be explored through a discussion of the recent Supreme Court dissenting opinions in *In Re Stanford*<sup>114</sup> and *Patterson v. Texas*.<sup>115</sup> Second, *Kent v. United States*<sup>116</sup> will be analyzed to describe the procedural protections afforded juveniles when a waiver of jurisdiction is sought. Third, the definition of punishment will be explored through a discussion of *Kennedy v. Mendoza-Martinez*.<sup>117</sup>

#### *1. The Movement to Exempt All Juvenile Offenders*

The Supreme Court currently holds that the Eighth Amendment<sup>118</sup> exempts whole classes of criminals from execution. Currently, these classes are insane or mentally

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have a constitutional obligation to conduct proportionality analysis.").

112. *Id.* at 392 (Brennan, J., dissenting) (second and third alterations in original) (quoting Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978)). Brennan continued, "[d]espite Justice SCALIA's view to the contrary, however," the inquiry does not stop at "legislative or jury rejection of a penalty" but extends to whether the punishment is proportional to moral culpability and whether the punishment "measurabl[y] contribut[es] to acceptable goals of punishment." *Id.* at 392-93 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

113. *Id.* at 383 (Brennan, J., dissenting).

114. 537 U.S. 968 (2002) (Stevens, J., dissenting).

115. 536 U.S. 984 (2002) (Stevens, J., dissenting).

116. 383 U.S. 541 (1966).

117. 372 U.S. 144 (1963).

118. U.S. CONST. amend. VIII.

retarded adults<sup>119</sup> and juvenile offenders who are fifteen-years-old, or younger.<sup>120</sup> This categorical approach has left sixteen- and seventeen-year-old offenders to fend for themselves, as if they were adults. There is a movement, however, to extend the juvenile exemption to include these sixteen- and seventeen-year-old offenders.<sup>121</sup> Should this movement towards exempting juveniles succeed, only sane, non-mentally retarded adults would be death-eligible.

The push for the expanded juvenile exemption draws support from *Atkins v. Virginia*,<sup>122</sup> decided in late 2002.<sup>123</sup> The *Atkins* Court determined that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”<sup>124</sup> And, at least as to fifteen-year-old or younger offenders, “adolescents as a class are less mature and responsible than adults”<sup>125</sup> and “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.”<sup>126</sup> The logical extension, the Missouri Supreme Court reasons in *State ex rel. Simmons v. Roper*,<sup>127</sup> is that juveniles, being less culpable than the average adult, cannot be executed for crimes committed before their eighteenth birthday.<sup>128</sup>

The dissent in *In Re Stanford*<sup>129</sup> supports the proposition that the Eighth Amendment<sup>130</sup> prohibits the execution of all juvenile offenders as a class.<sup>131</sup> *In Re Stanford* posits not a rule of law, however, but a juggernaut of legal momentum,

119. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”). *See also Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”) (quoting *Ford*, 477 U.S. at 405).

120. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (“[W]e ... conclud[e] that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.”).

121. *See generally In Re Stanford*, 537 U.S. 968, 971-72 (2002) (Stevens, J., dissenting); *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401-06 (Mo. 2003) (en banc).

122. 536 U.S. 304 (2002).

123. *Atkins* overruled *Penry v. Lynaugh*, which held that the Eighth Amendment did not prohibit the execution of the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

124. *Atkins*, 536 U.S. at 319.

125. *Thompson*, 487 U.S. at 834.

126. *Id.* at 835.

127. 112 S.W.3d 397 (Mo. 2003).

128. *Id.* at 412 (“Although Mr. Simmons is 17 rather than 15, he is still an adolescent, and this Court finds the rationales set forth in *Thompson* and *Eddings* apply here.”).

129. 537 U.S. 968 (2002).

130. U.S. CONST. amend. VIII.

131. *In Re Stanford*, 537 U.S. at 972 (“[O]ffenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.”). *See also Roper*, 112 S.W.3d at 413 (“[T]his Court concludes that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violates the ‘evolving standards of decency that mark the progress of a maturing society,’ and is prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.”).

namely the proposition that juveniles<sup>132</sup> are not so culpable as adults so as to justify death eligibility.<sup>133</sup> In *Stanford v. Kentucky*,<sup>134</sup> some fourteen years earlier, the Court found that the Eighth Amendment did not bar executions of sixteen and seventeen-year-old offenders.<sup>135</sup> Yet, in *Roper*, the Missouri State Supreme Court found that the Eighth Amendment prohibits, as cruel and unusual punishment, the execution of seventeen-year-old offenders as a class.<sup>136</sup>

## 2. *The Transfer of Juveniles Out of Juvenile Jurisdiction*

In 1961, a woman in the District of Columbia was robbed and raped.<sup>137</sup> Latent fingerprints of Morris A. Kent, Jr., a sixteen-year-old, were found in the apartment.<sup>138</sup> Kent was taken into the custody of the Receiving Home for Children,<sup>139</sup> and he spent days in the custody of the police, being interrogated.<sup>140</sup> He was detained for almost a week, with “no arraignment ... [and] no determination [was made] by a judicial officer of probable cause for [his] apprehension.”<sup>141</sup> The week ended with the Juvenile Court judge “enter[ing] an order reciting that after ‘full investigation, I do hereby waive’ jurisdiction of petitioner.”<sup>142</sup> This “full investigation,” however, did not consist of a hearing or rulings on any of Kent’s motions, and the judge did not make any findings of fact nor refer to any reasons for waiver.<sup>143</sup> Following his transfer from juvenile court, Kent was “indicted by a grand jury of the United States District Court for the District of Columbia ... [on] eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery.”<sup>144</sup>

In *Kent v. United States*,<sup>145</sup> the Supreme Court found that “[t]he District Court had before it extensive information as to petitioner’s mental condition, bearing upon both competence to stand trial and the defense of insanity.”<sup>146</sup> Though Kent “was

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132. See *Roper*, 112 S.W.3d at 399 (referring to “juvenile,” for the purposes of capital punishment, as an individual who was under the age of 18 at the time of the offense).

133. In *Re Stanford*, 537 U.S. at 969 (“In my view, juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.”) (quoting *Stanford*, 492 U.S. at 394 (Brennan, J., dissenting)).

134. 492 U.S. 361 (1989).

135. *Id.* at 380.

136. *State ex rel. Simmons v. Roper*, 112 S.W.2d 397, 413 (Mo. 2003).

137. *Kent v. United States*, 383 U.S. 541, 543 (1966).

138. *Id.*

139. *Id.* at 544.

140. *Id.* at 544-45.

141. *Id.*

142. *Id.* at 546.

143. *Id.* (“We must assume that he denied, *sub silentio*, the motions for a hearing, the recommendation for hospitalization [sic] for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court’s jurisdiction.”).

144. *Id.* at 548. Kent “moved the District Court to dismiss the indictment on the grounds that the waiver was invalid” to no avail. *Id.*

145. *Id.* at 541.

146. *Id.* at 549 n.8.

‘suffering from ... Schizophrenic Reaction, Chronic Undifferentiated Type,’<sup>147</sup> he was still “‘mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense.’”<sup>148</sup> Kent’s “defense was wholly directed toward proving that he was not criminally responsible because ‘his unlawful act was the product of mental disease or mental defect.’”<sup>149</sup> Interestingly, after transfer, Kent was found guilty of housebreaking and robbery, yet not guilty by reason of insanity for the alleged rape.<sup>150</sup>

Kent raised several grounds for reversal,<sup>151</sup> though the Supreme Court addressed only the issue of whether there was “procedural error with respect to waiver of jurisdiction.”<sup>152</sup> The waiver proceeding was challenged on the following grounds: “because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction.”<sup>153</sup> Without explanation, the Court found “that the order of the Juvenile Court waiving its jurisdiction and transferring [Kent] for trial in the United States District Court for the District of Columbia was invalid.”<sup>154</sup>

The issue turned, instead, to what standard is “to be applied upon such review.”<sup>155</sup> Waiver of Juvenile Court jurisdiction is “critically important”<sup>156</sup> because the “child will be deprived of the special protections and provisions of the Juvenile Court Act.”<sup>157</sup> Though “the Juvenile Court should have considerable latitude”<sup>158</sup> over waiver, the statute “does not confer upon the Juvenile Court a license for arbitrary

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147. *Kent v. United States*, 383 U.S. 541, 549 n.8 (1966) (quoting the Superintendent of St. Elizabeths Hospital (April 5, 1962)).

148. *Id.* (quoting the Superintendent of St. Elizabeths Hospital (April 5, 1962)).

149. *Id.* at 550 (quoting *Durham v. United States*, 214 F.2d 862, 875 (1954)).

150. *Id.* The Court found:

The basis for this distinction—that petitioner was “sane” for purposes of the housebreaking and robbery but “insane” for the purposes of the rape—apparently was ... that the jury might find that the robberies had anteceded the rapes, and ... might conclude that the housebreakings and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

*Id.* at 550 n.10.

151. *Id.* at 551 (Kent “argue[d] that [his] detention and interrogation ... were unlawful ... [and] that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself ....”). Kent also claimed error for improper jury instructions, inadequate competency hearing, denial of motion to constitute juvenile court, and denial of motion for acquittal notwithstanding the verdict. *Id.* at 552 n.13.

152. *Id.* at 552.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 553. “As the Court of Appeals has said, ‘[I]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.’” *Id.* at 560-61 (quoting *Harling v. United States*, 295 F.2d 161, 164-65 (1961)).

157. *Kent v. United States*, 383 U.S. 541, 553 (1966).

158. *Id.* at 552-53.

procedure.”<sup>159</sup> Nor does the Constitution permit<sup>160</sup> the continued exposure of “[children who receive] the worst of both worlds: [getting] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>161</sup> “[A]s a condition to a valid waiver order,”<sup>162</sup> due process<sup>163</sup> requires that juveniles must receive a hearing, access to all records “considered by the court, and to a statement of reasons for the Juvenile Court’s decision.”<sup>164</sup> “The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court’s jurisdiction over such offenses will be waived are the following.”<sup>165</sup>

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
5. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court of the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other

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159. *Id.* at 553. “[T]his latitude ... assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a ‘full investigation.’” *Id.* at 552 (citing *Green v. United States*, 308 F.2d 303 (1962)).

160. *Id.* at 557. The Court finds:

[A]s a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court’s decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.

*Id.*

161. *Id.* at 556.

162. *Id.* at 557.

163. *Id.* “[T]he Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be.” *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 803 (1994).

164. *Id.* See also *In Re Gault*, 387 U.S. 1, 28 (1967) (“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”).

165. *Kent v. United States*, 383 U.S. 541, 566 (1966).



jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.<sup>166</sup>

Since *Kent* was decided, three types of statutorily created waivers have emerged.<sup>167</sup> Judicial waiver entails discretionary waiver by a juvenile judge.<sup>168</sup> Section 211.071(1) of the Missouri revised code provides for judicial discretion in waiver.<sup>169</sup> The juvenile judge is required to hold a hearing when certain offenses are alleged, but still maintains his discretion to “dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.”<sup>170</sup> Second, statutory waiver is the automatic categorical waiver of certain juveniles depending on the crime alleged.<sup>171</sup> Third, prosecutorial waiver involves the prosecutor’s power to either file in juvenile court or the courts of general jurisdiction.<sup>172</sup> None of these waiver procedures, however, require a finding of sufficient moral culpability and all allow waiver with mere allegations of wrongdoing.<sup>173</sup> Juveniles are not even afforded a grand jury, or its equivalent,

166. *Id.* at 566-67.

167. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 374 (1998).

168. *Id.*

169. The Missouri waiver statute contemplates waiver for twelve to seventeen-year-old offenders who have allegedly committed a felony:

If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child’s custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

MO. REV. STAT. § 211.071(1) (1996).

170. *Id.*

171. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 374 (1998) (also referring to this as “statutory exclusion”).

172. *Id.* (also referring to this as “direct file”).

173. The Missouri statute codifies *Kent*-like criteria, none of which are dispositive:

A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and

before juvenile jurisdiction is terminated. Arguably, waiver of juvenile jurisdiction is punishment.

### 3. *Transfer Is a Form of Punishment*

“If the intention of the legislature was to impose punishment,”<sup>174</sup> then the statute is punitive, regardless of any indicator to the contrary.<sup>175</sup> Missouri’s waiver statute, however, does not expressly state a legislative intent to punish.<sup>176</sup> Instead, the Missouri statute “by providing that one not a proper subject may be prosecuted as an adult clearly intended in a proper case that consideration of societal needs and the likely unrewarding ameliorative effect of the juvenile justice system require application of the general law.”<sup>177</sup>

The Court in *Smith v. Doe*,<sup>178</sup> dealing with whether a sex-offender registration statute violated the Ex Post Facto Clause, found that where a legislature intends the statute to be civil or non-punitive, or the intent is unknown, then a statute imposes punishment only if it is “‘so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>179</sup> In *Kennedy v. Mendoza-Martinez*,<sup>180</sup> the Court outlined a seven-part test for defining punishment.<sup>181</sup> The seven factors outlined are as follows:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a

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whether there are reasonable prospects of rehabilitation within the juvenile justice system. These criteria shall include but not be limited to:

- (1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
- (2) Whether the offense alleged involved viciousness, force and violence;
- (3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;
- (4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
- (5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;
- (6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;
- (7) The age of the child;
- (8) The program and facilities available to the juvenile court in considering disposition;
- (9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and
- (10) Racial disparity in certification.

MO. REV. STAT. § 211.071(6) (1996).

174. *Smith v. Doe*, 123 S. Ct. 1140, 1147 (2003).

175. *Id.*

176. *See generally* MO. REV. STAT. § 211.071 (1996).

177. *In re A.D.R.*, 603 S.W. 2d 575, 580 (Mo. 1980).

178. *Smith*, 123 S. Ct. at 1147.

179. *Id.* at 1147 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

180. 372 U.S. 144, 168 (1963).

181. *Id.* at 169.

finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.<sup>182</sup>

The Court in *Kennedy* had dealt with the automatic expatriation under the Nationality Act of 1940 for those who dodged the wartime draft.<sup>183</sup> The Court in *Kennedy* did not reach the seven factors, however, “because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.”<sup>184</sup>

The factors relevant to waiver are (1) whether the sanction furthers retribution or deterrence,<sup>185</sup> (2) whether the underlying conduct is already a crime,<sup>186</sup> (3) whether there is an alternative purpose assigned to waiver,<sup>187</sup> and (4) whether waiver is excessive to the alternative purpose assigned.<sup>188</sup> First, waiver of juvenile jurisdiction does further the traditional aims of punishment—retribution and deterrence.<sup>189</sup> Indeed, the explosion of juveniles transferred into the adult system is a product of the “tough on crime” movement.<sup>190</sup> “Adult time for adult crime”<sup>191</sup> is retribution for juvenile offenses. The harsher punishments of adult criminal courts for juvenile offenses are the deterrents.

Second, it is commonsensical that waiver applies to behavior that is already a crime. Missouri’s waiver statute requires a transfer hearing for allegations of first and second degree murder, first degree assault, forcible rape, forcible sodomy, first

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182. *Id.* at 168-69 (citations omitted).

183. *Id.* at 147-48.

184. *Id.* at 169 (citations omitted).

185. *E.g.*, *United States v. Constantine*, 296 U.S. 287, 295 (1935) (finding a large “tax,” which was triggered by committing certain crimes, was a penalty designed as a deterrent).

186. *E.g.*, *United States v. La Franca*, 282 U.S. 568, 572-73 (1931) (labeling as punishment a statute that called for forfeiture of automobiles used in a crime and a statute that provided the power to enjoin use of a premises that was used in crime).

187. *E.g.*, *Cummings v. Missouri*, 71 U.S. 277, 319 (1866) (finding the purpose of electing qualified officials insufficient to escape labeling the statute as punishment because the disqualifications were not related to the individual’s ability to do the job).

188. *E.g.*, *Rex Trailer Co. v. U.S.*, 350 U.S. 148, 154 (holding that a statute must be “so unreasonable or excessive that it [transforms] what was clearly intended as a civil remedy into a criminal penalty”).

189. Laureen D’Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 277 (1997) (“Policy makers throughout the country are responding to the increasing sentiment that violent juvenile offenders should face the same penalties as their adult counterparts ... [with a] familiar mantra, ‘adult time for adult crime.’”).

190. “The trend towards harsh sentencing is apparent at every level of the criminal justice system—from police enforcement of drunk driving laws to mandatory sentences for gun and drug crimes.” Christina Dejong & Eve Schwitzer Merrill, *Getting “Tough on Crime”; Juvenile Waiver and the Criminal Court*, 27 OHIO N.U. L. REV. 175, 176 (2001). “This increased use of adult charges and punishment is based on the same justification for any severe punishment, such as the death penalty: ‘getting tough’ on juvenile crime means providing incapacitation and deterrence to limit future crime both specifically and generally.” *Id.*

191. D’Ambra, *supra* note 175, at 277.

degree robbery and distribution of drugs.<sup>192</sup> Missouri also allows a transfer hearing for any alleged felony.<sup>193</sup> Because transfer is a derivative of alleged criminal conduct, this factor indicates that transfer is punishment.<sup>194</sup>

Third, the alternative purpose for waiver, protection of the public,<sup>195</sup> can be accomplished without transfer to adult courts. The answer is in “blended sentencing”<sup>196</sup> of juvenile offenders who pose a threat to public safety.<sup>197</sup> Instead, juveniles are subjected to the adult court process before any proof of criminal conduct, and juvenile protections are denied before a grand jury has found enough evidence to warrant trial. The courts can require proof of a juvenile’s mental capacity or criminal conduct under the jurisdiction of the juvenile courts, then subject the constitutionally culpable to the adult system. In any event, the factors traditionally employed to classify punishment support the conclusion that waiver of juvenile jurisdiction is punishment.<sup>198</sup>

In *Trop*, the government argued that expatriation was not punishment and did not, therefore, fall under the Eighth Amendment umbrella.<sup>199</sup> The Court, not impressed with Congress’ non-penal label on expatriation,<sup>200</sup> found that punishment is defined by the nature of the sanction imposed.<sup>201</sup> Accordingly, expatriation was defined as punishment. Likewise, where a juvenile is subjected to the adult criminal system, he is subjected to a punishment. This conclusion is inescapable.<sup>202</sup> Juveniles have a right to the protections of the juvenile system.<sup>203</sup> Waiver of this right exposes juveniles to the significantly harsher sanctions of the adult criminal system.<sup>204</sup> Waiver is punishment.

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192. MO. REV. STAT. § 211.071(1) (1996).

193. *Id.*

194. See *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922). Dealing with a tax statute, the *Lipke* Court found that where “[evidence] of crime (section 29) is essential to [taxation, it] clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.” *Id.* at 562.

195. *In re A.D.R.*, 603 S.W. 2d 575, 580 (Mo. 1980).

196. Cathi J. Hunt, Note, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 669 (1999) (“Blended sentences generally include both a state youth facility sentence, potentially until the age of twenty-one, and a suspended adult incarceration sentence.”).

197. *Id.* at 668 (“This type of legislation enables young offenders to receive rehabilitative services while also answering the public demand for protection from young offenders.”).

198. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (describing imprisonment as the “infamous punishment”). Logically, if imprisonment is punishment and waiver results in imprisonment, then waiver is punishment.

199. *Trop v. Dulles*, 356 U.S. 86, 94 (1958).

200. *Id.* (“How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!”).

201. *Id.* at 96 (“The controlling nature of such statutes normally depends on the evident purpose of the legislature.”).

202. See *Dejong & Merrill*, *supra* note 176, at 187 (“Punishments for waived juveniles are often severe since that was the original purpose of waiver.”). The purpose of the juvenile courts is not to punish. Thus, allowing for the possibility that juveniles will be subject to punishments as harsh as death “is in direct opposition to the purpose and intent of the juvenile court.” *Id.* at 191. Where normal juvenile procedure can result in the ultimate punishment, that procedural step that makes death possible must be seen as a punishment itself.

203. *Kent v. United States*, 383 U.S. 541, 557 (1966).

204. *Id.*

## III. STATEMENT OF THE CASE

A. *Facts*

Christopher Simmons, a seventeen-year-old offender, was found guilty of first-degree murder.<sup>205</sup> Simmons had first attempted to rob, then bound and gagged, Shirley Crook.<sup>206</sup> Simmons, believing he could get away with robbery and murder because he was a juvenile, “walked Ms. Crook down a railroad trestle, bound her more, and pushed her, while still alive, over the trestle and into the Meramec River.”<sup>207</sup>

B. *Procedure*

At sentencing, Simmons offered his age as a mitigating factor, but was still condemned to death.<sup>208</sup> In 1997, the death sentence was affirmed by the Missouri Supreme Court,<sup>209</sup> which also denied post-conviction relief.<sup>210</sup> Nearly five years later, the Court, in *Atkins v. Virginia*,<sup>211</sup> found that capital punishment of the mentally retarded is prohibited by the Eighth Amendment as cruel and unusual punishment.<sup>212</sup> Also in 2002, the U.S. Supreme Court denied a writ of habeas corpus for a seventeen-year-old offender in *In Re Stanford*.<sup>213</sup>

In August of 2003, notwithstanding *In Re Stanford*, the Missouri Supreme Court granted Simmons’ petition for writ of habeas corpus.<sup>214</sup> Surprisingly, the Missouri Supreme Court found “that the Supreme Court of the United States *would hold* that the execution of persons for crimes committed when they were under 18 years of age violates the ... Eighth Amendment,”<sup>215</sup> even though the Court had declined that opportunity just ten months prior.<sup>216</sup>

C. *Majority Holding*

The majority held that the Eighth Amendment prohibited the execution of juvenile offenders<sup>217</sup> for two principal reasons. First, in the fourteen years since *Stanford v. Kentucky*,<sup>218</sup> when the Court held that the Eighth Amendment did not

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205. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003).

206. *Id.* at 419 (Price, J., dissenting).

207. *Id.* (Price, J., dissenting).

208. *Id.* at 399.

209. *Id.*

210. *Id.* (citing State v. Simmons, 944 S.W.2d 165 (Mo. 1997) (en banc), *cert. denied*, 522 U.S. 953 (1997)).

211. 536 U.S. 304 (2002).

212. *Id.* at 321.

213. *In re Stanford*, 537 U.S. 968 (2002).

214. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003).

215. *Id.* (emphasis added).

216. *In re Stanford*, 537 U.S. 968 (2002).

217. *Roper*, 112 S.W.3d at 413.

218. 492 U.S. 361 (1989).

prohibit capital punishment of juvenile offenders,<sup>219</sup> “a national consensus [had] developed against the execution of juvenile offenders ....”<sup>220</sup> Second, in light of *Atkins v. Virginia*,<sup>221</sup> and the emerging national consensus against juvenile executions, “the [U.S.] Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments.”<sup>222</sup>

The Court in *Roper*, impressed with *Atkins*’ finding that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change,”<sup>223</sup> found there to be a consistent movement towards the abolition of the juvenile death penalty.<sup>224</sup> The Court also found the weight of the rarity of juvenile offender death sentences,<sup>225</sup> professional organizations’ opposition,<sup>226</sup> and the failure to achieve penological goals<sup>227</sup> as evidence supporting the emergence of a national consensus against juvenile death sentences.<sup>228</sup> Before the Missouri Supreme Court could find all seventeen-year-old offenders exempt from capital punishment, however, it had to distinguish *Stanford v. Kentucky*.<sup>229</sup>

*Simmons* construed the holding of *Stanford* “that there was not then a national consensus against the execution of those who were 16 or 17 years old at the time of their crimes and declined to bar such executions.”<sup>230</sup> The Missouri Court reasoned that because there is now a consensus, the United States Supreme Court would hold that juvenile executions are prohibited by the Eighth Amendment.<sup>231</sup> *Roper* based its “authority and the obligation to determine the case before it based on current—2003—standards of decency”<sup>232</sup> because of recent dissenting opinions in

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219. *Id.* at 380 (“We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.”).

220. *Roper*, 112 S.W.3d at 399.

221. 536 U.S. 304 (2002).

222. *Roper*, 112 S.W.3d at 400.

223. *Id.* at 405 (2003) (citing *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (emphasis added)).

224. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 408 (Mo. 2003).

225. *Id.* at 410 (“Juveniles are so seldom executed that, other than perhaps in Texas and Virginia, the death penalty for juveniles has become so truly unusual that its potential application is more hypothetical than real.”).

226. *Id.* at 411 (finding a “wide array” of domestic groups as well as the consistently growing international community oppose the juvenile death penalty).

227. *Id.* at 412 (“Similarly, as to juveniles, neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty....”).

228. *Id.* at 413 (“For these reasons, this Court concludes that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age...is prohibited by the Eighth Amendment....”).

229. 492 U.S. 361 (1989).

230. *Roper*, 112 S.W.3d at 399.

231. *Id.* at 413.

232. *Id.* at 407.

*Patterson v. Texas*<sup>233</sup> and *In Re Stanford*.<sup>234</sup> These cases, *Roper* holds, make it possible to revisit the issue in *Stanford* without being bound by its holding.<sup>235</sup>

Judge Price dissented, however, because “[t]his opinion is directly in conflict with the United States Supreme Court decision of *Stanford v. Kentucky* ...”<sup>236</sup> Price relied on the exact same cases, *Patterson* and *In Re Stanford*,<sup>237</sup> to support the opposite proposition that “[i]t is the United States Supreme Court’s prerogative, and its alone, to overrule one of its decisions.”<sup>238</sup> Where the majority found “authority and the obligation” to employ today’s standards of decency, Price found a “solemn duty to abide by decisions of the Supreme Court” and want of power to “imply or anticipate the overruling of a decision of the United States Supreme Court.”<sup>239</sup>

#### IV ANALYSIS

The “evolving standards of decency” standard is not inherently flawed. It is another way of articulating that Eighth Amendment prohibitions are flexible and dynamic enough to change as society changes. The flaw, rather, lies in the way that the evolving standards are measured. Justice Scalia posits the most extreme position, that is, that the sole measures of evolving standards are legislative enactments and jury sentencing patterns.<sup>240</sup> He calls this measure a national consensus, and ends the inquiry there.<sup>241</sup> To some extent, the Court previously has employed this national consensus measure.<sup>242</sup> It is fundamental, however, that the Constitution stands to limit these forms of majoritarian rule.<sup>243</sup> And, as such, the Constitution, and its Eighth Amendment, should be found to prohibit cruel and unusual punishment not because of any majoritarian measure, but because of Constitutional principles (e.g., proportionality).<sup>244</sup>

This part proceeds by outlining the proper role of a national consensus and the needed greater role of proportionality. It argues for a solution with a wider, but less absolute, impact on juveniles. That is, that waiver of juvenile jurisdiction must meet the constitutional standard of proportionality or be barred as cruel and unusual. Where the State has proven that an individual juvenile has the mental capacity of the average adult, then the juvenile’s moral culpability allows for waiver of juvenile jurisdiction. Furthermore, once a juvenile has been found constitutionally culpable

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233. 536 U.S. 984, 985 (2002) (Ginsburg, J., dissenting) (finding the argument for reconsideration of *Stanford v. Kentucky* “tenable” in light of the decision in *Atkins v. Virginia*).

234. 537 U.S. 968, 968 (2002) (Stevens, J., dissenting) (finding *Atkins v. Virginia* supports a reconsideration of *Stanford v. Kentucky*).

235. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 407 (Mo. 2003).

236. *Id.* at 419 (Price, J., dissenting).

237. *Id.* (Price, J., dissenting) (also citing *Mullin v. Hain*, 123 S. Ct. 1654 (2003)).

238. *Id.* (Price J., dissenting) (citing *United States v. Hatter*, 532 U.S. 557, 567 (2001); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *Rodriguez de Quinas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

239. *Id.* at 420 (Price, J., dissenting).

240. *Stanford v. Kentucky*, 492 U.S. 361, 378-80 (1989) (plurality opinion) (Scalia, J.).

241. *Id.* at 379 (plurality opinion) (Scalia, J.).

242. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 822-23 (1988).

243. *See Weems v. United States*, 217 U.S. 349, 373 (1910).

244. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (White, J.).

and properly transferred, his punishment should be no less harsh than would be exacted on an adult. Consequently, this part will conclude with the offered solution that *State ex rel. Simmons v. Roper* should be remanded for a proper determination of Simmons' culpability relative to the average adult murderer at the time of the offense.

*A. National Consensus Standard*

As seen above, the "evolving standards of decency" were a product of the Supreme Court decisions of *Weems v. United States*<sup>245</sup> and *Trop v. Dulles*.<sup>246</sup> *Weems* proposed that "principle[s], to be vital, must be capable of wider application than the mischief which gave [them] birth,"<sup>247</sup> and *Trop* concluded that Eighth Amendment prohibitions are measured against "the evolving standards of decency that mark the progress of a maturing society."<sup>248</sup> Neither case considered the practices of state legislatures or the patterns of juries. Instead, both considered the Constitutional principle of proportionality in determining that fifteen years of hard labor for falsification of government documents and expatriation for wartime desertion, respectively, were both prohibited by the Eighth Amendment.<sup>249</sup>

*Weems* and *Trop*, however, were concerned with the imposition of subjective, personal beliefs of the individual Justices, namely that individual moral judgments would substitute constitutional principals when analyzing the death penalty.<sup>250</sup> This concern sparked an interest by the Justices of the 1970s to plant Eighth Amendment prohibitions in the forest of objective indicia. The two primary objective indicators have been legislative enactments and jury sentencing patterns.<sup>251</sup> But other objective indicators have included professional, religious, and social, both national and international, organizations' positions, and international practices.<sup>252</sup> Though the rule has been to draw a correlation between this national consensus and the independent Constitutional principle of proportionality, the distinction between causation and correlation has been steadily obscured. Indeed, it is not always clear whether the Constitution's Eighth Amendment prohibits a punishment because of a national consensus or merely in accord with a national consensus.

*B. Proportionality Measured by Moral Culpability*

Another objective test, based in constitutional principle and not majoritarian rule or personal predilections, is proportionality. Proportionality can include the inquiry of whether the criminal conduct is proportional to the punishment or whether the

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245. 217 U.S. 349 (1910).

246. 356 U.S. 86 (1958).

247. *Weems*, 217 U.S. at 373.

248. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

249. *Id.* at 102; *Weems*, 217 U.S. at 382.

250. *Trop*, 356 U.S. at 103; *Weems*, 217 U.S. at 378-79.

251. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion) (Stewart, J.).

252. *See generally Thompson v. Oklahoma*, 487 U.S. 815, 822-838 (1988).



criminal's culpability is proportional to the punishment.<sup>253</sup> In the latter case, and dealing with capital offenses, the objective litmus test is that of the average adult murderer.<sup>254</sup> The average adult murderer is not sentenced to death.<sup>255</sup> Therefore, if a criminal defendant is less culpable than the average adult murderer then execution is a disproportional punishment.<sup>256</sup> This approach allows for individualized determinations of culpability<sup>257</sup>—as the broader fiduciary duty we owe our children should require<sup>258</sup>—under an objective rubric of constitutional rules (i.e. the average adult murderer is not culpable enough for death, the average adult robber is not culpable enough for life imprisonment, etc.).

The Court used moral culpability to determine proportionality in *Atkins v. Virginia*.<sup>259</sup> There, the Court found that the mentally retarded “do not act with the level of moral culpability that characterized the most serious adult criminal conduct,”<sup>260</sup> but left the determination of who is mentally retarded to the trier of fact.<sup>261</sup> There is no such convenient case-by-case application of a categorical exemption to juveniles.<sup>262</sup> The juvenile exemption in *Thompson* for fifteen-year-old-or younger offenders follows from the presumption that no children under sixteen-years-old are sufficiently culpable to justify execution. What is left to determine on a case-by-case basis but the juvenile's age? Moreover, in regards to the juvenile's culpability, age is only a proxy.<sup>263</sup> Where the issue of whether a defendant is mentally retarded is dispositive of relative moral culpability, the issue of the juvenile's age serves only as a rough approximation. While it is safe to say that, generally speaking, fifteen-year-olds are less culpable than sixteen-year-olds, such a bright line rule removes the issue of the actual individual defendant's culpability from the trier of fact. *Atkins* found that the measure of moral culpability is the mental capacity of the mentally retarded defendant vis-à-vis the average adult

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253. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

254. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“If the culpability of the average murderer is insufficient to justify [imposition of death], the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”).

255. *Id.*

256. *Id.*

257. *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (“[C]ontemporary society [is] no longer tolerant of the random or discriminatory infliction of the penalty of death,..., evolving standards of decency [require] due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty.”).

258. “An ideal juvenile justice system adequately protects society from serious and violent juvenile offenders and effectively rehabilitates those who can be saved; however, it must allow for processes that discriminate between the two.” Brenda Gordon, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 225 (1999).

259. 536 U.S. 304 (2002).

260. *Id.* at 305.

261. *Id.* at 317 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

262. See *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (“insist[ing] on ‘individualized consideration as a constitution requirement in imposing the death sentence’”) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

263. “To a large degree, ‘the cut-off age between adolescence and adulthood is arbitrary,’ with the dividing line, in part, a social and legal construct.” Gordon, *supra* note 244, at 215 (quoting Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 323, 366 (1991)).

defendant.<sup>264</sup> So too should a juvenile's moral culpability be measured by his individual mental capacity relative to the average adult defendant. This process ensures that mature and immature juveniles receive the particular treatment they deserve, as individuals, not as a class.<sup>265</sup>

Once an individual analysis is made possible, the proper Eighth Amendment inquiry should be whether the punishment is proportional to the individual defendant's culpability. In the case of the mentally retarded, it is per se disproportional to execute the mentally retarded because of their lesser culpability.<sup>266</sup> In the case of juveniles, it should be per se disproportional to execute juveniles whom the State has not proven to be at least as culpable as the average adult. This litmus test of proportional culpability to the average adult murderer provides an objective inquiry, outside the subjective predilections of individual Justices. This satisfies the concern in *Trop* and *Weems*<sup>267</sup> and alleviates the insatiable quest for objective indicia to support the Court's independent analysis. Only here can one see the forest for the trees and protect the vitality of the Constitution.

### C. Juvenile Transfers as Punishment

Thus far, the inquiry has been limited to the sentencing phase of a criminal proceeding. This section goes further by positing that the transfer of a juvenile to the adult courts is a punishment because it subjects the child to significantly harsher punishment<sup>268</sup> and the stigma of a criminal record. Logically, if transfer is punishment then jurisdictional waivers of juveniles must fall within the purview of the Eighth Amendment. The natural conclusion being that where waiver is sought, the State, to satisfy the Eighth Amendment requirement of proportionality,<sup>269</sup> must prove beyond a reasonable doubt that the child to be transferred is at least as culpable as the average adult.

Bringing the Eighth Amendment prohibitions to bear on juvenile transfers would facilitate case-by-case determinations of particular juvenile's individual culpability. Whereas, reserving the analysis as a last ditch effort to save a child offender's life is prone to the creation of categorical exemptions. These categorical exemptions don't adequately address the concerns underlying the class restriction. That is,

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264. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

265. See generally Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991). Bishop and Frazier are concerned that juvenile justice will cease to be individualized if prosecutorial waiver persists. *Id.* at 301.

266. *Atkins*, 536 U.S. at 321.

267. *Trop v. Dulles*, 356 U.S. 86, 103 (1958); *Weems v. United States*, 217 U.S. 349, 378-79 (1910).

268. "[Adult courts] are in fact consistently more punitive." Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57, 82 (2003). This study tested for, and found, a leniency gap between the treatment of juveniles in juvenile and adult courts. See generally *Id.*

269. *Ewing v. California*, 531 U.S. 11, 17 (2003) ("The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991)).

concern over the relative culpability of juveniles is better satisfied by actually inquiring into the individual juvenile's mental capacity than by exempting whole classes of juveniles from a particular punishment. Class exemptions do not account for the exceptionally mature fifteen-year-old nor the weak-minded seventeen-year-old.<sup>270</sup> Instead, class exemptions draw a bright line, based on a proxy to mental capacity, that does not adequately protect those who are actually less culpable nor subject those sufficiently culpable to the punishment they deserve.

## V. CONCLUSION

The Eighth Amendment is an ancient tree in the constitutional forest. The continued prerequisite of objective indicia is a hungry fungus, capable of completely obscuring this ancient tree's sunlight. *Trop* cautioned that constitutional judgment must derive from "vital, living principles that authorize and limit governmental powers in our Nation."<sup>271</sup> But in perpetuating the fungus—by allowing legislative enactments to function as a condition precedent to constitutional principles—we are allowing the ancient tree to slowly die. This sickness, of relegating the Eighth Amendment to majoritarian rule, will spread, reducing the Constitution to mere "good advice"<sup>272</sup> without the possibility of continued survival. The forest will die, and the lands it once supported will return to majority rule, and minority oppression. Would the Civil Rights movement have survived if the only constitutional protections available were a derivative of legislative enactments?

The Supreme Court should return the "evolving standards of decency" to its proper roots: by tracing the actual shadow of the ancient tree, instead of the area upon which the folks plant their gardens, to see what ground it shades and what ground it does not. This proper measure persists in independent principles of constitutional judgment. For example, "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."<sup>273</sup> This objective indicator satisfies the concerns of *Trop* and *Weems* without relegating our most fundamental constitutional protections to the will of the majority. Where a juvenile

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270. D'Ambra, *supra* note 175, at 302 ("A model juvenile justice system protects society from violent juvenile criminals and effectively reforms youths who can be saved, but it must differentiate between the two."). D'Ambra posits her vision of a model juvenile system:

This does not require, as some advocate, disposing of the juvenile system and transferring youths with little or no discretion. Under *Kent*, the juvenile transfer policy was meant to remove only those juveniles, described as chronic, serious, violent, sophisticated and mature, who are beyond the purview of the juvenile court. Punishing young people as adults holds them to adult standards when imposing sanctions, while in larger society juveniles are considered morally, educationally, and socially immature, and are denied privileges of adulthood. Furthermore, the impact of a lengthy, adult-type sentence differs qualitatively for a youth in formative years from a similar sentence imposed on an adult.

*Id.*

271. *Trop*, 356 U.S. at 103.

272. *Id.* at 104.

273. *Weems*, 217 U.S. at 367.

in fact has a lesser culpability<sup>274</sup> than the average adult, the Eighth Amendment should prohibit as cruel and unusual punishment the waiver of juvenile jurisdiction, and any sentence of death.

Consequently, the transfer and subsequent capital sentence of Mr. Simmons are cruel and unusual punishments because Mr. Simmons has not been proven to be at least as morally culpable as the average adult. This case should be remanded for a determination of Mr. Simmons' mental capacity at the time of the offense. Proof beyond a reasonable doubt that Mr. Simmons had the mental capacity of an average adult would require affirmance of his death sentence. Anything less would find his conviction and sentence void. If we are to rehabilitate our children to any degree we must, at a minimum, protect those who know not what they do. Adult punishment is warranted, however, where a juvenile exhibits the moral culpability of an average adult. And both goals are achieved by requiring proof of the individual juvenile's mental capacity *before* waiver of juvenile jurisdiction.

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274. Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1282 (1996) ("Those juveniles tried in adult criminal court are not only those offenders most requiring the strict discipline of the criminal system ... [but also] nonviolent and first-time violent juvenile offenders....").



## SELL, SINGLETON, AND FORCIBLE MEDICATION— RUNNING ROUGHSHOD OVER LIBERTY

Melinda S. Campbell

### INTRODUCTION

A significant number of death row inmates are afflicted with mental illness,<sup>1</sup> but states continue to put inmates to death at a rapid rate despite this alarmingly high percentage, seemingly without a pause to consider the statistic's importance.<sup>2</sup> Criminals who suffer from psychosis and other diseases of the mind are put to death for past crimes, even though in some cases they do not know or understand they are being put to death or the reason why.<sup>3</sup> For instance, Ricky Ray Rector, an Arkansas man convicted of double murder, was found competent to be executed and put to death in 1992.<sup>4</sup> On the evening of Rector's execution, he left the pecan pie dessert from his last meal in his cell, informing the guards that he was "saving it for later."<sup>5</sup> Clearly, he was not a man who understood his fate.<sup>6</sup>

The Supreme Court has dedicated much time to determining when states may impose capital punishment on convicted criminals, and the permissibility of various forms of that punishment.<sup>7</sup> Although the Court has left unexamined the critical issue of whether states can forcibly medicate mentally-ill inmates to make them

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1. Few studies have quantified the prevalence of mental illness on Death Row, perhaps due to the difficulty involved in formulating a legal definition of mental illness or insanity. Researchers who have undertaken such a task believe that as many as half of all death row inmates suffer from mental illness. Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 338 (1993) (indicating that "approximately half" of inmates on Death Row "suffer from some mental disease"); Dorothy O. Lewis, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (indicating that as many as 40% of death row inmates suffer from mental illness).

2. 527 inmates were put to death in the United States between January 1997 and December 2003. Death Penalty Information Center, *Executions By Year*, at [www.deathpenaltyinfo.org/article.php?scid=8&did=146](http://www.deathpenaltyinfo.org/article.php?scid=8&did=146) (Feb. 14, 2004). In fact, the number of executions during this seven-year period was greater than the combined number of executions in the 21 years prior, since the death penalty was adjudged constitutional in 1976. *Id.* (indicating that there were 358 executions from 1976 until 1996).

3. Katherine Stapp, *Death Penalty For Mentally Ill Called a Rights Abuse*, INTER PRESS SERVICE (Nov. 7, 2003), at 2003 WL 66986323.

4. Ellen Goodman, *The Real Insanity: Curing Inmate to Execute Him*, MILWAUKEE JOURNAL SENTINEL, Feb. 21, 2003, at 15A.

5. *Id.*

6. Rupert Cornwell, *Court Clears Treatment, Execution for Insane Killer*, THE HAMILTON SPECTATOR, Feb. 12, 2003, at C02.

7. See *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (holding that imposing the sentence of death for a crime committed when the defendant was 16 or 17 is not cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (holding that the execution of a mentally-retarded inmate is cruel and unusual punishment); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (holding that death by firing squad is not cruel and unusual punishment); *In Re Kemmler*, 136 U.S. 436, 443-44 (1890) (holding that death by electrocution is not cruel and unusual punishment).

competent to be executed,<sup>8</sup> it recently held that a state may forcibly medicate a mentally-ill defendant to make him competent to stand trial in *Sell v. United States*.<sup>9</sup> Shortly after the *Sell* decision, the Court refused to hear a death row inmate's appeal of an order allowing Arkansas to forcibly medicate him to make him competent to be executed.<sup>10</sup> Though the Court has recently refused to rule on forcible medication in the context of competency to be executed, given the Court's recent decision in *Sell* to allow a state's interest in making a defendant competent to stand trial to override a defendant's interest in being free from forced medication,<sup>11</sup> it seems likely that Supreme Court support for the execution of the "artificially competent"<sup>12</sup> is only a short time away.

Part I of this comment examines the Supreme Court's past decisions relating to the death penalty and decisions surrounding competency to stand trial and competency to be executed. Part II discusses the debate surrounding the execution of mentally-ill defendants, detailing two divergent lines of cases that have guided state courts in determining whether to execute mentally-ill defendants. Part II will also present the case of *Singleton v. Norris*, the death row appeal mentioned above which the Court recently rejected.<sup>13</sup> Part III of this comment examines the possible reasons for the Supreme Court's refusal to hear *Singleton*'s appeal and the decision that the Court may have reached had it agreed to hear *Singleton*. Part III also discusses the result this author believes the Court should reach on the issue of forcible medication for the purpose of rendering an inmate competent to be executed. Finally, this comment proposes that the Court's proper course would have been to accept certiorari in *Singleton* in order to proscribe the forced medication of a mentally-ill inmate; in fact, this comment proposes that a court should consider forcible medication only when an execution date has not been set, or the execution has been stayed.

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8. The Supreme Court granted certiorari to hear the issue in *Perry v. Louisiana*, 494 U.S. 1015 (1990), but rather than deciding the issue, it remanded the case for further consideration in light of another Supreme Court decision regarding forcible medication, though not in the context of capital punishment, *Washington v. Harper*, 494 U.S. 210 (1990). See *Perry v. Louisiana*, 498 U.S. 38 (1990). On remand, the Supreme Court of Louisiana decided that "the usage of the death penalty to subject insane prisoners to execution under the pretense that they can be made 'sane' by forcibly invading their minds, bodies and personhood with antipsychotic drugs, clearly would constitute cruel, excessive and unusual punishment." *State v. Perry*, 610 So. 2d 746, 771 (1992).

9. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003).

10. *Singleton v. Norris*, 124 S. Ct. 74 (2003).

11. *Sell*, 123 S. Ct. at 2180-81.

12. Ptolemy H. Taylor, Comment, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045, 1045 (1992). See also Kathy Swedlow, *Forced Medication of Legally Incompetent Persons: A Primer*, HUM. RTS. Q., Spring 2003, at 4 (noting that "antipsychotic medications simply make the more florid symptoms of psychosis, leaving the patient uncured, and his incompetency merely 'muted' for the duration of his treatment," which in *Singleton*'s case would be the time period between treatment and his execution).

13. *Singleton*, 124 S. Ct. at 74.

## I. BACKGROUND

This nation's founding fathers agreed that cruel and unusual punishment could not and would not be tolerated in a country where freedom reigned and tyranny was the enemy.<sup>14</sup> Since the Eighth Amendment's ratification in 1791, the Supreme Court has spent significant time determining what reach it should have in controlling states' determinations as to who should be executed and how.<sup>15</sup> Although these decisions indicate that the Court is concerned with preserving the civil liberties of criminals both before and after conviction,<sup>16</sup> the Court still firmly upholds state interests in prosecuting suspects and executing convicted killers,<sup>17</sup> even though public support for the death penalty has begun to wane.<sup>18</sup> Given the federal government's aggressive support of the death penalty<sup>19</sup> and the sluggish pace at which the judiciary reacts to changes in public opinion,<sup>20</sup> it is somewhat unclear how the Supreme Court will rule when capital punishment cases arise.

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14. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

15. See *Stanford*, 492 U.S. at 379 (holding that imposing the death penalty on a defendant for a crime committed when he was 16 or 17 is not cruel and unusual punishment); *Atkins*, 536 U.S. at 311 (holding that the execution of a mentally-retarded inmate is cruel and unusual punishment); *Wilkerson*, 99 U.S. at 134-35 (holding that death by firing squad is not cruel and unusual punishment); *In Re Kemmler*, 136 U.S. at 443-44 (holding that death by electrocution is not cruel and unusual punishment).

16. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (rejecting the proposition that the imposition of the death penalty for the crime of rape is "excessive" and therefore cruel and unusual punishment); *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (holding that the death penalty is cruel and unusual punishment where the defendant was an accomplice to a robbery during which a murder was committed, but the defendant neither killed, attempted to kill, nor intended to kill) (quoting *Lockett v. Ohio*, 458 U.S. 586, 605 (1978) (holding that there must be "individualized consideration as a constitutional requirement in imposing the death sentence.")). See *Atkins*, 536 U.S. at 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958), where Chief Justice Warren stated, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man ....").

17. As recently as June 2002, the Court noted that the government had an interest in carrying out executions where the twin goals of deterrence and retribution would be met. *Atkins*, 536 U.S. at 319-20 (2002) (even as it ruled that execution of mentally retarded inmates is unconstitutional, the Court recognized that a state may have an interest in seeing that "the most deserving of [punishment] are put to death" and noted that "increased severity of the punishment [may] inhibit criminal actors from carrying out murderous conduct.").

18. Death Penalty Information Center, *Pew Poll Reveals Declining Support for the Death Penalty*, available at [www.deathpenaltyinfo.org/article.php?scid=23&did=210#pew20030724](http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#pew20030724) (December 21, 2003).

19. Laurence A. Grayer, *Against the Global Trend: Support for the Death Penalty Continues to Expand Within the United States*, 7 INT'L. LEGAL PERSP. 1, 12-13 (1995) (noting that the federal government has even attempted in recent years to expand the reach of the death penalty to non-homicidal crimes, such as drug-related offenses).

20. Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Toward Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 744-55 (2001) (observing that although there has been a steady decrease in support for the death penalty, the Supreme Court and other governmental bodies have been slow to change policy on the death penalty). See also Henry Schwarzschild, *The Death Penalty in the United States: A Commentary and Review*, 22 AM. J. CRIM. L. 247, 248 (1994) (noting that the Supreme Court has refused to adequately consider the "criminological, sociological, and legal evidence of the failings of death penalty laws.").



*A. Death Penalty Jurisprudence*

The use of the death penalty to punish criminals for horrendous crimes has a long tradition in the United States and England,<sup>21</sup> though the Supreme Court's position on when and how criminals may be executed has changed over time.

In 1972, the Supreme Court "effectively invalidated the death penalty"<sup>22</sup> in *Furman v. Georgia*.<sup>23</sup> In *Furman*, the five concurring opinions, together forming a majority as to the holding, stated that in the five consolidated cases before the Court the death penalty constituted cruel and unusual punishment and was therefore unconstitutional under the Eighth and Fourteenth Amendments.<sup>24</sup> Although the justices did not emphasize one particular rationale,<sup>25</sup> the Court eventually made clear that the *Furman* decision was based on the principle that a state may not impose the death penalty in an arbitrary or capricious manner.<sup>26</sup> As Justice White stated in his concurring opinion in *Furman*, there must be a "meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not."<sup>27</sup> However, because the Court did not speak with one voice and make this point clear in *Furman v. Georgia*, it was uncertain whether states could impose the death penalty at all.<sup>28</sup> This confusion was resolved four years later in *Gregg v. Georgia*,<sup>29</sup> when the Court considered whether the death penalty is cruel and unusual in all circumstances.<sup>30</sup>

In *Gregg*, the Supreme Court recognized that the death penalty is not unconstitutional per se.<sup>31</sup> In fact, the Court noted that the Framers actually had the death penalty in mind when it drafted the Eighth Amendment,<sup>32</sup> indicating that there was reason to believe capital punishment would be constitutional within certain limitations.<sup>33</sup> At the time of the Amendment's ratification, every state had some form of capital punishment.<sup>34</sup> Furthermore, following the *Furman* decision, states quickly modified their death penalty statutes to comply with constitutional mandates.<sup>35</sup> Therefore, it was clear "that a large proportion of American society continue[d] to regard [the death penalty] as an appropriate and necessary criminal sanction."<sup>36</sup> In further support of its decision to uphold the constitutionality of

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21. *Gregg v. Georgia*, 428 U.S. 153, 176-77 (1976) (noting that the death penalty had a long history in England and the United States, but in America the Fourteenth and Eighth Amendments have required careful scrutiny of the death penalty to ensure that civil rights are not infringed).

22. Taylor, *supra* note 12, at 1047.

23. 408 U.S. 238 (1972) (per curiam).

24. *Id.* at 239-40.

25. Each of the five justices in the majority wrote a separate concurring opinion.

26. *Gregg*, 428 U.S. at 188.

27. *Furman*, 408 U.S. at 313 (White, J., concurring).

28. Taylor, *supra* note 12, at 1047-48.

29. *Gregg*, 428 U.S. at 153.

30. *Id.* at 169.

31. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

32. *Id.* at 177.

33. *Id.*

34. *Id.*

35. Taylor, *supra* note 12, at 1048-49.

36. *Gregg*, 428 U.S. at 179.

capital punishment, the *Gregg* Court cited two rationales that provided support for the death penalty's continued administration in the United States: retribution and deterrence.<sup>37</sup> Under the first rationale, states execute criminals because it is what they deserve and everyone, including criminals, should be given their just deserts.<sup>38</sup> Under the second rationale, capital punishment is justified because it deters other would-be murderers from killing intentionally.<sup>39</sup>

Since *Gregg*'s proclamation that capital punishment is not unconstitutional per se, the Court has been engaged in the task of determining what exactly is cruel and unusual punishment.<sup>40</sup> Even before the decision in *Gregg*, and now many years after it, the Court's attention has been focused on the issue of whether executing mentally-ill criminals is unconstitutional and what exactly constitutes competence to be executed.<sup>41</sup>

Although the Court has ruled that the death penalty is generally allowed under the Eighth Amendment,<sup>42</sup> a state's ability to execute criminals for their crimes is limited by the Fifth Amendment's due process requirements<sup>43</sup> as applied to the states

37. *Id.* at 183.

38. FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL: THE CASE FOR CAPITAL PUNISHMENT 136 (1978) (arguing that society has not just a right, but a duty to punish criminals, even through capital punishment). *See also* G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT § 100 (T.M. Knox trans., Clarendon Press 1962) (1942) (asserting that criminals have a right to punishment by virtue of their crimes and that punishing them honors them as "rational beings"). *But see* *Furman v. Georgia*, 408 U.S. 238, 342-43 (Marshall, J., concurring) (equating retribution with vengeance, an illegitimate goal in civilized society).

39. CARRINGTON, *supra* note 38, at 90 (citing Isaac Erlich, *The Deterrent Effect of Capital Punishment*, 65 AM. ECONOMIC REV. 397 (1975), which found that when actually administered, the death penalty may deter as many as eight murders for every completed execution). *But see* KARL MENNINGER, THE CRIME OF PUNISHMENT 206 (Viking Compass ed., 1969) (making a two-fold argument against deterrence theory: first, that the deterrent effect of capital punishment cannot be demonstrated easily through research or scientific evidence, and, second, that executing a criminal to deter others makes him suffer not for what he alone has done, but for what others may do).

40. *See, e.g.,* *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (holding that imposing the death penalty on a defendant for a crime committed when he was 16 or 17 is not cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that the execution of a mentally-retarded inmate is cruel and unusual punishment); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (holding that death by firing squad is not cruel and unusual punishment); *In Re Kemmler*, 136 U.S. 436, 443-44 (1890) (holding that death by electrocution is not cruel and unusual punishment).

41. *See* *Perry v. Louisiana*, 498 U.S. 38, 38 (1990) (remanding case to the lower court to determine whether defendant should be forcibly medicated in order to render him competent to be executed in light of *Washington v. Harper*, 494 U.S. 210 (1990)). *See generally* *Ford v. Wainwright*, 477 U.S. 399 (1986) (determining that an inmate who is adjudged insane may not be executed because he was no longer competent to be executed though he was sane at the time of trial and sentencing).

42. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

43. *Gregg*, 428 U.S. at 177; U.S. CONST. amend. V. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law ...

*Id.*

through the Fourteenth Amendment.<sup>44</sup> Therefore, before it can impose the death penalty on a defendant, a state must provide procedural due process, which involves the “opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.”<sup>45</sup> In addition, the Supreme Court has looked beyond procedural rights under the Due Process Clause and has concluded that certain fundamental rights and liberty interests are protected by the Fifth and Fourteenth Amendment.<sup>46</sup> These substantive due process rights have included a variety of personal rights that the Court felt were so deeply rooted in the country’s history and inherent in the concept of ordered liberty<sup>47</sup> that to deny them would be an unconstitutional deprivation under the Fifth and Fourteenth Amendments.<sup>48</sup> The Court has held that these rights are so important that government action impairing them must meet a strict scrutiny test.<sup>49</sup>

Most assuredly, the right to live is a fundamental right.<sup>50</sup> Therefore, before a state court may sentence a criminal to death, it must demonstrate that the imposition of the death penalty is narrowly tailored to further a compelling governmental interest.<sup>51</sup> In doing so, states have cited their interests in retribution and deterrence as justifications for capital punishment.<sup>52</sup> However, the Supreme Court has

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44. *Gregg*, 428 U.S. at 177; U.S. CONST. amend. XIV (“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”). Some commentators argue that the Eighth Amendment was never incorporated through the Fourteenth Amendment and therefore does not apply to the states. DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 11-12 (2003). However, that argument was implicitly rejected by the Supreme Court in *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the Court held that a California statute criminalizing narcotics addiction constituted cruel and unusual punishment under the Fourteenth Amendment, though it did not directly state that the Eighth Amendment applied to the states. *Id.* at 666. The incorporation debate will not be contemplated here, as the author chooses to follow the lead of the Supreme Court in *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), in which the Court considered the constitutionality of capital punishment on the assumption that the Eighth Amendment does apply to the states.

45. *Anderson Natl. Bank v. Lockett*, 321 U.S. 233, 246 (1944) (holding that notice of presumptively abandoned deposits posted on the courthouse door satisfies procedural due process requirement of notice).

46. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

47. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (determining that the right to die is not one so inherent in the concept of ordered liberty as to constitute a fundamental right).

48. These rights include such fundamental rights as the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1966)), the right to have children (*Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942)), the right to choose how to raise one’s child (*Meyer v. Nebraska*, 262 U.S. 390 (1923)), the right to marital privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), the right to abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)), and the right to use contraception (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

49. *Reno*, 507 U.S. at 301-02 (indicating that where a fundamental liberty interest is at stake, the governmental action must be narrowly tailored to further compelling government interests in order to meet the substantive due process “strict scrutiny” test under the Fifth and Fourteenth Amendments).

50. *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring) (citing *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

51. *Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring).

52. *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002) (indicating that the major goals of capital punishment are to deter potential criminals by fear of death and to give a criminal his “just desserts”).

recognized that when the defendant is mentally ill, these justifications are not enough.<sup>53</sup>

### *B. Competency Jurisprudence: Two Standards*

Because the standards both concern the mental health of the accused, it may seem that the competency standard for bringing a defendant to trial should be the same as or similar to the competency standard for executing an inmate. Instead, courts have recognized distinct tests for each standard.<sup>54</sup> The difference may be explained by focusing on the result of being found competent under each standard.<sup>55</sup> In one case, competency allows the state to put the defendant to death; in the other, the defendant still has an opportunity to prove his innocence.<sup>56</sup> Therefore, it seems logical that courts would require different evidentiary requirements for each standard. However, though the evidentiary standards remain distinct academically, forcible medication would, as a practical matter, eradicate any real differences between them, for if the mentally ill can be made competent forcibly in either circumstance, there is no reason to have distinct standards, or any standards at all.

#### *1. Competency to Stand Trial: A Low Threshold*

The Fifth Amendment states that no person may “be deprived of life, liberty, or property, without due process of law ...”<sup>57</sup> Although this right is of utmost importance to defendants awaiting trial, the Supreme Court has held that only a low threshold of competency need be met in order to comply with the due process requirements of the Fifth and Fourteenth Amendments.<sup>58</sup> In fact, to be competent to stand trial, a defendant need only understand the charges leveled against him and be able to assist his attorney in the defense of his case.<sup>59</sup>

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53. *Id.* at 318-21 (holding that the execution of a mentally retarded inmate constitutes cruel and unusual punishment); *Ford v. Wainwright*, 477 U.S. 399, 399 (1986) (holding that the Eighth Amendment prohibits the execution of an insane prisoner).

54. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (in order to be competent to stand trial, a defendant must be able to understand the charges leveled against him and be able to assist counsel in his defense); *Ford*, 477 U.S. at 422 (Powell, J., concurring) (in order to be competent to be executed, an inmate must understand that his death is imminent and the reason for the imposition of the death sentence).

55. *Id.*

56. Grant H. Morris, *Escaping the Asylum: When Freedom Is a Crime*, 40 SAN DIEGO L. REV. 481, 509 (2003).

57. U.S. Const. amend. V, cl. 3.

58. *Dusky*, 362 U.S. at 402. *See also* *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (noting that although an incompetent defendant is “physically present in the courtroom,” his inability to defend himself makes the adjudication a “trial[] in absentia” (citing Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)); George J. Annas & Joan E. Densberger, *Competence to Refuse Medical Treatment: Autonomy v. Paternalism*, 15 U. TOL. L. REV. 561, 562 (1984) (competency is defined as the “capacity to understand and appreciate the nature and consequences of one’s actions.”).

59. *Dusky*, 362 U.S. at 402 (holding that it is not enough that a defendant is “oriented to time and place and [has] some recollection of events,” but he must be able to assist in his own defense). *See, e.g., Drope*, 420 U.S. at 171 (holding that “a person whose mental condition is such that he lacks the

This standard only requires the lowest showing of competency; in fact, many defendants who have severe mental illness are deemed competent to stand trial.<sup>60</sup> For instance, a Georgia man who had a significant history of paranoia and schizophrenia was deemed competent to stand trial even though his history of mental illness suggested that this determination was incorrect.<sup>61</sup> The man, Daniel Colwell, held a television reporter hostage with a toy gun and a kitchen knife, demanding that he receive free airtime to promote atheism on local television.<sup>62</sup> Colwell told many that he wanted to die, as he believed that he would only know peace through death.<sup>63</sup> Eventually he killed “a middle aged white couple” in a Wal-Mart parking lot, convinced that killing them would ensure that he would get the death penalty.<sup>64</sup> The trial court ruled that he was competent to stand trial, and after Colwell was convicted, he enlisted the help of several judges to circumvent his attorneys’ attempts to appeal the conviction.<sup>65</sup> Colwell’s case demonstrates that even a defendant who is severely mentally ill, one who is not merely unable to assist in a defense, but is proactive in sabotaging it, may be found competent to stand trial.

## 2. Competency to Be Executed: Still Surprisingly Low

The competency to be executed standard differs in significant respects from the standard for competency to stand trial. Asserting that the execution of insane criminals does not further governmental interests in retribution and deterrence,<sup>66</sup> the Supreme Court held in *Ford v. Wainwright* that the execution of insane criminals is unconstitutional under the Eighth Amendment.<sup>67</sup> An inmate must be competent at the time of execution, not just at the time of sentencing, or the punishment is unconstitutional.<sup>68</sup> The *Ford* majority did not set forth a specific test for determining competency to be executed, but Justice Powell wrote a concurring opinion that suggested that a defendant should be executed only if he can “perceive[] the connection between his crime and his punishment” and “only if the defendant is aware that his death is approaching [so that he] can ... prepare himself for his passing.”<sup>69</sup> By requiring that the inmate be able to perceive the connection

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capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial”); Morris, *supra* note 56, at 505 (noting that the prohibition against prosecuting an incompetent defendant “is fundamental to an adversary system of justice” (citing *Drope*, 420 U.S. at 172)).

60. See, e.g., *Pate v. Robinson*, 383 U.S. 375, 375 (1966).

61. Cari Courtenay-Quirk, *Capital Punishment as Suicide: The Case of Daniel Colwell*, THE NEW ABOLITIONIST, Issue 29 (Sept. 2003), available at [http://www.nodeathpenalty.org/currentna/11\\_DanielColwell.html](http://www.nodeathpenalty.org/currentna/11_DanielColwell.html) (Dec. 21, 2003) (last visited Jan. 7, 2004).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Ford v. Wainwright*, 477 U.S. 399, 407-08 (1986).

67. *Id.* at 409-10.

68. *Id.* (even though the inmate may have been competent at the time of trial and sentencing, he cannot be executed if he is not competent at the time set for execution).

69. *Id.* at 422 (Powell, J., concurring).

between his crime and punishment, the state is promoting the retributive goal of capital punishment, to give the criminal what he deserves.<sup>70</sup> Yet, consideration of the goal of deterrence was conspicuously absent from the analysis in *Ford*.<sup>71</sup>

Because the *Ford* majority never set forth its own competency test, most courts and commentators have adopted Justice Powell's test.<sup>72</sup> Justice Powell believed that the retributive goal of punishment is only achieved if the defendant understands the connection between his offense and the punishment inflicted and if the defendant is able to prepare himself for death.<sup>73</sup> Therefore, an inmate may be executed only if he is aware of the punishment he is about to suffer and why he is about to suffer it.<sup>74</sup> If an inmate cannot understand that he is about to die or that his death is the result of his criminal actions, he is incompetent for execution.<sup>75</sup>

## II. RELEVANT PRECEDENT

Two separate and very different lines of cases have developed as a result of Supreme Court decisions relating to the supervision and treatment of mentally-ill defendants in the criminal justice system. Under the first, the state's interests in adjudicating a defendant's guilt or innocence prevail over the defendant's individual liberty to be free from unwanted medical treatment.<sup>76</sup> Under the second, the individual's right to life trumps the government's interests in exacting punishment and deterring others from crime through the use of capital punishment.<sup>77</sup> These lines of cases converged in *Singleton v. Norris*,<sup>78</sup> a case which combined these two value conflicts and asked whether the governmental interest in deterrence and retribution through capital punishment can overcome both a defendant's right to life and his right to be free from unwanted medication.

### A. *Sell v. United States: A Court May Order Artificial Competency*

In *Sell v. United States*,<sup>79</sup> the Supreme Court limited a state's ability to forcibly medicate mentally-ill defendants in order to make them competent to stand trial.

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70. *Id.* at 421 (Powell, J., concurring).

71. If one accepts the argument that forcible medication merely masks the symptoms of insanity, but does not provide a cure, Taylor, *supra* note 12, at 1059-60, then this omission is not unexpected, as the Court had already held that the execution of an insane man serves no deterrent effect. *Ford*, 477 U.S. at 407.

72. *Ford*, 477 U.S. at 422 (Powell, J., concurring) (an inmate must understand "the connection between his crime and his punishment" and be "aware that his death is approaching"); *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991); *State v. Scott*, 748 N.E.2d 11, 13 (2001) (indicating that the Ohio Legislature had codified Justice Powell's test in OHIO REV. CODE ANN. § 2949.48); Rebecca A. Miller-Rice, *The "Insane" Contradiction of Singleton v. Norris: Forced Medication in a Death Row Inmate's Medical Interest Which Happens to Facilitate His Execution*, 22 U. ARK. LITTLE ROCK L. REV. 659, 665 n.27 (2000).

73. *Ford*, 477 U.S. at 422 (Powell, J., concurring).

74. *Id.*

75. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring).

76. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2184-85 (2003).

77. *Ford*, 477 U.S. at 409.

78. *See Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003).

79. *Sell*, 123 S.Ct. at 2178-79.

Although the Court had ruled that a state may be allowed to forcibly medicate mentally-ill defendants without violating their constitutional rights in two previous cases, *Washington v. Harper*<sup>80</sup> and *Riggins v. Nevada*,<sup>81</sup> the Court established clear limits on this ability in *Sell*.

### 1. *Background Facts*

Defendant Sell had a “long and unfortunate history of mental illness,”<sup>82</sup> a history that included intermittent episodes as far back as 1982.<sup>83</sup> At various times between 1982 and 1997, Sell claimed to see a leopard boarding a bus, alleged that several public officials were trying to kill him, and told police that God had told him that for every FBI person he killed, a soul would be saved.<sup>84</sup> Sell was hospitalized, medicated, and released in each of these instances.<sup>85</sup>

In May of 1997, Sell, a practicing dentist, was charged with fraud after he submitted fictitious insurance claims for payment.<sup>86</sup> The federal magistrate judge hearing the fraud case found Sell competent to stand trial and released him on bail despite noting that Sell might later have a “psychotic episode.”<sup>87</sup> Sell and his wife were soon after charged with fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering.<sup>88</sup> In 1998, the government claimed Sell attempted to intimidate a witness, and the magistrate convened a bail revocation hearing.<sup>89</sup> At the hearing, Sell acted irrationally, screaming, shouting insults and racial epithets, and spitting in the magistrate’s face. The magistrate revoked Sell’s bail after reviewing a psychiatrist’s report that Sell’s condition had worsened.<sup>90</sup>

Later in 1998, Sell was charged with the attempted murders of two individuals, the FBI agent who arrested him and a former employee who had agreed to testify against Sell in the Medicare fraud case.<sup>91</sup> The attempted murder charges were joined with the fraud cases for trial.<sup>92</sup> In 1999, upon Sell’s request, the magistrate reconsidered Sell’s competence to stand trial and determined that he was not.<sup>93</sup> Sell was hospitalized at the United States Medical Center for Federal Prisoners and ordered to receive treatment for up to four months to determine if he would attain the capacity to stand trial.<sup>94</sup> After two months, the staff at the Medical Center

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80. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

81. *Riggins v. Nevada*, 504 U.S. 127, 135-36 (1992) (concluding that a court may allow the forcible medication of inmates in certain circumstances, even though those circumstances were not conclusively proved in the case at bar).

82. *Sell*, 123 S.Ct. at 2179.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2179 (2003).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

advised Sell to take antipsychotic medication, which he refused.<sup>95</sup> The Medical Center staff then sought permission to forcibly medicate Sell, first seeking permission from the Medical Center's institutional authorities, then from the courts.<sup>96</sup>

## 2. *Procedural Background*

In June 1999, the Medical Center staff asked institutional authorities for permission to forcibly administer the antipsychotic drugs Sell refused.<sup>97</sup> At a hearing, a reviewing psychiatrist considered the staff's medical opinions and concerns, Sell's perceptions about the prosecution of his case, Sell's prior history, and the views of those who knew Sell (as to whether he suffered from a mental illness).<sup>98</sup> The psychiatrist found that Sell was mentally ill and dangerous (only outside prison), and that involuntary medication was necessary to treat the mental illness and make Sell competent to stand trial.<sup>99</sup> The Medical Center undertook an administrative review of its psychiatrist's decision, allowing a Bureau of Prisons (BOP) official to review the evidence considered by the psychiatrist and make a determination as to whether forcible medication would be appropriate.<sup>100</sup>

In his review of the psychiatrist's recommendation, the BOP official considered the same evidence that was before the psychiatrist at the hearing and determined that Sell was a potential risk to community safety.<sup>101</sup> The BOP official concluded that the requested medication was the least intrusive medical intervention that would likely alleviate the symptoms of Sell's condition, which the Medical Center staff had diagnosed as "Delusional Disorder" with a possible "underlying Schizophrenic Process."<sup>102</sup> Based on his conclusion that forcible medication represented the most promising method of alleviating Sell's symptoms,<sup>103</sup> the BOP official upheld the psychiatrist's recommendation of forcible administration of antipsychotic medication.<sup>104</sup>

In July of 1999, Sell filed a motion contesting the decisions of the psychiatrist and the BOP official.<sup>105</sup> In September, he appeared before the magistrate who had first found that he was not competent to stand trial.<sup>106</sup> In addition to the evidence considered by the administrative officials previously, the magistrate heard additional evidence about the requested medication's effectiveness and testimony about an

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95. *Id.*

96. *Sell v. United States*, 123 S.Ct. 2174, 2179 (2003).

97. *Id.*

98. *Id.* at 2179-80.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2180.

103. Although the BOP official indicated that forcible medication was the option "most likely" to 'ameliorate' Sell's symptoms," the majority in *Sell* did not specify the medical alternatives the Medical Center could have chosen and it is unclear whether the BOP official listed them in his report. *Id.* at 2180.

104. *Id.*

105. *Id.*

106. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2181 (2003).



incident between Sell and one of the Medical Center's nurses.<sup>107</sup> During this incident, which occurred in July of 1999, Sell approached a nurse and declared his love for her.<sup>108</sup> After the nurse told him his behavior was inappropriate and unwelcome, he criticized her and claimed he could not help his behavior.<sup>109</sup> Members of the Medical Center staff testified that Sell had been moved to a locked cell after the confrontation, as incidents like these were not harmless and, given Sell's history, suggested that he was a safety risk.<sup>110</sup>

Almost a year later, in August of 2000, the magistrate determined that the government had "made a substantial and very strong showing"<sup>111</sup> that Sell was a danger to himself and others, that the requested medication was the only course of treatment likely to make Sell less dangerous and make him competent to stand trial, that any side effects would be mitigated by new drugs, and that the benefits of forced medication would outweigh any risks.<sup>112</sup> Based on these findings, the magistrate ordered the involuntary administration of antipsychotic drugs, but stayed the order so that Sell could appeal the decision to the U.S. District Court for the Eastern District of Missouri.<sup>113</sup>

In April 2001, the district court reviewed the record and held that the magistrate's finding that Sell was dangerous was clearly erroneous.<sup>114</sup> However, although the court found that Sell did not pose a danger to himself or others in the Medical Center, it affirmed the magistrate's order.<sup>115</sup> The district court held that the antipsychotic drugs in Sell's treatment plan were "medically appropriate" and "the only viable hope of rendering defendant competent to stand trial."<sup>116</sup> Furthermore, the court held that forcible medication was necessary to prosecute Sell and determine his guilt or innocence, which is a compelling government interest sufficient to overcome Sell's interest in avoiding unwanted medication, though the court refused to examine whether the requested medication would prejudice Sell's defense at trial.<sup>117</sup> Arguing that the forced medication was inappropriate and would prejudice him at trial, Sell appealed the district court's order to the Eighth Circuit Court of Appeals.<sup>118</sup>

In March 2002, the Eighth Circuit upheld the district court's finding that the record did not indicate that Sell was a danger to himself or others, and that the incident with the nurse merely constituted "inappropriate familiarity and even infatuation."<sup>119</sup> However, the court also upheld the district court's order of forcible medication, citing the government's interest in trying Sell on the serious fraud charges (as the panel disregarded the attempted murder charges during its review of

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2180-81.

113. *Id.* at 2181.

114. *Id.*

115. *Id.*

116. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2181 (2003).

117. *Id.*

118. *Id.*

119. *Id.*

the case) and that less intrusive means of achieving competency could not be obtained.<sup>120</sup> The Eighth Circuit also held that the requested administration was medically appropriate and would likely make Sell competent to stand trial.<sup>121</sup>

Only one member of the Eighth Circuit panel dissented, “on the ground that the fraud and money laundering charges were ‘not serious enough to warrant the forced medication of the defendant.’”<sup>122</sup> Sell appealed the Eighth Circuit’s decision to the U.S. Supreme Court, claiming that his liberty interest in refusing medication, a right guaranteed under the Constitution, had been improperly denied without due process of law.<sup>123</sup>

The majority opinion in *Sell* addressed two issues. First, the Court considered whether the Eighth Circuit Court of Appeals had jurisdiction to even hear Sell’s appeal from the district court.<sup>124</sup> Second, the Court evaluated the court of appeals’ decision to uphold the forcible medication order, setting out the factors to be considered in determining whether forcible medication is appropriate in a particular case.<sup>125</sup> The Court held that although the appeals court had jurisdiction to hear Sell’s appeal,<sup>126</sup> its order allowing the involuntary administration of antipsychotic drugs to Sell was improper because the court did not correctly evaluate the Medical Center’s request.<sup>127</sup> Because the court of appeals focused on “dangerousness” test factors rather than “competence” test factors, the Court remanded the matter with instructions on how to decide the case.<sup>128</sup>

The district court’s order allowing the forcible administration of antipsychotic drugs did not constitute a final judgment on the issue of Sell’s guilt or innocence; rather, it was only a pretrial order pertaining solely to the issue of whether the state could forcibly medicate Sell.<sup>129</sup> Normally, a defendant must wait until the conclusion of his trial to seek appellate review of such a pretrial order.<sup>130</sup> Therefore, the court of appeals would not have had jurisdiction to hear Sell’s appeal under 28 U.S.C. § 1291, which allows direct appeals from final federal court decisions only.<sup>131</sup> In order for Sell to meet the jurisdictional requirement, the order allowing forcible medication had to be an appealable “collateral order.”<sup>132</sup> The Court set out a three-part test for determining whether an order meets the “collateral order” requirement.<sup>133</sup> First, the order must “conclusively [determine] the disputed question.”<sup>134</sup> Second, the order must “[resolve] an important issue completely

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2182.

125. *Id.*

126. *Sell v. United States*, 123 S. Ct. 2174, 2183 (2003).

127. *Id.* at 2186-87.

128. *Id.* at 2187.

129. *Id.* at 2182.

130. *Id.*

131. 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”).

132. *Sell*, 123 S.Ct. at 2182.

133. *Id.* (citing the test set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

134. *Id.*

separate from the merits of the action.”<sup>135</sup> Finally, the order must be “effectively unreviewable on appeal from a final judgment.”<sup>136</sup> The Court found that the district court’s order met all three criteria.<sup>137</sup>

The Court noted that the order conclusively determined whether Sell had a legal right to avoid involuntary administration of the medication.<sup>138</sup> The order also resolved constitutional issues in relation to Sell’s right to privacy, a matter wholly distinct and separate from the issue of Sell’s guilt or innocence, the merits of the underlying case.<sup>139</sup> Finally, the order would be unreviewable on appeal because by the time trial began, let alone by the time an appeal would be heard after the trial’s conclusion, Sell would have already been subjected to the involuntary treatment the Medical Center sought and a reversal of any conviction on appeal could not “undo” the harm caused.<sup>140</sup> Therefore, because the order met all three requirements of an appealable collateral order, the Eighth Circuit Court of Appeals and the U.S. Supreme Court had jurisdiction to hear the appeal.<sup>141</sup>

The Court then turned to the merits of Sell’s appeal: whether forced medication of mentally-ill defendants to make them competent to stand trial is unconstitutional under the Due Process Clause of the Fifth Amendment.<sup>142</sup> Before beginning its analysis of the merits, the Court reviewed its previous decisions in *Harper*<sup>143</sup> and *Riggins*.<sup>144</sup>

In *Harper*, the plaintiff was convicted of robbery in 1976 and sentenced to imprisonment in the Washington State Penitentiary.<sup>145</sup> During his four years in prison, Harper spent much of his time in the mental health unit, where he willingly received treatment with antipsychotic drugs.<sup>146</sup> He was paroled in 1980 on the condition that he continue receiving medical treatment, but this parole was revoked just over a year later when Harper assaulted two nurses at a Seattle hospital.<sup>147</sup> After Harper was sent to a special correctional institute for convicted felons with serious mental disorders, he was diagnosed with manic-depressive disorder.<sup>148</sup> Harper willingly began another treatment regimen of antipsychotic medication, but in 1982 refused to continue taking the medication.<sup>149</sup> His treating physician then sought an order allowing him to forcibly administer the drugs to Harper.<sup>150</sup> This order was granted by the superintendent of the special correctional institute, and Harper was

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135. *Id.*

136. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 2182 (2003).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 2182-83.

142. *Id.* at 2183.

143. *Washington v. Harper*, 494 U.S. 210 (1990).

144. *Riggins v. Nevada*, 504 U.S. 127 (1992).

145. *Washington*, 494 U.S. at 213.

146. *Id.* at 214.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

forcibly medicated for over a year.<sup>151</sup> After he was transferred again, he refused further medication and another forcible medication order was given.<sup>152</sup> In February 1985, Harper filed suit under 42 U.S.C. § 1983, alleging violations of the due process, equal protection, and free speech clauses of the Constitution.<sup>153</sup> The court upheld the order, holding that the procedures utilized in obtaining the orders were adequate.<sup>154</sup> The Washington Supreme Court reversed, holding that the intrusive nature of the treatment sought required greater procedural protections.<sup>155</sup> The U.S. Supreme Court granted certiorari in 1989.<sup>156</sup>

The Supreme Court first expressly recognized that an inmate has a “significant liberty interest in avoiding unwanted administration of antipsychotic drugs.”<sup>157</sup> The Supreme Court held, however, that given the state’s great interest in preserving prison safety and security,<sup>158</sup> the Due Process Clause permits a state to forcibly medicate a mentally-ill inmate when the inmate poses a danger to himself or others, and if the treatment is in his best medical interests.<sup>159</sup> Therefore, Washington’s policy of forcibly medicating inmates “comported with constitutional requirements.”<sup>160</sup> Furthermore, the Court held that the inmate’s rights would be best protected by allowing medical professionals to make the medication decision rather than judges who are untrained in medicine,<sup>161</sup> so long as procedural safeguards were in place for an inmate to assert his interests.<sup>162</sup> Because Washington allowed an inmate to appeal the medication decision,<sup>163</sup> provided him with notice of an adversary hearing, and allowed the inmate to present and cross-examine witnesses,<sup>164</sup> the policy was upheld.<sup>165</sup> Thus, the ultimate outcome of *Harper* was the establishment of one test for determining if forcible medication is appropriate: the dangerousness analysis.

In *Riggins*, the defendant was charged with murder after an investigation into the death of a Las Vegas man who had been stabbed multiple times.<sup>166</sup> After being taken into custody, Riggins began complaining that he was hearing voices and having difficulty sleeping.<sup>167</sup> He was subsequently treated with an antipsychotic drug he had taken in the past.<sup>168</sup> In January 1988, Riggins moved for a

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151. *Id.* at 217.

152. *Id.*

153. *Washington v. Harper*, 494 U.S. 210, 217 (1990).

154. *Id.* at 217-18.

155. *Id.*

156. *Washington v. Harper*, 489 U.S. 1064 (1989).

157. *Washington*, 494 U.S. at 221-22 (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

158. *Id.* at 223 (citing *Tumer v. Safley*, 482 U.S. 78 (1987) and *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)).

159. *Id.* at 227.

160. *Id.* at 225.

161. *Id.* at 231.

162. *Id.* at 233.

163. *Washington v. Harper*, 494 U.S. 210, 232-33 (1990).

164. *Id.* at 235.

165. *Id.*

166. *Riggins v. Nevada*, 504 U.S. 127, 129 (1992).

167. *Id.*

168. *Id.*

determination of his competency to stand trial on the murder charges.<sup>169</sup> The court ruled that he was competent to stand trial and trial preparations resumed.<sup>170</sup> Five months later, Riggins moved for an order to suspend treatment, arguing that the Due Process Clause required the court to allow him to show the jury his “true mental state” to bolster his insanity defense.<sup>171</sup> Riggins claimed that the medication suppressed his symptoms and altered his true demeanor.<sup>172</sup> The court denied his motion and Riggins was treated without his consent through the end of his trial.<sup>173</sup> Riggins was convicted of murder and robbery with the use of a deadly weapon, and was sentenced to death.<sup>174</sup> The Nevada Supreme Court affirmed the convictions and sentence, rejecting Riggins’s claims that the involuntary administration of drugs violated his due process rights.<sup>175</sup>

The Supreme Court in *Riggins* acknowledged the dangerousness analysis adopted in *Harper*, and noted that Nevada may have been able to justify forcibly medicating Riggins based on a finding that he presented a danger to himself or others and that medication was medically appropriate.<sup>176</sup> However, the Court also noted that Nevada could have justified “medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins’ guilt or innocence by using less intrusive means.”<sup>177</sup> The Court did not determine which test applied. Instead, because the trial court did not consider Riggins’ liberty interest in refusing medication, the Supreme Court remanded the case for further proceedings.<sup>178</sup> However, it did so only after establishing a second test for determining if forcible medication is appropriate: the governmental interests test.<sup>179</sup>

The *Sell* Court held that, together, *Harper* and *Riggins* support the proposition that

[t]he Government [may] involuntarily ... administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>180</sup>

The Court noted that this analysis implicitly requires the following four findings:<sup>181</sup>

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169. *Id.*

170. *Id.* at 130.

171. *Id.*

172. *Id.*

173. *Id.* at 131.

174. *Id.*

175. *Id.* at 132.

176. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

177. *Id.*

178. *Id.* at 138.

179. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2184 (2003).

180. *Id.*

181. *Id.* at 2184-85.

- That important governmental interests are at stake (which may include the interest in trying a defendant who is accused of a serious crime, and ensuring that the trial is fair);<sup>182</sup>
- That forcible medication will significantly further those interests (e.g., the medication will make the defendant competent to stand trial and will not have side effects that will limit the defendant's ability to assist counsel in his defense);<sup>183</sup>
- That the "involuntary medication is necessary to further those interests" (and that alternative, less intrusive methods will probably not achieve substantially the same results);<sup>184</sup> and
- That forcible medication is medically appropriate (that is, that medication is in the patient's best interest).<sup>185</sup>

The Court was careful to note that when determining whether forcible medication is appropriate, a court should not consider whether medication is appropriate for competency purposes if there is another purpose for which medication is proper.<sup>186</sup> For instance, if the defendant is dangerous, forcible medication is proper under *Harper*,<sup>187</sup> and there is no need to consider forcible medication for the purpose of restoring competency to stand trial.<sup>188</sup> The analysis a court would use to evaluate forcible medication for the purpose of making a defendant competent to stand trial is different from the other forcible medication analyses,<sup>189</sup> so the others should be considered first, separately from the competence ground, for the sake of clarity.<sup>190</sup> If the state cannot prove that the defendant poses a danger to himself or others, and medication is therefore not justified on the dangerousness ground, only then should the court go on to consider the competence ground.<sup>191</sup> The evidence produced in connection with the dangerousness analysis should be considered in connection with the competence analysis.<sup>192</sup>

In *Sell*, the appeals court held that the magistrate's determination that Sell was dangerous was clearly erroneous.<sup>193</sup> Although the Supreme Court indicated that it probably would not have found the magistrate's determination to be clearly

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182. *Id.* at 2184.

183. *Id.* at 2184-85.

184. *Id.* at 2185.

185. *Id.*

186. *Id.*

187. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

188. *Sell*, 123 S.Ct. at 2185.

189. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2185 (2003) (noting that the dangerousness inquiry is much more objective than the competency inquiry).

190. *Id.* (suggesting that it would probably be easier for a medical expert to give an opinion on whether medication is "medically appropriate and necessary to control a patient's potentially dangerous behavior" than to form an opinion on the legal questions of trial fairness and competency).

191. *Id.* at 2186.

192. *Id.* (indicating that the dangerousness analysis will focus the court on such questions as why it is medically appropriate to forcibly medicate a non-dangerous defendant who is competent to make his own decisions about medical treatment, and whether the state's interest in bringing the defendant to trial is enough, on its own, to justify forcible medication and its potentially adverse side effects).

193. *Id.*

erroneous, it declined to review the appeals court's determination because the government did not contest the issue on appeal.<sup>194</sup> As to the determination itself, the magistrate offered two reasons for upholding the psychiatrist and BOP official's orders permitting forcible medication: first, to render Sell not dangerous, and second, to make him competent to stand trial.<sup>195</sup> The hearing before the magistrate consisted of the presentation of evidence and witness testimony that focused primarily on the dangerousness inquiry and not on trial competence factors.<sup>196</sup>

As noted above, the Supreme Court ruled that a court should first determine whether forcible medication can be validated on a non-competence ground, then move to a competence analysis.<sup>197</sup> In *Sell*, the lower federal courts found that the dangerousness determination was clearly erroneous, and no other grounds upon which the order could be grounded were given.<sup>198</sup> Therefore, the only way the order permitting forcible medication would have been proper is if medication was required under the competence test.<sup>199</sup> However, the magistrate did not focus on any of the factors relevant to such an inquiry.<sup>200</sup> The separate competence analysis may have mattered, the Supreme Court stated, because drugs administered to render Sell non-dangerous might have had an adverse effect on his ability to assist counsel in his defense.<sup>201</sup> Therefore, a separate competence analysis was necessary to preserve Sell's constitutional right to a fair trial.<sup>202</sup> Because the courts below did not undertake this separate analysis, the Court vacated the judgment of the Eighth Circuit Court of Appeals and remanded the case for a determination on the issue of whether forcible medication was proper for one of the purposes outlined in the opinion.<sup>203</sup>

The dissenting opinion, written by Justice Scalia, centered on the jurisdictional aspect of the case rather than on the limits of states' ability to forcibly medicate defendants for competence purposes. Justice Scalia noted that Sell may not have received the remedy he desired if he had been required to wait for a final judgment to appeal, but that possibility was not an adequate reason for hearing the interlocutory appeal.<sup>204</sup> Scalia asserted that the collateral order exception cited by

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194. *Id.*

195. *Id.* at 2187.

196. *Id.*

197. The Court indicates that the dangerousness inquiry generally is more "objective and manageable" than the medicate-to-make-competent inquiry. *Id.* at 2185 (citing *Riggins v. Nevada*, 504 U.S. 127, 140 (1992)). Furthermore, because courts generally treat involuntary medication as a civil matter, and civil proceedings to forcibly medicate usually turn on whether the patient poses a danger to himself or others, the *Harper* dangerousness ground seems better suited for a criminal forcible medication inquiry. *Id.* at 2185-86. The Court seemed to implicitly recognize that the competency ground would be more controversial and therefore less desirable, because it noted that in many cases, courts who consider dangerousness grounds first will often not need to reach the competency ground. *Id.*

198. *Id.* at 2186.

199. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2187 (2003).

200. *Id.*

201. *Id.*

202. *Id.* (noting that when only dangerousness is considered, a court cannot tell whether the medication's side effects would undermine a defendant's defense or otherwise make trial unfair).

203. *Id.*

204. *Id.* at 2189 (Scalia, J., dissenting) (distinguishing two *types* of remedies: postdeprivation

the majority in *Sell* should be strictly construed, and that because the order in the *Sell* case did not fall under one of the three narrow categories of orders under the exception, the Eighth Circuit should not have heard the case in the first place.<sup>205</sup>

Justice Scalia's argument that there was no jurisdiction to hear *Sell*'s appeal underscored his later assertion that opportunistic defendants would take advantage of the procedural device to delay trial and conviction.<sup>206</sup> Specifically, Scalia argued that a defendant could take his medication (thereby making him competent) for part of the trial and then suddenly refuse to take further medication (thereby making him incompetent).<sup>207</sup> If the defendant would be deemed incompetent to stand trial after refusing further medication, the trial could not continue without infringing on the defendant's right to due process.<sup>208</sup> If the court ordered forcible medication to make the defendant competent to stand trial, the defendant could bring the trial to a standstill by appealing that interlocutory order.<sup>209</sup> Thus, Scalia argued, any defendant could unilaterally decide whether a trial would proceed through his decision to take or refuse medication, undermining the justice system.<sup>210</sup> Furthermore, Scalia asserted that under the interlocutory appeal doctrine put forth by the majority, *any* criminal defendant could immediately appeal *any* supposed violation of his constitutional rights, even if only to delay trial.<sup>211</sup> Therefore, Scalia concluded, a defendant who chooses to challenge a forced medication order in court must "abide by the limitations attached to such a challenge"—namely, he must wait to appeal the decision until after a final judgment is rendered.<sup>212</sup>

#### *B. Ford v. Wainwright: Executing the Insane Is Cruel and Unusual Punishment*

In *Ford*, the defendant was convicted of murdering a police officer<sup>213</sup> and sentenced to death in 1974.<sup>214</sup> While on Death Row in Florida, Ford began to suffer from delusions so severe that he called himself the Pope and claimed that he had fired numerous prison officials after a "hostage crisis" during which they kidnapped his family and sexually abused his female relatives.<sup>215</sup> In 1983, Ford was diagnosed with a condition resembling "Paranoid Schizophrenia With Suicide Potential."<sup>216</sup> After further consultation, another psychiatrist concluded that Ford did not understand why he was being executed, nor did he understand the connection between the homicide he committed and his death sentence.<sup>217</sup> In fact, Ford believed that he would not be put to death because "he owned the prisons and could control

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injunction" versus "postdeprivation vacatur of conviction").

205. *Id.* at 2189-90 (Scalia, J., dissenting).

206. *Id.* at 2190 (Scalia, J., dissenting).

207. *Id.* (Scalia, J., dissenting).

208. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

209. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2190 (2003) (Scalia, J., dissenting).

210. *Id.* (Scalia, J., dissenting).

211. *Id.* (Scalia, J., dissenting).

212. *Id.* at 2191 (Scalia, J., dissenting).

213. *Ford v. Wainwright*, 752 F.2d 526, 526 (11th Cir. 1985).

214. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

215. *Id.* at 402.

216. *Id.* at 402-03.

217. *Id.* at 403.



the Governor through mind waves.”<sup>218</sup> At the time of this evaluation, the psychiatrists he interviewed with did not believe that Ford could be putting on a performance.<sup>219</sup>

Despite these initial reports, a three-psychiatrist panel unanimously concluded that although Ford did have severe mental illness, he understood that he would be put to death for a murder he committed some years before.<sup>220</sup> In fact, one of the psychiatrists reported that he believed that Ford’s disorder was “contrived and recently learned,” contradicting the original reports on Ford’s condition.<sup>221</sup> Without comment or explanation, the governor of Florida signed a death warrant for Ford’s execution.<sup>222</sup> Ford then filed a petition for habeas corpus in federal court, seeking a hearing to determine his competency to be executed.<sup>223</sup> Though the lower courts refused to overturn Ford’s death sentence, the U.S. Supreme Court accepted Ford’s appeal and invalidated the sentence of death.<sup>224</sup>

The Supreme Court first addressed itself to the issue of “whether the Constitution places a substantive restriction on the State’s power to take the life of an insane prisoner.”<sup>225</sup> Upon surveying the common law, the Court noted that executing an insane criminal had traditionally been regarded as “savage and inhuman.”<sup>226</sup> It also suggested that executing such an individual does not provide an example to others and therefore serves no deterrent effect.<sup>227</sup> Furthermore, the majority argued, the goal of retribution is not served by executing an insane criminal, as the execution does not have the same “moral quality” as the execution of a mentally healthy individual.<sup>228</sup> Finally, individuals who do not understand that they will be put to death and the reasons why will not be able to prepare themselves properly for death.<sup>229</sup> All these reasons indicate that the execution of insane individuals is not desirable and may even be considered abhorrent in civilized society.<sup>230</sup>

The Court next considered the constitutionality of such executions under the Eighth Amendment.<sup>231</sup> Citing the common law reasons enumerated above, and noting that pure intuition suggests that executing insane individuals offends humanity, the Court held that the Eighth Amendment prohibition on cruel and unusual punishment forbids the execution of an insane criminal.<sup>232</sup> Although the Court did not provide a test for determining when an inmate is competent to be executed, the Court did indicate that stringent standards must be applied in making

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218. *Id.*

219. *Id.*

220. *Id.* at 403-04.

221. *Id.* at 404.

222. *Id.*

223. *Id.*

224. *Ford v. Wainwright*, 477 U.S. 399, 404-18 (1986).

225. *Id.*

226. *Id.* at 406 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 24-25 (Garland Publishing 1978) (1783)).

227. *Id.* at 407.

228. *Id.* at 408.

229. *Id.* at 407-08 (citing religious reasons militating against execution of insane individuals).

230. *Id.* at 409.

231. *Id.*

232. *Id.* at 409-10.

such a determination.<sup>233</sup> The Court noted that Florida's procedures for determining competency were inadequate under the Due Process Clause, as the procedural framework in place did not allow the prisoner or his counsel to present material relevant to his sanity at a hearing prior to execution.<sup>234</sup> After the Court ruled that the procedural protections afforded Ford were inadequate,<sup>235</sup> it remanded the case for an evidentiary hearing on the issue of competency, with the requirement that the related procedures adhere to the Court's decision.<sup>236</sup>

Although the Court ordered an evidentiary hearing to determine Ford's sanity and competency to be executed, the majority did not set forth a standard for determining competency. Instead, Justice Powell wrote a concurring opinion setting forth the test discussed above: to be competent to be executed, an inmate must understand the connection between his crime and his punishment and must be given ample time to prepare himself for his death.<sup>237</sup> This test, which is discussed more fully below, has been adopted by courts and commentators alike.<sup>238</sup>

C. Singleton v. Norris: *The Court at a Crossroads*

Charles Singleton was tried and convicted of capital felony-murder and aggravated robbery in 1979.<sup>239</sup> The trial court sentenced Singleton to death<sup>240</sup> and upon Singleton's exhaustion of his state court appeals, an execution date was set for June 4, 1982.<sup>241</sup> Singleton petitioned the U.S. District Court for the Eastern District of Arkansas for a stay of execution and writ of habeas corpus when the Arkansas state courts offered no relief.<sup>242</sup> After the district court upheld his conviction, Singleton filed numerous petitions to have his conviction overturned. In these petitions, Singleton argued that his death sentence should be reversed because he was incompetent to be executed and therefore, under *Ford*, he could not be put to death.<sup>243</sup> Singleton's execution date was repeatedly rescheduled to allow him to appeal his sentence.<sup>244</sup>

At the time of his conviction and during his subsequent incarceration on Death Row, Singleton voluntarily took antipsychotic medication.<sup>245</sup> In 1992, he requested

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233. *Id.* at 411-12.

234. *Ford v. Wainwright*, 477 U.S. 399, 414 (1986).

235. *Id.* at 415-16 (noting that under Florida's scheme, the inmate has no opportunity to challenge or impeach the state-appointed psychiatrists' opinions and that the governor is the one making the ultimate decision, though he is not completely neutral since his subordinates are "responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing.").

236. *Id.* at 417-18.

237. *Id.* at 422 (Powell, J., concurring).

238. *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991); *State v. Scott*, 748 N.E.2d 11, 13 (2001) (indicating that the Ohio Legislature codified Justice Powell's test in OHIO REV. CODE ANN. § 2949.28); Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 363 (1994); Taylor, *supra* note 12, at 1053.

239. *Singleton v. Norris*, 319 F.3d 1018, 1020 (8th Cir. 2003).

240. *Id.*

241. *Id.* at 1021.

242. *Singleton v. Lockhart*, 653 F. Supp. 1114, 1115 (E.D. Ark. 1986).

243. *Id.* at 1116; *Singleton v. Lockhart*, 962 F.2d 1315, 1321 (8th Cir. 1992).

244. *Singleton v. Norris*, 319 F.3d at 1021.

245. *Id.*

that this treatment cease and that his competency to be executed be evaluated after the drugs' effects had abated.<sup>246</sup> When Arkansas state courts refused his motion, Singleton again filed a habeas corpus petition asserting a *Ford* claim, which was denied.<sup>247</sup> In 1997, a medication review panel ruled that Singleton should be involuntarily medicated because he posed a danger to himself and others.<sup>248</sup> Because the ruling and subsequent medication rendered Singleton competent to be executed, Arkansas set an execution date for March 1, 2000.<sup>249</sup> Singleton filed yet another habeas corpus petition in federal court, arguing "that the State could not constitutionally restore his *Ford* competency through use of forced medication and then execute him."<sup>250</sup>

The lower court determined that because the medication review panel's decision was not motivated by the desire to restore Singleton's competency to be executed, but rather was made to prevent Singleton from presenting a danger to himself or others,<sup>251</sup> the court could decide the validity of the forced medication scheme without considering the issue of medication solely for the purpose of restoring competency to execute.<sup>252</sup> Once the appeal reached the Supreme Court in March 2000, the case was remanded for factual determinations.<sup>253</sup> The district court determined that Singleton was not competent to be executed when the forced medication regimen began in 1997, but it only stated that Singleton would regress into psychosis without the medication, not that he would become incompetent to be executed without the medication.<sup>254</sup> Despite the lower court's refusal to admit this fact, the record indicated that Singleton would become psychotic without the medication, suggesting that Singleton would become incompetent if he was not medicated.<sup>255</sup>

Although it recognized that the evidentiary requirements for competency to stand trial are very different from the requirements for competency to be executed, the Eighth Circuit without explanation applied the competency to stand trial standard imposed in *Sell*.<sup>256</sup> Under *Sell*, medication would be appropriate if the state could show that Singleton would likely be restored to competency, that the side effects of the medication would not overwhelm its benefits, and that medication would be in Singleton's best interests.<sup>257</sup> The Eighth Circuit determined that the state had "an essential interest in carrying out a lawfully imposed sentence"<sup>258</sup> and that the side effects of the medication administered did not overwhelm its benefits.<sup>259</sup> Furthermore, Singleton did not demonstrate that there were less intrusive methods

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246. *Id.*

247. *Id.* (citing *Singleton v. Norris*, 108 F.3d 872, 874 (8th Cir. 1997)).

248. *Id.*

249. *Singleton v. Norris*, 319 F.3d 1018, 1021 (8th Cir. 2003).

250. *Id.* at 1022.

251. *Id.* at 1021-22.

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.*

256. *Id.* at 1024-25.

257. *Id.*

258. *Id.* at 1025 (citing *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

259. *Singleton v. Norris*, 319 F.3d 1018, 1025 (8th Cir. 2003).

available to restore competence;<sup>260</sup> the court squarely rejected Singleton's argument that the "artificial competency" that would result from involuntary medication would not constitute the requisite competency for executing a mentally-ill inmate.<sup>261</sup>

However, the real point of contention in the Eighth Circuit was the requirement that the medication be in the patient's best interests.<sup>262</sup> Singleton argued that involuntary medication can never be in an inmate's best interests when the treatment's purpose is to render him competent to be put to death.<sup>263</sup> The Eighth Circuit rejected his argument and held that an inmate's "best medical interests ... must be determined without regard to whether there is a pending date of execution."<sup>264</sup> Despite this assertion that a looming execution date would not change its analysis, the court was careful to note that its ruling was premised on the assumption that the underlying order of involuntary medication was based on a *Harper* dangerousness finding, not on the medication's ability to restore the inmate's competency to be executed.<sup>265</sup> It seems, therefore, that if a state can make a showing that a death row inmate is dangerous, no matter how weak, then the state gains the benefit of restoring the inmate to competency to execute through forcible medication.<sup>266</sup>

When Singleton's appeal reached the Supreme Court, the Court was asked to decide whether it would adhere to the rule in *Ford* and hold that Singleton could not be put to death due to his mental illness, or whether it would order forcible medication under an extension of the ruling in *Sell*. Instead of making this decision, the Court declined to choose one line of cases over the other by denying certiorari and leaving the lower courts to muddle through the issue without guidance from the nation's highest court.

The rest of this comment examines possible reasons why the Court refused to decide *Singleton* and how it should have ruled had it agreed to hear arguments. Following the Supreme Court's denial of Singleton's petition for writ of certiorari, Arkansas scheduled his execution. Charles Singleton was put to death on January 6, 2004.<sup>267</sup>

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260. *Id.*

261. *Id.*

262. *Id.* at 1025-26.

263. *Id.* at 1026.

264. *Id.*

265. *Id.*

266. *Id.* at 1027.

267. Steve Barnes, *National Briefing South: Arkansas: One Execution Held; One is Stayed*, N.Y. TIMES, Jan. 7, 2004, at A17.

## III. DISCUSSION

*A. Pass the Buck: Why the Court Did Not Hear Singleton*

Before the *Singleton* case made its way to the Supreme Court, legal commentators were uncertain as to how lower courts would analyze the legality of forcibly medicating a death row inmate.<sup>268</sup> Should the courts adopt *Sell*'s requirements, or apply *Ford* instead? This uncertainty begged the question: Did *Sell*, a case concerning competency to stand trial, have any effect on cases concerning competency to execute? Even more importantly, should it? Although the Court had the opportunity in *Singleton* to formulate an analytical approach to the forcible medication issue in relation to competency to execute, as it did in relation to competency to stand trial in *Sell*, the Court declined to affirm or reject the Eighth Circuit's extension of *Sell*. Perhaps the Court wanted the issue to percolate in the lower courts as did the issue of what constitutes competency to be executed did after the *Perry* and *Ford* decisions.<sup>269</sup> On the other hand, perhaps the Court recognized the Eighth Circuit's application of *Sell* and determined that, for the time being, the issue was correctly decided.<sup>270</sup>

The Court has previously allowed issues to remain in the lower courts for a time before hearing the issue on appeal, as it did with affirmative action in 1998<sup>271</sup> and competency to be executed after *Ford* in 1986. In *Ford*, although the Court held that the execution of a mentally incompetent person would be cruel and unusual punishment under the Eighth Amendment,<sup>272</sup> the majority opinion did not provide a test for determining whether an inmate is competent to be executed.<sup>273</sup> As noted above, Justice Powell provided a cognitive test in his concurring opinion in *Ford*,<sup>274</sup> and this analysis was subsequently adopted as the definitive test for determining

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268. See Elaine Cassel, *Medicating the Mentally Ill for Trial and Execution: What Are the Implications of the Supreme Court's Recent Decisions?*, at writ.findlaw.com/cassel/20030703.html (July 3, 2003) (noting that "[t]he grim and ethically and medically questionable practices of ... drugging delusional [inmates], only to execute them, may continue unchecked.").

269. David L. Katz, *Perry v. Louisiana: Medical Ethics on Death Row—Is Judicial Intervention Warranted?*, 4 GEO. J. LEGAL ETHICS 707, 712 n.39 (1991) (noting that the *Perry* court and the *Ford* majority did not articulate a standard for determining whether an inmate is competent to be executed, so lower courts looked to the Justice Powell's articulation in his concurring opinion in *Ford*, the two-pronged test outlined above in which an inmate must understand he is about to be executed and the connection between his crime and the execution).

270. See Neil A. Lewis, *Court Begins New Term by Letting State Authority Expand*, N.Y. TIMES, Oct. 6, 2003, available at <http://www.nytimes.com/2003/10/06/politics/06CND-SCOT.html> (last visited Feb. 13, 2004) (reporting that although the Court chose not to decide *Singleton*'s appeal, the refusal to reconsider the Eighth Circuit's decision "represent[ed] an acceptance of expansion[] of state authority").

271. Peter Grier & James Skip Thurman, *Ruling May Clarify Affirmative Action Hiring vs. Firing*, CHRISTIAN SCIENCE MONITOR, Mar. 10, 1998, available at 1998 WL 2366369 (noting that the Court may have refused to hear a discrimination case by a white professor so that the affirmative-action issue could percolate in the lower courts for awhile longer).

272. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986). See also Miller-Rice, *supra* note 72, at 664.

273. See generally *Ford*, 477 U.S. at 399.

274. *Id.* at 422.

execution competency.<sup>275</sup> Thus, the Court has left issues open for discussion and argument in the lower courts before.

Because the *Sell* decision was only rendered in June of 2003, the Court may wait to hear a case like *Singleton* until the issues surrounding forcible medication and competency to be executed have had a chance to be thoroughly discussed by lower courts in light of the decision and rationale in *Sell*.<sup>276</sup> If this is the case, the Court will probably not hear an appeal similar to *Singleton* unless the issue is clear: the state is attempting to forcibly medicate for the sole purpose of executing the mentally-ill inmate. Part of the problem with *Singleton* was that the medical center treating him indicated that he was forcibly medicated because he posed a danger to himself and others,<sup>277</sup> not merely because of a governmental interest in executing him.<sup>278</sup> Perhaps the Court is waiting for a case where the decision to medicate was based solely on the state's interest in executing a criminal. Given the fact that lower courts give great deference to medical opinions on an inmate's dangerousness,<sup>279</sup> it is likely that states will continue to seek forcible medication orders based on *Harper* grounds. Thus, it seems unlikely that a case involving forcible medication based on competency alone will make its way to the Supreme Court any time soon, if ever.

Another theory behind the Court's denial of certiorari is that the Court actually agreed with the Eighth Circuit in its extension of the *Sell* rationale to the *Singleton* case.<sup>280</sup> Although the *Sell* case did not involve competency to be executed, only competency to stand trial, much of the rationale in that case would carry over to the *Singleton* case. For instance, the government's interest in carrying out the punishment imposed on the inmate is an important governmental interest that may satisfy *Sell*'s requirement for such an interest.<sup>281</sup> However, as discussed more fully below, *Singleton* and similar cases would not meet all of the requirements set forth in *Sell* and, therefore, the Court would need to either create a new rule to allow forcible medication for the purpose of rendering an inmate competent to be executed, or it would have to find that execution after such forcible medication is unconstitutional.

#### *B. How the Court Should Rule*

Although the Court did not agree to hear *Singleton*'s appeal, there are some indications in prior cases that suggest how the Court would have ruled had it heard *Singleton*'s appeal. Given the Court's recent decision in *Sell*, in which it became clear that the Court placed great emphasis on the state's interest in bringing suspected criminals to justice,<sup>282</sup> even over the defendant's liberty interest in

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275. *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991); *State v. Scott*, 748 N.E.2d 11, 13 (2001).

276. Marcia Coyle, *A Cloudy Future for Forced Medication After the Ruling, More Litigation?*, NAT'L L.J., June 23, 2003, at 1.

277. *Singleton v. Norris*, 319 F.3d 1018, 1021 (8th Cir. 2003).

278. *Id.* at 1021-22.

279. *See, e.g., id.*

280. *See Lewis, supra* note 270.

281. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 2185 (2003).

282. *Id.*

refusing unwanted medical treatment,<sup>283</sup> it is likely that the Court would have chosen to apply the *Sell* requirements in *Singleton* and determined that Singleton should be medicated in order to be executed.

However, this result is problematic. As suggested above, in *Singleton* and similar cases, the state could not meet all of *Sell*'s requirements. The government does have an important interest in administering sentences imposed by courts,<sup>284</sup> and to the extent that this punishment cannot be carried out without the use of antipsychotic medication to make the inmate competent to be executed, the medication is necessary to significantly further the governmental interest. Thus, the first three requirements under *Sell* would be met.<sup>285</sup> However, it would be difficult, if not impossible, for the government to meet the final requirement under *Sell*. The government would not be able to show that medication is in the best interests of the patient when it only leads to his death.<sup>286</sup> As one commentator has put it, "How can it possibly be in Singleton's best medical interest to shoot enough drugs into him so that he may become sane enough to be put to death?"<sup>287</sup>

Furthermore, there are ethical problems that would prohibit physicians from administering the medication, even with a court order to do so. Upon entering the practice of medicine, physicians take the Hippocratic Oath, promising that they will only serve their patient's best interests and will "do no harm" to them.<sup>288</sup> Many commentators have focused on the principle that doctors are to "do no harm"<sup>289</sup> and have argued that a physician who forcibly medicates a mentally-ill inmate while knowing that the inmate will be executed upon reaching competency violates the Hippocratic Oath.<sup>290</sup> The American Medical Association has even stated that a "physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."<sup>291</sup> Commentators have suggested that because the physician knows of the inmate's impending execution, and that without his assistance in treating the inmate the execution will not take place, the physician is actually a part of the execution

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283. *Id.*

284. However, it has been suggested that the government's interest in bringing a defendant to trial or executing a convicted felon is in no way strong enough to override a citizen's rights to be free from unwanted medical treatment, as this outcome would create a slippery slope. Warren Richey, *Forced Medication: When Does it Violate Rights*, CHRISTIAN SCIENCE MONITOR, Mar. 3, 2003, at 1. At least one commentator has suggested that allowing the government to assert such a broad power in the name of furthering state interests could lead to the forcible medication of schoolchildren as a requirement for attending public school or of all citizens in an effort to protect against chemical or biological terrorist attacks. *Id.* When, Richey asks, is personal freedom enough to overcome such an overwhelming power? *Id.*

285. *Sell*, 123 S.Ct. at 2185.

286. Chris Adams, *Death Watch: Delusional Justice*, CHAMPION, May 2003, at 46; Brent W. Stricker, *Seeking an Answer: Questioning the Validity of Forcible Medication to Ensure Mental Competency of Those Condemned to Die*, 32 McGEORGE L. REV. 317, 326 (2000).

287. Adams, *supra* note 286, at 46.

288. Rochelle G. Salguero, *Medical Ethics and Competency to be Executed*, 96 YALE L.J. 167, 173 (1986); BRIT. MED. ASS'N, THE HANDBOOK OF MEDICAL ETHICS 69-70 (1984).

289. BRIT. MED. ASS'N, *supra* note 288, at 69-70.

290. Salguero, *supra* note 288, at 175; Taylor, *supra* note 12, at 1061.

291. Salguero, *supra* note 288, at 175.

itself.<sup>292</sup> Because the physician's efforts are "directed toward the eventual execution of the condemned prisoner,"<sup>293</sup> the medical attention and treatment the physician gives really just cloaks a strategy to cause the inmate's death.<sup>294</sup> These ethical considerations would require that the physician refrain from participation in *Singleton*, whereas physician participation would be acceptable in *Sell* because the defendant still has an opportunity to prove his innocence.<sup>295</sup> Again, though forcible medication may be proper under *Sell* in a theoretical sense, it would not be proper under *Singleton*.

By obtaining a court order allowing forced medication, the state would also be taking part in a scheme to essentially circumvent the Supreme Court's prior rulings on the execution of mentally-ill criminals. Because the inmate is not actually cured through the involuntary treatment rendered, but is only made "artificially competent[t],"<sup>296</sup> execution is not proper. Justice Powell suggested in *Ford* that if an insane inmate should be "cured of his disease,"<sup>297</sup> then the state would be able to execute him because the disability preventing execution had subsided.<sup>298</sup> However, antipsychotic medication is not designed to cure the patient of his insanity; the medication merely masks the symptoms of psychosis for a short time.<sup>299</sup> Since the effects of antipsychotic medication lasts only as long as the medication remains in the inmate's blood stream and the underlying illness remains, it is clear that the medication does not provide a cure.<sup>300</sup> Therefore, execution is not made proper, even for a short time, because a cure is not actually brought about. Furthermore, in light of the requirement that an inmate who is about to be put to death must understand his impending death and the reason for it, commentators have suggested that forcible medication does not provide the reliability and predictability that is needed to impose the death penalty.<sup>301</sup> Where competency is restored for only as long as medication remains in an inmate's blood stream and the ability to understand his crime and punishment deteriorates rapidly without medication, it would be difficult to reliably and predictably determine when an inmate meets the *Ford* test for competency to be executed.<sup>302</sup>

Finally, moral considerations militate against forcible medication for the sole purpose of rendering an inmate competent to be executed. Supporters of forcible medication couch their arguments in terms of alleviating the inmate's suffering, yet they do not speak of how "improving a person's health in order to kill him feels like a cruel betrayal."<sup>303</sup> Some even try to argue that there is a duty to medicate a

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292. Taylor, *supra* note 12, at 1062.

293. *Id.*

294. *Id.*

295. See Morris, *supra* note 56, at 509.

296. Taylor, *supra* note 12, at 1059.

297. *Ford v. Wainwright*, 477 U.S. 399, 425 n.5 (1986).

298. *Id.*

299. Taylor, *supra* note 12, at 1059. See Adams, *supra* note 286, at 46.

300. Taylor, *supra* note 12, at 1059.

301. *Id.* at 1059-60.

302. *Id.*

303. Sherry F. Colb, *Medicating Prisoners So They Can Be Killed: A Federal Court Approves Forcible Antipsychotic Treatment for Mentally Incompetent Convicts*, at <http://writ.findlaw.com/colb/20030226.html> (Feb. 26, 2003).



mentally-ill inmate because “it would be cruel and unusual punishment to deprive him of medication that would make him competent,” aside from any effect it would have on the ability of the state to execute him.<sup>304</sup> Thus, some proponents of forcible medication seem to value temporary mental relief over the inmate’s right to live.

These arguments by proponents of forcible medication make little sense when one considers the rationale for the death penalty in the first place. Although deterrence is cited as a main goal of capital punishment,<sup>305</sup> there is no evidence to support the fact that the death penalty serves any real deterrent effect in civilized society.<sup>306</sup> Furthermore, in a civilized society where people are valued for their intrinsic worth, as ends rather than means,<sup>307</sup> to deliberately kill an individual so that he may serve as an example to others seems untenable. Using capital punishment as a deterrent seems patently unfair because it punishes the inmate for the potential crimes of others, not just for what he has done.<sup>308</sup>

The main argument in favor of the death penalty, though rarely admitted, is that of retribution.<sup>309</sup> In essence, proponents of the retributive argument assert that society should be able to avenge itself for transgressions against its members.<sup>310</sup> In fact, one commentator has stated, “[s]ociety has not only a right but an affirmative duty to punish those who transgress against its members.”<sup>311</sup> These proponents of the death penalty would agree that the punishment must be proportionate to the crime, or that society must attempt to take “an eye for an eye.”<sup>312</sup>

Yet the execution of a mentally-ill inmate would not seem to fulfill this retributive goal. Although the inmate has been dealt with in a “fit[ting]” manner in light of his crime, as H.L.A. Hart stated, the punishment may not really be “equivalent to the crime.”<sup>313</sup> Perhaps to make a psychological point, Hart cites Blackstone’s “quaint” suggestion that “the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune.”<sup>314</sup> Thus, it is clear that the killing of a mentally-ill inmate, one who must be forcibly propped up by antipsychotic medication in order to understand the world around him, does not provide the same retributive satisfaction as the execution of a mentally-healthy individual, which is

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304. WENDY KAMINER, *IT’S ALL THE RAGE: CRIME AND CULTURE* 95 (1995).

305. KAMINER, *supra* note 304, at 100.

306. JAN GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 88 (1983).

307. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor ed. & trans., Cambridge University Press 1997) (1785).

308. MENNINGER, *supra* note 39, at 206.

309. *Id.* at 190.

310. CARRINGTON, *supra* note 38, at 136.

311. *Id.*

312. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 160 (1968).

313. *Id.* at 161.

314. 4 BLACKSTONE, *supra* note 226, at 13; HART, *supra* note 312, at 161. In his *COMMENTARIES*, Blackstone further notes that because retributive justifications are obviously not enough to support the imposition of the death penalty, capital punishment must be acceptable based on its potential deterrent effect. 4 BLACKSTONE, *supra* note 226, at 13-14 (“But the reason upon which this instance is grounded seems to be that this is the highest penalty that man can inflict, and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others ....”).

surely what death penalty supporters have in mind when advancing retributive arguments. Because one of the underlying principles of punishment in general is that it be efficacious,<sup>315</sup> the execution of a mentally-ill inmate does not serve the underlying purposes of punishment and should not be tolerated in civilized society.

Commentators have noted that the law is not comfortable with inflicting punishment upon one who is “totally unaware of his participation in the punishment.”<sup>316</sup> Even in the earliest days of punishment, criminals were physically propped up to receive punishment, as the state could only maximize the retributive value of punishment by punishing a criminal who was “hale and hearty.”<sup>317</sup> Thus, the ironic result of this policy is that “if the condemned prisoner begins to fail he must be propped up, medically treated, and nursed back to health before receiving the final, lethal blessing.”<sup>318</sup> Once it became clear that this system was barbaric and cruel, the courts began to embrace mercy and humanity in an attempt to save face.<sup>319</sup> One of these face-saving actions was the creation of the insanity defense, which recognized the inhumanity involved in punishing one who is mentally ill.<sup>320</sup> It seems clear that to allow forced medication solely to restore competency to be executed would signal a return to this barbaric theory and implementation of punishment.

Some would argue that when a state executes an insane individual, the punishment does fit the crime because the lives of insane criminals are worth just as much as those of sane inmates.<sup>321</sup> While it is true that this counter-argument would cure the problem of efficacy, as the punishment would be considered equivalent to the crime, this “eye for an eye” rationale does not justify execution in and of itself.<sup>322</sup> As Justice Marshall stated in his concurring opinion in *Furman*, “Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.”<sup>323</sup> Thus, retribution may be the justification for punishment only when it is coupled with some other rationale, such as deterrence.<sup>324</sup> Therefore, even if the killing of an insane inmate who has been forcibly medicated has full retributive value, that fact alone is not enough to justify carrying out his

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315. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179 (photo. reprint 1823) (1780).

316. MENNINGER, *supra* note 39, at 113.

317. *Id.* at 114.

318. *Id.* (noting that if the state’s sole objective was to get rid of an undesirable, physical or mental illness it should be welcomed as an assistance in the punishment, but since it is not, there must be retributive aims inherent in punishment).

319. *Id.*

320. *Id.*

321. KANT, *supra* note 307, at 315.

322. *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (“The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State’s sole end in punishment.”).

323. *Id.* (Marshall, J., concurring) (citation omitted).

324. *Id.* (Marshall, J., concurring) (“Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.”). *See also id.* (indicating that “deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation” are “proper goals of punishment”).

execution. As previously noted, the execution of an inmate has little or no deterrent effect,<sup>325</sup> let alone the execution of one who only understands his punishment and crime through the forcible introduction of antipsychotic medication into his blood stream. Thus, even assuming that the execution of an insane inmate takes “an eye for an eye,” more is needed to justify such harsh punishment.

The Supreme Court did not discuss any of these moral or social considerations when it had the chance. Instead, it allowed the issue to return to lower courts when it denied certiorari in *Singleton*, leaving open the possibility that the appeals of other insane inmates will be overruled. Had the Court accepted *Singleton*’s appeal and considered the arguments above in light of *Sell*’s requirements, especially that forced medication be in an inmate’s best interests,<sup>326</sup> the Court would have had the opportunity to affirm its holding in *Ford* and deny states the right to forcibly medicate inmates for the sole purpose of making them competent for execution. This would have been the proper course of action in light of the constitutional, moral, and ethical considerations outlined above.

### *C. The Effects of the Court’s Decision*

If the Supreme Court had followed its line of reasoning in *Ford*, determining that *Singleton* could not be executed because he was incompetent to be executed and that forcible medication would not be proper in light of various moral, ethical, and legal considerations, the judiciary would have the task of deciding what should be done with *Singleton* and other incompetent death row inmates. The state could not forcibly medicate *Singleton* because that would make him competent to be executed. Without the medication, he could not be executed because he would be incompetent to be executed. As a result, *Singleton* would remain on Death Row for years, until he became competent to be executed without the aid of medication (and this seems virtually impossible, as the mentally ill do not simply become well on their own).<sup>327</sup> Some would argue that to leave *Singleton* to languish on Death Row in the hell of his own mind is “cruel and unusual punishment” and medication should be given to him to alleviate those harmful symptoms of his psychosis.<sup>328</sup> However, this position is problematic because the state would end up right back at the beginning of the analysis—forcible medication which has the side effect of rendering the inmate competent to be executed.

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325. GORECKI, *supra* note 306, at 88.

326. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 2185 (2003).

327. See Dora W. Klein, Note, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications to a Defendant During Trial*, 55 VAND. L. REV. 165, 212 (2002); Joannmarie Ilaria Davoli, *Still Stuck in the Cuckoo’s Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987, 1045 (2002) (“[T]he best chance an individual may have to recover from psychiatric illness is to receive prompt, effective treatment when symptoms first appear.”).

328. See *Olmstead v. L.C.*, 527 U.S. 581, 609-10 (1999) (Kennedy, J., concurring) (“[F]or the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.”).

Thus, courts are left in a quandary: forcibly medicating mentally-ill inmates cannot be tolerated where the goals of retribution and deterrence will not be furthered by their execution, yet society does not want to support killers for the rest of their lives in jail. Some commentators have suggested that inmates should be committed civilly rather than be subject to criminal prosecution.<sup>329</sup> The basic argument these commentators make is that when faced with a situation where an inmate is not competent to stand trial, it would be better to deal with civil commitment proceedings and change those laws than to compromise the inmate's right to a fair trial by forcibly medicating him.<sup>330</sup> In the same way, these commentators argue that it would be better for the Court to allow an insane inmate to remain incarcerated where he will not pose a danger to himself or others, rather than jeopardize his right to be free from unwanted medical treatment.<sup>331</sup>

Other commentators have suggested that the death sentences of mentally-ill inmates should be commuted to life sentences.<sup>332</sup> That way, the inmate can be treated without the risk that the state will use the treatment to its advantage in rendering the inmate competent to be executed.<sup>333</sup> Furthermore, physicians would not face an ethical dilemma by participating in the forced administration of medication because the administration, and, therefore, the physician, would not be part of an execution. The commutation option, opponents may argue, may create a strain on already scarce resources. Most jails around the United States already have housing shortages, with more prisoners than they have room for, and more arriving daily.<sup>334</sup> If death row inmates are given life sentences instead, it stands to reason that an even greater strain on the jail system would result. However, this argument is weak, as there are only 3,504 inmates on Death Row in the United States,<sup>335</sup> only some of which suffer from mental illness severe enough to require commutation.<sup>336</sup> Therefore, the strain on the prison system would be negligible.

State courts must ultimately determine what should be done with the mentally-ill prisoners within their jurisdictions. The U.S. Supreme Court, however, must give those courts direction as to the ultimate aim of the justice system. It is up to the Supreme Court to protect the most basic civil rights of all Americans, including the mentally ill.

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329. Klein, *supra* note 327, at 213.

330. *Id.* at 215.

331. *See id.*

332. Lindsay A. Horstman, Comment, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823, 849 (2002).

333. *Id.* at 846-47.

334. The U.S. Department of Justice Bureau of Justice Statistics has estimated that there are over two million prisoners in the United States, an increase of 3.7% over the prior year. *See* U.S. Dep't of Justice Bureau of Justice Statistics, *Prison Statistics*, at <http://www.ojp.usdoj.gov/bjs/prisons.htm> (rev. Jan. 7, 2004).

335. Death Penalty Information Center, *Death Row Inmates By State and Size of Death Row by Year*, at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188> (Dec. 21, 2003) (reporting figure as of Oct. 1, 2003).

336. Lewis, et al., *supra* note 1, at 840.

#### IV. CONCLUSION

If the Supreme Court chooses not to impose a limit on government actions, society can never know where the government will stop in its quest for “justice” and how to prevent it from going too far. Allowing the government to have such a broad power to forcibly medicate mentally-ill defendants and inmates starts down the road of allowing the government boundless discretion to determine when its own interests override the personal freedoms of its citizens.

Thus, the Court should hear a case similar to *Singleton* in the near future to forge a definite guideline as to when forcible medication is allowed and when it is not. For the moral and ethical reasons outlined above, the Court should not allow states to forcibly medicate mentally-ill inmates when they are scheduled to be executed, as there is no way to meaningfully separate the act of medicating from the act of executing. Furthermore, when societal goals of deterrence and retribution are not furthered by the act of medicating mentally-ill defendants and then executing them, and in fact those goals are soiled by the government’s ability to bypass any moral guidelines it chooses in the name of state interests, then a grave injustice has been wrought. Thus, the Court should foster a bright-line rule which bars states from imposing involuntary medication on incompetent death row inmates to make them competent to be executed.

Finally, the Court’s ruling on this issue will leave a significant question to be considered by the legal community: what should be done with incompetent death row inmates who must be punished, but cannot be executed as their sentences require? This is a question for commentators to hash out in the future. First the Court must stop governments, state and federal alike, from running roughshod over the liberty of some of their most vulnerable citizens.

## NOTE

### MILLER-EL V. COCKRELL: PROCEDURAL RULES TO PROTECT PRISONERS' RIGHTS

Kristy Bowling

#### I. INTRODUCTION

FOR state prisoners sentenced to death, habeas corpus is the only federal court review available to challenge the constitutionality of their convictions.<sup>337</sup> The Rehnquist Court is perceived to have erected procedural barriers that prevent relief for constitutional violations. Some commentators speculate that this approach may ultimately unravel the Warren Court's expansion of individual rights.<sup>338</sup> The Rehnquist Court has been accused of "elevat[ing] state procedural interests over concern for human life, over due process of law, and yes, over the Constitution itself"<sup>339</sup> and "limit[ing] the scope of habeas review to the point where it is a mere shadow of a protection."<sup>340</sup> As Chief Justice William Rehnquist said in the context of ending delays in carrying out the death penalty, "Let's get on with it."<sup>341</sup>

The recent trend in court decisions has had the effect of tightening guidelines governing appeals by habeas petitioners, thereby limiting relief granted to prisoners.<sup>342</sup> Despite this effect, the Court appears to be more "concerned about how the death penalty is administered and is interested in ensuring fairer and more just procedures in capital cases."<sup>343</sup> *Miller-El v. Cockrell*<sup>344</sup> is an example of how the Supreme Court has used procedural rules to protect the constitutional rights of prisoners. Commentators have characterized the Rehnquist Court as having a "primary interest ... in establishing procedural rules that preclude federal courts from considering even the most egregious violations of a defendant's constitutional

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337. David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALA. L. REV. 557, 559 (1997).

338. Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process"*, 74 N.Y.U. L. REV. 313, 315 (1999).

339. *Id.* at 351-52.

340. Blumberg, *supra* note 1, at 557.

341. Adam Thurschwell, *Federal Courts, the Death Penalty, and the Due Process Clause: The Original Understanding of the "Heightened Reliability" of Capital Trials*, 14 FED. SENT. REP. 14, 14 (2001).

342. William P. Welty, Comment, "Adjudication on the Merits" Under the AEDPA, 5 U. PA. J. CONST. L. 900, 902 (2003).

343. Erwin Chemerinsky, *October Term 2002*, 6 GREEN BAG 2d 367, 373 (2002).

344. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) [hereinafter *Miller-El VT*].

rights.”<sup>345</sup> However, in *Miller-El*, the Rehnquist Court decision actually served to expand opportunities available to petitioners, rather than restricting their rights.

Specifically, the Court addresses three areas where the lower courts abused previously established rules. These areas include the standard for the Certificate of Appealability, the Batson evidentiary framework, and deference. A Certificate of Appealability (COA) is a jurisdictional pre-requisite required before a petitioner can bring a habeas appeal. The purpose of requiring a COA is to eliminate frivolous appeals. The standard established requires that the petitioner make a substantial showing of the denial of a constitutional right.<sup>346</sup> Recently, courts have applied the standard in a much more demanding manner than was ever intended, resulting in the exclusion of claims with merit.<sup>347</sup> The Court’s holding in *Miller-El* directly addressed this issue and returned the standard for a COA to a simple threshold inquiry.<sup>348</sup>

Historically, discrimination has been prevalent in the jury selection process.<sup>349</sup> Despite attempts to eradicate discriminatory jury practices, it is still an issue today. The Batson Doctrine is the current framework to prove claims of discrimination and requires the inclusion of all relevant evidence. In *Miller-El* the court reaffirmed the evidentiary framework and has strengthened the Batson Doctrine. In doing so, it not only helped guarantee a defendant’s constitutional liberties but also worked toward ensuring all races are treated equally in our criminal justice system.

Deference is given to trial courts’ determinations of fact in all habeas appeals. The Court recognized this; however, it affirmed that deference is not absolute.<sup>350</sup> Several courts have interpreted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provisions as giving absolute deference to some state court determinations.<sup>351</sup> The Supreme Court has disapproved of this practice.<sup>352</sup> By allowing appellate courts to overturn a trial court’s determination (when supported by proper authority), the Court gave more discretion to appellate courts to correct unsupported or biased decisions quickly and showed that these decisions will not be tolerated.

This note first provides an overview of the historical development of the Habeas Corpus Doctrine, the Certificate of Appealability, and the evolution of the Batson Doctrine. Next, relevant facts and procedure of *Miller-El*’s case are laid out, followed by an analysis of the Supreme Court’s decision. Finally, the rationale behind the Court’s decision and the effect of the decision on habeas practices will be discussed.

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345. Reinhardt, *supra* note 2, at 352.

346. 28 U.S.C. § 2253(c)(2) (2000).

347. *Miller-El VI*, 537 U.S. at 336.

348. *Id.*

349. Cheryl A.C. Brown, Comment, *Challenging the Challenge: Twelve Years After Batson, Courts Are Still Struggling to Fill in the Gap Left by the Supreme Court*, 28 U. BALT. L. REV. 379, 389 (1999).

350. *Miller-El VI*, 537 U.S. at 340.

351. 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.4(d), at 79 (4th ed. 2001).

352. *Miller-El VI*, 537 U.S. at 340.

## II. BACKGROUND

*A. Habeas Corpus Doctrine*

Guaranteed by the United States Constitution,<sup>353</sup> the writ of habeas corpus was believed to provide important protections for the individual against an intrusion by the state upon individual liberties.<sup>354</sup> Today, it is the single federal remedy available for a prisoner to challenge the legality of his detention and seek immediate release.<sup>355</sup> This doctrine stands as assurance that the convicted person “was not deprived of his liberty without due process of law, ... so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution.”<sup>356</sup> It is a remedy that defends personal freedoms and “both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair.”<sup>357</sup> The writ protects against constitutional errors “that [risk] an unreliable trial outcome and the consequent conviction of an innocent person.”<sup>358</sup>

Habeas corpus review is especially important in capital cases. The death penalty differs from all other sentences, because it is the most severe and final punishment possible. It is imposed only when the guilty party has committed such a heinous crime that the state is justified in taking the life of one of its own citizens.<sup>359</sup> Because of these unique elements, the Supreme Court has held that it is of “vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”<sup>360</sup> Capital cases deserve special procedural protections to ensure accurate identification of guilty individuals where execution is the proper sentence.<sup>361</sup> Habeas corpus review helps ensure that a high constitutional standard of due process

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353. U.S. CONST. art. I, § 9, cl. 2.

354. Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 681 (2000).

355. See *Thirty-Second Annual Review of Criminal Procedure*, 91 GEO. L.J. 1, 817-85 (2003).

356. *Felts v. Murphy*, 201 U.S. 123, 129 (1906). The appellant suffered from almost complete deafness. *Id.* at 128. He was convicted of murder at a trial where he could not hear the evidence presented but understood that he was on trial for that murder, never objected, and allowed his counsel to act on his behalf. *Id.* at 129-30. On review of a writ of habeas corpus, the Supreme Court determined that despite not hearing the evidence against him, he was not deprived of his liberty without due process of law because he had counsel that knew he was on trial for murder. *Id.*

357. *O’Neal v. McAninch*, 513 U.S. 432, 442 (1995). Petitioner appealed the denial of a habeas corpus claim where the Sixth Circuit deemed a trial error harmless. *Id.* at 435. The Supreme Court held that when in a habeas proceeding and the court is in grave doubt whether the error was harmless, “the petitioner must win.” *Id.* at 436. See also *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

358. *O’Neal*, 513 U.S. at 442.

359. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Upon being convicted of first-degree murder, the petitioner was sentenced to death. *Id.* at 351. The trial judge at sentencing reviewed a confidential presentence investigation report that was not made available to counsel or the state supreme court for review. *Id.* The Supreme Court held that this procedure violated the constitutional requirement that no person should be deprived of life without due process of law. *Id.* at 361-62.

360. *Id.* at 358.

361. 1 HERTZ & LIEBMAN, *supra* note 15, § 2.6, at 100-01.



and reliability has been provided.<sup>362</sup> Approximately fifty percent of all death sentences are reversed because of federal habeas writs.<sup>363</sup>

Habeas corpus “is not a means of curing factually erroneous convictions.”<sup>364</sup> As Justice Holmes’ wrote, “what we have to deal with is not the petitioners’ innocence or guilt but solely the question of whether their constitutional rights have been preserved.”<sup>365</sup> The Supreme Court has not hesitated to grant habeas relief to petitioners who are likely guilty but whose constitutional rights were violated.<sup>366</sup> The reverse is also true. The Supreme Court has upheld convictions even when the petitioner was likely innocent, because no constitutional errors were evident.<sup>367</sup>

As can be expected, results such as these can outrage communities who believe the individual harmed the well-being and safety of their citizens.<sup>368</sup> This is amplified when the crime is one that is punishable by death, a sentence reserved for the most atrocious crimes that “shock, frighten, and enrage” the community.<sup>369</sup> However, “our system of government requires that even [these] ... individual[s] ... be protected by an ‘inflexible execution of the national laws’ that safeguard his—and our—liberties.”<sup>370</sup> It is especially important in capital cases to ensure that the proper procedures were followed in convicting criminals because of the “temptation—indeed, at times, the compulsion—for the legal arm of that community to move more swiftly and directly toward punishment than ... permit[ted].”<sup>371</sup>

When faced with a serious crime close to home, it is easy for communities to overlook the procedural protections given by the Constitution and focus solely on getting the accused punished. However, this approach threatens the concept of liberty and due process guaranteed to all. As William Blackstone once said, “it is better that ten guilty persons escape, than that one innocent suffer.”<sup>372</sup> Habeas corpus is a tool used to double check the system by ensuring that an individual’s procedural rights are upheld before that individual’s life and freedoms are permanently taken away.<sup>373</sup>

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362. 1 *id.* § 2.6, at 101.

363. Williams, *supra* note 18, at 681.

364. 1 HERTZ & LIEBMAN, *supra* note 15, § 2.5, at 86.

365. Moore v. Dempsey, 261 U.S. 86, 87-88 (1923). Petitioners were a group of African Americans convicted and sentenced to death for the murder of a white man after an attack upon their church. *Id.* at 87. The Supreme Court reversed the denial of the habeas petition alleging that the trial was a charade and held that “if a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law.” *Id.* at 88, 90-91.

366. 1 HERTZ & LIEBMAN, *supra* note 15, § 2.5, at 86-87.

367. 1 *id.* at 87.

368. 1 *id.* at 88.

369. 1 *id.* § 2.6, at 102.

370. 1 *id.* § 2.5, at 88.

371. 1 *id.* § 2.6, at 102-03.

372. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (9th ed. 1978).

373. 1 HERTZ & LIEBMAN, *supra* note 15, § 2.6, at 100-01.

### *B. Certificate of Appealability*

In order to appeal the final denial of habeas relief, a petitioner must obtain a Certificate of Appealability (COA) from a circuit justice or judge.<sup>374</sup> The COA was created by the Antiterrorism and Effective Death Penalty Act of 1996<sup>375</sup> (AEDPA) to replace the Certificate of Probable Cause (CPC) which had been required since 1908.<sup>376</sup> The COA is necessary because the petitioner has no constitutional right to appeal the denial of a habeas corpus petition.<sup>377</sup> The petitioner can only obtain the right to appeal if he can establish a “substantial showing of the denial of a constitutional right.”<sup>378</sup> Without a COA, the court of appeals lacks jurisdiction to review the denial of the lower court’s ruling on the merits of the petitioner’s habeas claim.<sup>379</sup>

When Congress passed the CPC in 1908, courts had traditionally recognized an absolute right to appeal the denial of a habeas corpus petition.<sup>380</sup> However, Congress created the CPC requirement to reduce the large number of frivolous habeas corpus claims challenging capital sentences for the sole purpose of delaying the petitioner’s execution.<sup>381</sup> The practice of filing a meritless appeal on the eve of an execution had become common and resulted in long delays—some of three or more years.<sup>382</sup> The House Judiciary Report insisted that this “vicious practice” be stopped;

That the delay of execution and punishment in criminal cases is the most potent cause in inducing local dissatisfaction, not infrequently developing into lynching, is obvious, and it is certainly the duty of Congress to eliminate so far as possible all unnecessary and factious delay, and this will be accomplished by the passage of this bill.<sup>383</sup>

The CPC was designed as a means of separating the frivolous appeals from those with some merit to eliminate unneeded delay in executions.<sup>384</sup> It required the existence of probable cause, which was commonly understood as “something more

374. *Thirty-Second Annual Review of Criminal Procedure*, *supra* note 19, at 857-58. Interpretation has enabled district judges who rendered the decision eligible to issue the COA in addition to the circuit justice or judge as FED. R. APP. P. 22(b) allows. *Id.* at 858 n.2660.

375. 28 U.S.C. § 2253 (2000). President Clinton declared that the AEDPA’s purpose was to “streamline Federal appeals for convicted criminals sentenced to the death penalty” but not to make substantive changes in the standards for granting the writ.” 1 HERTZ & LIEBMAN, *supra* note 15, § 3.2, at 111 (quoting Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996)).

376. 2 HERTZ & LIEBMAN, *supra* note 15, § 35.4(a), at 1568. *See also* H. R. REP. NO. 23, at 1-2 (1908).

377. 2 *id.* § 35.4(a), at 1567.

378. 2 *id.* § 35.4(a), at 1568.

379. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 337 (2003).

380. Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, 313 (1983).

381. *See* H. R. REP. NO. 23, at 1-2 (1908); *id.* at 313.

382. *See* H.R. REP. NO. 23, at 1-2 (1908); Robbins, *supra* note 44, at 314.

383. H.R. REP. NO. 23, at 1-2 (1908). *See also* Robbins, *supra* note 44, at 314.

384. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). *See also* Robbins, *supra* note 44, at 313.

than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement."<sup>385</sup>

The CPC standard required a "substantial showing of the denial of a federal right."<sup>386</sup> In *Barefoot v. Estelle*, the Supreme Court defined what constituted a substantial showing.<sup>387</sup> It adopted the explanation in *Gordon v. Willis*<sup>388</sup> from the Northern District of Georgia that stated:

[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."<sup>389</sup>

When Congress converted the CPC to the COA under the AEDPA, it altered some of the requirements. These changes include:

- Requiring the denial of a constitutional right, instead of a federal right,
- Requiring a COA for both federal and state prisoner proceedings, instead of just state prisoner proceedings,
- Limiting authority to issue a COA to "a circuit justice or judge," and
- Requiring that issues satisfying the requisite standard be specified, instead of the entire case.<sup>390</sup>

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385. *Barefoot*, 463 U.S. at 893 (quoting Harry A. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 352 (1967)).

386. *Barefoot*, 463 U.S. at 893 (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972)).

387. *Barefoot*, 463 U.S. at 892-96. In *Barefoot v. Estelle*, the Supreme Court treated the petitioner's application for a stay of execution as a petition for writ of certiorari. *Id.* at 887. Petitioner contended that the use of psychiatric testimony at the sentencing hearing regarding the probability that he would commit further violent acts was unconstitutional. *Id.* at 896. The Texas Court of Criminal Appeals had previously rejected this contention and upheld the petitioner's conviction. *Id.* at 885. The Supreme Court also upheld this determination. *Id.* at 903. In doing so, it suggested procedural guidelines for handling habeas corpus appeals requiring a certificate of probable cause. *Id.* at 892-96. These guidelines were as follows: (1) whether or not the petitioner received a CPC, (2) when a CPC is issued, the petitioner must be given the "opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal," (3) "a court of appeals may adopt expedited procedures in resolving the merits of habeas corpus appeals," (4) on successive appeals, the district court may "expedite consideration of the petition," and (5) "stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from [the Supreme] Court to the court of appeals that has denied a writ of habeas corpus." *Id.*

388. *Gordon v. Willis*, 516 F. Supp. 911 (N.D. Ga. 1980). Petitioner filed a request for a CPC after the denial of habeas corpus. *Id.* at 912. The district court granted the CPC despite its belief that the petition for habeas corpus was correctly denied. *Id.* at 913. The court believed that some of the petitioner's issues, specifically the validity of the line-up, were not frivolous and were entitled to appellate review. *Id.* at 913.

389. *Barefoot*, 463 U.S. at 893 n.4. See also *Gordon*, 516 F. Supp. at 913 (citing U.S. *ex. rel. Jones v. Richmond*, 245 F.2d 234 (2d Cir. 1957), *cert. denied*, 355 U.S. 846 (1957)).

390. 1 HERTZ & LIEBMAN, *supra* note 15, § 3.2, at 112-15; LARRY W. YACKLE, POSTCONVICTION REMEDIES § 160, at 586 (1981).

Except for substituting “constitutional” for “federal,” the Supreme Court determined in *Slack v. McDaniel*<sup>391</sup> that the AEDPA is a codification of the CPC standard established in *Barefoot*.<sup>392</sup> Because the AEDPA standard is a codification of the CPC, it should assume the same meaning that was previously established.<sup>393</sup> Consequently, the standard for issuance of a COA when a court denies a constitutional claim on the merits is straightforward: “The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”<sup>394</sup>

### *C. Discriminatory Use of Peremptory Strikes*

Many attorneys consider jury selection critical to winning or losing a case.<sup>395</sup> As a result, large amounts of money and time are put towards finding the client’s ideal jury instead of an impartial jury.<sup>396</sup> Members of the venire can only be excused by either a challenge for cause or a peremptory challenge.<sup>397</sup>

Challenges for cause are granted if either:

- (1) that juror explicitly admits he or she cannot be impartial due to a personal belief, prejudice, or bias for or against one of the parties, or about the case in general; or
- (2) the judge determines from the juror’s answers during the voir dire that the juror is unable or unwilling to decide the case on the basis of the evidence and the law.<sup>398</sup>

The challenge for cause has been considered a component of the Sixth Amendment “right to a fair trial by an impartial jury” and is constitutionally guaranteed.<sup>399</sup>

Peremptory challenges are the only available method to excuse jurors without showing or demonstrating cause.<sup>400</sup> These challenges have existed since at least

391. *Slack v. McDaniel*, 529 U.S. 473 (2000). Petitioner brought a federal habeas corpus petition in district court. *Id.* at 478. The court dismissed his petition without prejudice because he failed to exhaust all available state remedies. *Id.* After unsuccessfully returning to state court, he again brought a federal habeas corpus petition. *Id.* at 479. It was also denied. *Id.* The district court held that it was “[a] second or successive petition” and “invoked the abuse of writ doctrine to dismiss with prejudice” all claims the petitioner failed to raise in the original federal habeas corpus petition. *Id.* Petitioner then filed a Notice of Appeal which courts treat as a CPC. *Id.* at 480. The district court and the Ninth Circuit Court denied the petitioner’s request for a CPC. *Id.* The Supreme Court held that when a petitioner’s claims have been denied solely on procedural grounds, a COA should be issued if it “states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 484. The Court determined that except for substituting the word “constitutional” for “federal” the COA is a codification of the substantial showing standard established in *Barefoot* for the CPC. *Id.*

392. *Id.* at 483.

393. *Id.*

394. *Id.* at 484.

395. Brown, *supra* note 13, at 379.

396. *Id.*

397. Shari Seidman Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL’Y 77, 78 (1997).

398. *Id.*

399. U.S. CONST. amend. VI; Diamond et al., *supra* note 61, at 78.

400. Brown, *supra* note 13, at 383.

1790 and are incorporated into both federal and state statutory jury procedures.<sup>401</sup> Their purpose is to provide “challenges without cause, without explanation and without judicial scrutiny” in the hopes of selecting impartial juries.<sup>402</sup> Unlike the challenge for cause, the peremptory challenges are not considered to be guaranteed by the Constitution.<sup>403</sup>

Because peremptory challenges traditionally were used at the sole discretion of the attorney, it was easy for attorneys to manipulate the outcome of the trial and discriminate against minorities.<sup>404</sup> The Supreme Court found that this type of prosecutorial discrimination “casts doubt on the integrity of the judicial process,”<sup>405</sup> “places the fairness of a criminal proceeding in doubt,”<sup>406</sup> and “invites cynicism respecting the jury’s neutrality.”<sup>407</sup> In addition, the Court noted that “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”<sup>408</sup>

To deal with the discrimination, Congress passed the Civil Rights Act of 1875, which prohibited excluding minorities from jury service because of race.<sup>409</sup> In 1879, the Supreme Court decided *Strauder v. West Virginia*,<sup>410</sup> where a West Virginia statute that disqualified African Americans for jury service was held to be unconstitutional because it violated the African American defendant’s right to equal protection of the laws.<sup>411</sup> The *Strauder* Court enumerated the purpose of the Equal Protection Clause as “assur[ing] to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons ....”<sup>412</sup> Excluding African Americans from jury service denied the race “the right to participate in the administration of justice.”<sup>413</sup> This decision represented the first time the Court recognized the right of African Americans to serve on juries, albeit indirectly through the rights of the defendant.<sup>414</sup>

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401. Diamond et al., *supra* note 61, at 79.

402. Swain v. Alabama, 380 U.S. 202, 212 (1965).

403. Diamond et al., *supra* note 61, at 79.

404. Brown, *supra* note 13, at 384-85.

405. Rose v. Mitchell, 443 U.S. 545, 556 (1979). Petitioners brought a habeas corpus claim alleging that they were victims of racial discrimination in the selection of the foreman of the grand jury that indicted them for murder. *Id.* at 547. The Court held that discriminatory practices in the selection of a grand jury foreman are sufficient to set aside a criminal conviction. *Id.* at 559. However, in the instant case the petitioners failed to make a prima facie case of discrimination, and therefore their convictions were upheld. *Id.* at 574.

406. Powers v. Ohio, 499 U.S. 400, 411 (1991). The petitioner, a white man, brought a petition for habeas corpus relief because the prosecution used peremptory strikes to exclude all potential black jurors. *Id.* at 403. The Supreme Court held that it was irrelevant that the petitioner was the same race as his jury and the racial discrimination employed by the prosecutor violated the petitioner’s equal protection rights. *Id.* at 415-16.

407. *Id.* at 412.

408. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

409. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 892 (1994).

410. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

411. *Id.* at 307; Alschuler & Deiss, *supra* note 73, at 892-93.

412. *Strauder*, 100 U.S. at 306.

413. Brown, *supra* note 13, at 390.

414. Alschuler & Deiss, *supra* note 73, at 892-94.

The continued discrimination in juror selection and the use of peremptory challenge continued for nearly a century after the Civil Rights Act.<sup>415</sup> In 1965, the Supreme Court decided *Swain v. Alabama*,<sup>416</sup> in which the Court recognized the discriminatory use of peremptory challenges for the first time.<sup>417</sup> The Court determined that eliminating African Americans solely for reasons unrelated to the particular case would violate the “right and opportunity to participate in the administration of justice,” and was therefore unconstitutional.<sup>418</sup> However, the Court did not put forth a viable standard to stop the abusive use of peremptory challenges.<sup>419</sup> Instead, the standard created was too stiff for most defendants to meet. It required the defendant to prove systematic discrimination by the prosecutor over a period of time,<sup>420</sup> a nearly impossible task for a single defendant.<sup>421</sup> The underlying rationale for establishing a standard this rigorous was to protect the primary purpose of having challenges that were at the sole discretion of the attorney, and not based on any justifiable explanation.<sup>422</sup>

The Supreme Court did not revise the standard established in *Swain* until 1986, when *Batson v. Kentucky* was decided.<sup>423</sup> *Batson* prohibited prosecutors from using race as a basis for excluding jurors who were the same race as the defendant.<sup>424</sup> The Court justified its decision on the basis of an Equal Protection violation.<sup>425</sup> The Court held that peremptory challenges based on the assumption that African Americans were unable to be impartial against someone of the same race was impermissible.<sup>426</sup> The Court reasoned that the constitutional protection given to suspect classes was greater than the right to peremptory challenges.<sup>427</sup> Consequently, defendants now only have to prove the prosecutor used the challenges in a discriminatory manner in their particular jury selection, rather than proving the prosecutor’s historical pattern of discrimination.<sup>428</sup>

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415. Alschuler & Deiss, *supra* note 73, at 894.

416. *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, an African American was sentenced to death after being convicted of rape. *Id.* at 203. No African Americans had served on a petit jury in the county in which he was tried since 1950. *Id.* at 205. All African American jurors who were not excused for cause were eliminated by the prosecutor’s peremptory strikes. *Id.* The Court held that striking African Americans with the use of peremptory challenges in one case is not a denial of equal protection. *Id.* at 227. The systematic striking of African Americans can support a discrimination claim, but the burden of proof is on the petitioner and it must be proved that the State is responsible for the exclusion. *Id.*

417. *Brown*, *supra* note 13, at 391.

418. Alschuler & Deiss, *supra* note 73, at 897.

419. *Brown*, *supra* note 13, at 391.

420. *Id.* at 391-92.

421. *Id.* at 392-93.

422. *Id.* at 392.

423. *Brown*, *supra* note 13, at 393.

424. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); Diamond et al., *supra* note 61, at 79.

425. *Batson*, 476 U.S. at 89; *Brown*, *supra* note 13, at 393.

426. *Batson*, 476 U.S. at 89; *Brown*, *supra* note 13, at 393. The Supreme Court has since extended the reach of *Batson* to include challenges by all races and genders. *Id.* at 395 (citing *Powers v. Ohio*, 499 U.S. 400 (1991); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)).

427. *Brown*, *supra* note 13, at 393.

428. *Id.* at 394.

The Court created a three-part standard to evaluate possible violations.<sup>429</sup> The first step requires the defendant to establish purposeful discrimination, that the prosecutor used peremptory strikes in a discriminatory manner.<sup>430</sup> Purposeful discrimination is established by the following elements:

1. [defendant] was a member of a cognizable racial group;
2. the prosecutor had exercised peremptory challenges to remove from the venire members of defendant's race ...; and
3. the facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.<sup>431</sup>

Once this is established, the burden shifts to the prosecutor to provide race-neutral explanations.<sup>432</sup> Finally, the judge must decide whether the prosecutor's explanations refute the alleged discrimination.<sup>433</sup>

Since the *Batson* decision, there have been numerous cases defining and expanding its holding.<sup>434</sup> Changes include applying the *Batson* standard to defense attorneys<sup>435</sup> and civil cases,<sup>436</sup> eliminating the requirement that the excluded juror be the same race as the defendant,<sup>437</sup> and expanding it to include gender discrimination.<sup>438</sup> However, some suggest that *Batson* and its progeny are not an effective means of eliminating racial discrimination from the jury selection process.<sup>439</sup> Peremptory challenges can be made for any reason, even just a hunch, so long as that hunch is not based on race or gender.<sup>440</sup> The very nature of these challenges is ambiguous and when called upon, the judge must distinguish legitimate explanations from false explanations that conceal illegitimate uses of the challenge.<sup>441</sup>

### III. STATEMENT OF THE CASE

#### *A. Factual Background*

On November 15, 1985, Thomas Miller-El, Dorothy Miller-El, and Kenneth Flowers robbed the Holiday Inn South located in Dallas, Texas.<sup>442</sup> Dorothy Miller-

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429. *Batson*, 476 U.S. 96-98; Diamond et al., *supra* note 61, at 80.

430. *Batson*, 476 U.S. at 96.

431. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988) [hereinafter *Miller-El I*], *rev'd*, 537 U.S. 322 (2003) (citing *Batson*, 476 U.S. at 96.).

432. *Batson*, 476 U.S. at 97.

433. *Id.* at 98.

434. Diamond et al., *supra* note 61, at 79-80.

435. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

436. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

437. *Powers*, 499 U.S. at 402.

438. *J. E. B. v. Alabama*, 511 U.S. 127, 128-29 (1994).

439. Diamond et al., *supra* note 61, at 81.

440. *Id.* at 81-82.

441. *Id.* at 82.

442. *Miller-El v. Johnson*, 261 F.3d 445, 447 (5th Cir. 2001) [hereinafter *Miller-El IV*], *rev'd*, 537 U.S. 903 (2003); Brief for Respondent at 1, *Miller-El VI* (No. 01-7662).

El, who was a previous employee of the Holiday Inn, had stopped by to pick up her paycheck and was given access to the office near the vault.<sup>443</sup> While Dorothy Miller-El was in the office, she asked Mohamed Ali Karimijoji, who was in a locked area closing out the cash registers, to wait with her until her ride arrived.<sup>444</sup> Karimijoji refused, and sent her to the front desk for help.<sup>445</sup> Three or four hours later, Thomas Miller-El requested a room from Donald Hall, one of four employees on duty that night.<sup>446</sup> Kenneth Flowers waited around the corner and approached the desk only after Donald Hall spotted him.<sup>447</sup> At that point both Thomas Miller-El and Kenneth Flowers produced weapons.<sup>448</sup> Thomas Miller-El carried a semi-automatic “tech” nine-millimeter machine gun and Kenneth Flowers had a .45 caliber hand gun.<sup>449</sup>

Thomas Miller-El instructed Hall to empty the cash drawer and bring any other employees to the front.<sup>450</sup> Hall complied by placing all the money on the counter and instructed Doug Walker to come to the front.<sup>451</sup> Flowers then opened the door to let Dorothy Miller-El, who had been waiting out of sight, into the back room where she assisted him in removing the motel’s safe.<sup>452</sup> Hall and Walker were then instructed to open a bellman’s closet, where they were forced to lie on the floor while Thomas Miller-El and Flowers removed all valuables from their wallets.<sup>453</sup> Thomas Miller-El then tied and gagged Walker while Flowers tied and gagged Hall.<sup>454</sup> When Thomas Miller-El asked Flowers if he was going to “do it,” Flowers replied that he could not and left the room.<sup>455</sup> Thomas Miller-El then removed Walker’s glasses, stood at his feet, and shot him in the back two times followed by one shot into Hall’s side.<sup>456</sup> The shot fired into Hall severed his spine causing him to become a paraplegic.<sup>457</sup> Walker was killed immediately.<sup>458</sup> Shortly after, Thomas Miller-El (“Miller-El”) was arrested and charged with capital murder during the course of committing a robbery.<sup>459</sup> He pleaded not guilty.<sup>460</sup>

Jury selection began in February 1986 and lasted for five weeks.<sup>461</sup> Miller-El contended that the prosecution used jury selection devices, specifically peremptory challenges, the jury shuffle, disparate questioning, and for-cause challenges to strike

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443. *Miller-El IV*, 261 F.3d at 447.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.* at 447-48.

450. *Id.* at 448.

451. *Id.*

452. *Miller-El v. State*, 782 S.W.2d 892, 894 (Tex. Crim. App., 1990) [hereinafter *Miller-El II*].

453. *Miller-El v. Johnson (Miller-El IV)*, 261 F.3d 445, 448 (5th Cir. 2001), *rev’d*, 537 U.S. 322 (2003).

454. *Id.*

455. *Id.*

456. *Id.*; *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 328 (2003).

457. Brief for Respondent at 2, *Miller-El IV* (No. 01-7662).

458. *Id.*

459. *Miller-El IV*, 261 F.3d at 448.

460. *Id.*

461. *Miller-El VI*, 537 U.S. at 328.



ten of the eleven eligible African Americans from the venire.<sup>462</sup> The prosecution used 91% of its eligible strikes against African Americans.<sup>463</sup> It was well documented that racial discrimination was historically widespread in the jury selection practices of Dallas County, Texas.<sup>464</sup> Both prosecutors in Miller-El's case were trained under a manual that instructed the exclusion of "any member of a minority group which may subject him to oppression" and taught that "minority races almost always empathize with the Defendant."<sup>465</sup> The petitioner also refers to a study conducted by the *Dallas Morning News*, showing that during the 1980s prosecutors eliminated 92% of African Americans by using peremptory strikes. In capital cases, the percentage increased to 98%.<sup>466</sup>

Jury shuffles were also used to reduce the number of African Americans who would have to answer questions in voir dire.<sup>467</sup> Each week forty to fifty potential jurors were called to appear.<sup>468</sup> Approximately six members were questioned every day during voir dire.<sup>469</sup> Those not questioned were released.<sup>470</sup> The jury shuffle occurs before the questioning begins and reorders the forty to fifty potential jurors by shuffling their juror card numbers and then reseating them.<sup>471</sup> Jury shuffles were commonly requested by the prosecution when a large number of African Americans were present in the front of the panel.<sup>472</sup>

Disparate questioning occurs when different questions are asked to members of different races during individual voir dire in an attempt to draw out a for cause challenge or legitimate basis for a peremptory strike.<sup>473</sup> During the jury selection for the Miller-El trial the prosecutors engaged in this practice. Prior to asking 53% of the African American potential jurors about their views on the death penalty, the prosecution gave them an explicit account of the execution procedure.<sup>474</sup> This detailed description was only given to 6% of Caucasians.<sup>475</sup> In Texas, a juror's inability to administer the minimum sentencing is another basis for excusing the potential jurors for cause.<sup>476</sup> When questioned about minimum sentences, 94% of whites were told that the sentence could be as light as 5 years whereas only 12.5% of African Americans were given this information.<sup>477</sup>

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462. Brief for Petitioner at 2, *Miller-El IV* (No. 01-7662).

463. *Id.* at 6. A total of fifteen strikes were given to each side. *Id.* at 6 n.3. The Prosecution used ten of these strikes against African Americans, four of the strikes were against non-African Americans and one strike was unused. *Id.*

464. *Id.* at 3.

465. *Id.* at 4.

466. *Id.* at 4-5.

467. *Id.* at 11.

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.* at 12.

473. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 344 (2003).

474. *Id.*

475. *Id.*

476. *Id.* at 345.

477. *Id.*

The prosecution explained that the appearance of different treatment was only because more African American panelists were opposed to the death penalty than non-minority panelists.<sup>478</sup> Also, prosecutors provided “race-neutral, case-related reasons” for each of the ten African Americans removed by peremptory challenges.<sup>479</sup> Ultimately a jury of two white males, seven white females, an African American male, a Filipino American male and a Latino male was selected.<sup>480</sup> On March 24, 1986, the jury found Miller-El guilty and sentenced him to death.<sup>481</sup>

### *B. Procedural History*

#### *1. Lower Court Rulings*

Before the trial, Miller-El moved to strike the jury due to racially discriminatory practices used by the prosecution that violated his Equal Protection rights under the Fourteenth Amendment.<sup>482</sup> At this time, the controlling standard had been established by the Supreme Court’s decision in *Swain v. Alabama*.<sup>483</sup> Miller-El’s motion was denied when the trial court judge found “no evidence ... that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney’s office.”<sup>484</sup>

While on appeal after the conviction, the Supreme Court decided *Batson v. Kentucky*, which established a three-part framework for evaluating the race-based use of peremptory challenges.<sup>485</sup> The Texas Court of Criminal Appeals determined that Miller-El satisfied the requirements of purposeful discrimination because: (1) he is an African American, (2) the prosecutors used 10 of 14 peremptory challenges to remove African Americans, and (3) the skewed number of strikes created an inference of discrimination by leaving only one African American left to be seated on the jury.<sup>486</sup> The court then remanded the case back to the trial court for a hearing to determine whether the prosecutor’s actions were racially motivated.<sup>487</sup> The trial court concluded that the evidence Miller-El put forward was not sufficient to meet even the first step under the *Batson* test because it failed to “raise an inference of racial motivation in the use of the state’s peremptory challenges.”<sup>488</sup> The trial court also concluded that even if Miller-El did raise an inference of racial motivation, he would have failed all of the remaining steps, because the prosecution had put forth

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478. Brief for Respondent at 1, *Miller-El IV* (No. 01-7662). The prosecution uses the juror questionnaires to support this contention. *Id.*

479. *Id.* at 3.

480. *Id.* at 1.

481. *Miller-El v. Johnson (Miller-El IV)*, 261 F.3d 445, 448 (5th Cir. 2001), *rev’d*, 537 U.S. 322 (2003).

482. *Miller-El VI*, 537 U.S. at 328.

483. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 328 (2003).

484. *Id.*

485. *Id.*

486. *Miller-El v. State (Miller-El I)*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988), *rev’d*, 537 U.S. 322 (2003).

487. *Id.*

488. *Miller-El VI*, 537 U.S. at 329.

a “credible, race-neutral explanation” for each juror excluded.<sup>489</sup> Ultimately, the Texas Court of Criminal Appeals accepted the trial court’s findings and affirmed the conviction and sentence in an unpublished decision.<sup>490</sup> The Supreme Court denied Miller-El’s petition for writ of certiorari.<sup>491</sup>

Next, Miller-El filed his petition for habeas corpus relief in federal district court under 28 U.S.C. § 2254, in which he raised the issue of improper peremptory strikes during jury selection.<sup>492</sup> The United States District Court for the Northern District of Texas denied the petition for a writ of habeas corpus.<sup>493</sup> The district court adopted the findings and recommendations of the Federal Magistrate Judge to deny the habeas petition.<sup>494</sup> In regards to the *Batson* claim, the district court determined that the Magistrate Judge was correct in deferring to the “experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.”<sup>495</sup> Despite being concerned over some of the evidence Miller-El presented, the Federal Magistrate judge deferred to the state court’s acceptance of the race-neutral explanations offered by the prosecutors.<sup>496</sup>

Miller-El sought a COA from the district court under 28 U.S.C. § 2253 (c)(2), which was denied.<sup>497</sup> After the district court’s denial, Miller-El then requested a COA from the United States Court of Appeals for the Fifth Circuit.<sup>498</sup> On appeal, petitioner argued that the decisions of the lower courts reflected an “unreasonable application of *Batson*” and that the courts did not “give proper weight and credit to the evidence which petitioner presented regarding the historical data.”<sup>499</sup> The Fifth Circuit Court of Appeals followed the *Barefoot* standard for granting a COA but added the requirements of 28 USC § 2254.<sup>500</sup> This required the court to give great deference to the state court findings unless petitioner could establish by clear and convincing evidence that the state court findings were “unreasonable in light of the evidence presented.”<sup>501</sup> As a result, the appeals court determined that the lower court was correct in denying Miller-El’s application for a COA, because Miller-El failed to present clear and convincing evidence of any unreasonable determination made by the state court.<sup>502</sup>

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489. *Id.*

490. *Miller-El IV*, 261 F.3d at 448.

491. *Miller-El VI*, 537 U.S. at 329.

492. *Miller-El v. Johnson (Miller-El IV)*, 261 F.3d 445, 449 (5th Cir. 2001), *rev’d* 537 U.S. 322 (2003). Miller-El’s petition for habeas appeal raised four issues: improper peremptory strikes, competency to stand trial, failure to conduct a competency hearing, and admission of evidence related to his affiliation with the Moorish Science Temple during sentencing. *Id.*

493. *Id.*

494. *Id.*

495. *Miller-El v. Johnson*, No. 3:96-CV-1992-H, 2000 U.S. Dist. LEXIS 7763, at \*6 (N.D. Tex. June 5, 2000) [hereinafter *Miller-El III*].

496. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 330 (2003).

497. *Id.*

498. *Miller-El IV*, 261 F.3d at 449.

499. *Id.* at 451.

500. *Miller-El VI*, 537 U.S. at 330-32.

501. *Id.* at 331.

502. *Id.*

## 2. Supreme Court Ruling

Miller-El petitioned the United States Supreme Court for a writ of certiorari.<sup>503</sup> It was granted on March 4, 2002 but was limited to the following question: “Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner’s claim under *Batson v. Kentucky*?”<sup>504</sup>

### i. Majority Opinion

The Supreme Court reversed the decision of the Fifth Circuit and found that a COA should have been issued, because the district court’s decision was debatable.<sup>505</sup> When the Court applied these rules to the court of appeals’ denial of Miller-El’s application for a COA, it determined the court of appeals erred in several ways.<sup>506</sup> The court of appeals applied too demanding of a standard when it merged the independent requirements of § 2254(d)(2) and § 2254(e)(1), requiring the petitioner to prove the decision was objectively unreasonable by clear and convincing evidence, with the COA standard of § 2253.<sup>507</sup> In addition, the court of appeals was wrong in accepting the state court’s determination of the prosecutor’s demeanor and credibility simply because the state court was entitled to great deference.<sup>508</sup>

The AEDPA standard requires only a “substantial showing of the denial of a constitutional right.”<sup>509</sup> This standard prohibits an extensive evaluation of the merits of factual and legal issues presented in the petitioner’s claim.<sup>510</sup> The Supreme Court determined that the Fifth Circuit was incorrect to add the requirements of § 2254 to the COA standard laid out in § 2253.<sup>511</sup> Doing this required the court to look extensively at the underlying claim, which was too demanding.<sup>512</sup> In the Court’s analysis, the separation is justified because § 2254 applies only to the granting of habeas relief and not to the granting of the COA.<sup>513</sup> Therefore, neither the clear and convincing evidence standard found under § 2254(e)(1) nor the unreasonableness standard under § 2254(d)(2) should be considered in granting a COA.<sup>514</sup>

The Court explained that by using the more demanding standard, the lower court in effect decided the appeal on the merits, undermining the purpose of the COA and violating federal law.<sup>515</sup> The COA is required for the court to have jurisdiction over the merits appeal.<sup>516</sup> By overlooking the COA standard and deciding the appeal on the merits, the lower court acted without having determined whether it had

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503. *Miller-El v. Cockrell*, 535 U.S. 903, 904 (2002) [hereinafter *Miller-El VI*].

504. *Id.*

505. *Miller-El VI*, 537 U.S. at 348.

506. *Id.* at 341.

507. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 342 (2003).

508. *Id.*

509. 28 U.S.C.S. § 2253(c)(2) (2003).

510. *Miller-El VI*, 537 U.S. at 336-37.

511. *Id.* at 348.

512. *Id.* at 341.

513. *Id.*

514. *Id.*

515. *Id.* at 336-37.

516. *Id.* at 336.

jurisdiction.<sup>517</sup> The likelihood of the appeal's success is irrelevant. A COA can be granted even when ultimate relief is uncertain or unlikely.<sup>518</sup> The standard is the debatability of the constitutional claim, not the resolution of that debate.<sup>519</sup>

While the standard for issuance is low, the Court maintained that certificates of appealability should not be granted in every case.<sup>520</sup> It is merely a threshold inquiry that was intended to eliminate only the frivolous claims in the growing number of habeas petitions.<sup>521</sup> The Court stressed that the COA should not become "*pro forma* or a matter of course," but should still eliminate the frivolous claims that do not deserve the attention of the courts.<sup>522</sup> The appeals court evaluated the merits of his constitutional claim but never made a separate determination for issuing a COA.<sup>523</sup>

The Court had to consider the *Batson* three-step analysis at a preliminary level in order to determine if Miller-El had brought sufficient evidence to make a substantial showing as required by the COA standard.<sup>524</sup> The State conceded that Miller-El satisfied the first step and established a *prima facie* claim.<sup>525</sup> Miller-El conceded that the State satisfied the second step by putting forth race-neutral explanations.<sup>526</sup> The Court then focused on the third step—whether the petitioner proved purposeful discrimination.<sup>527</sup>

The Supreme Court in *Purkett v. Elem*<sup>528</sup> confirmed the standard for proving purposeful discrimination.<sup>529</sup> Purposeful discrimination can be shown through the prosecutor's credibility or how believable the race-neutral justifications are.<sup>530</sup> Credibility is evaluated by looking at "the prosecutor's demeanor[,] by how ... improbable the explanations are[,] and by whether the ... rationale [is based on an] accepted trial strategy."<sup>531</sup> In *Hernandez v. New York*,<sup>532</sup> the Court found that the

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517. Miller-El v. Cockrell (*Miller-El VI*), 537 U.S. 322, 342 (2003).

518. *Id.* at 347.

519. *Id.* at 341.

520. *Id.* at 337.

521. *Id.* at 337.

522. *Id.* at 338. Frivolous claims are those where the petitioner cannot prove that his claim has been brought in "good faith" or has some level of substance above "frivolity." *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.* at 338-39.

527. Miller-El v. Cockrell (*Miller-El VI*), 537 U.S. 322, 338-39 (2003).

528. *Purkett v. Elem*, 514 U.S. 765 (1995). The respondent was convicted of murder. *Id.* at 766. During the jury selection, the prosecutor excused two black men from the jury panel. *Id.* Respondent filed a petition for habeas relief which was denied by the district court because there was no purposeful discrimination. *Id.* at 766-67. The Supreme Court determined that the state court's finding of no racial motive was not supported by the record and the appellate courts improperly focused on the reasonableness of the motive instead of the genuineness of the motive. *Id.* at 769.

529. *Miller-El VI*, 537 U.S. at 338-39.

530. *Id.* at 339.

531. *Id.*

532. *Hernandez v. New York*, 500 U.S. 352 (1991). Hernandez claimed that the prosecutor excluded Latino men. *Id.* at 355. The proffered explanation was that these individuals were bilingual and often looked away from him or hesitated before responding which raised concerns that they might not be able to follow the interpreter. *Id.* at 356. The court rejected Hernandez's claim giving deference to the trial court's determination. *Id.* at 364-65.

credibility determination was a pure issue of fact.<sup>533</sup> Issues of fact determined by lower courts are given great deference.<sup>534</sup>

Deference is traditionally given to lower courts' rulings on issues of fact because there is little evidence to review and because it is a credibility determination that is best made by a judge who was present.<sup>535</sup> Federal law also requires that when state courts determine issues of fact, they are presumed to be correct.<sup>536</sup> To outweigh this presumption, clear and convincing evidence to the contrary must be shown.<sup>537</sup> When a decision is based on a factual determination, federal law requires evidence that the decision is objectively unreasonable in light of the evidence presented in the state-court proceeding to overturn it.<sup>538</sup> The Court, however, makes it clear that this deference should not result in "abandonment or abdication of judicial review."<sup>539</sup> When a federal court is guided by the AEDPA principals, it can disagree with and not accept a state court's factual determination.<sup>540</sup> In the instant case, the Court determined that issuance of a COA could have been justified by "any evidence" that the prosecutor's "peremptory strikes ... were race based."<sup>541</sup>

The relevant question for granting Miller-El a COA then became whether the district court's application of deference was debatable among jurists.<sup>542</sup> The Court concluded that Miller-El easily met the minimum needed to grant him a COA.<sup>543</sup> In fact, the Court concluded that the statistical evidence alone was enough to support the contention that discriminatory peremptory strikes may have been used and that the state court's factual determination should not be given great deference.<sup>544</sup>

The Court then continued using the analysis of the third step of the *Batson* framework.<sup>545</sup> It concluded that the state's race neutral explanations of the disparate treatment did not detract from the debatability.<sup>546</sup> When the record was evaluated, it appeared that prosecutors deliberately questioned African Americans to draw out answers that would justify their removal.<sup>547</sup> A comparative juror analysis revealed that some of the rationales given for the challenged African Americans applied equally to whites.<sup>548</sup> Also, the Court concluded that the petitioner's additional evidence of historical discrimination and questionable jury shuffle practices supported the conclusion that jurists of reason could disagree with the district

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533. *Id.* at 364.

534. *Miller-El VI*, 537 U.S. at 339-40.

535. *Id.* at 339 (citing *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

536. *Id.* at 340.

537. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 340 (2003); 28 U.S.C. § 2254(e)(1) (2000).

538. *Miller-El VI*, 537 U.S. at 340; 28 U.S.C. § 2254(d)(2) (2000).

539. *Miller-El VI*, 537 U.S. at 340.

540. *Id.*

541. *Id.* (emphasis added).

542. *Id.*

543. *Id.* at 341.

544. *Id.* Statistical evidence showed that the prosecutors used peremptory strikes to exclude 91% of the eligible African Americans. *Id.* at 342.

545. *Id.* at 342-43.

546. *Id.* at 343.

547. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 343 (2003).

548. *Id.*

court's decision.<sup>549</sup> The majority opinion expressed its concern over the inability for the state trial court to find an inference of discrimination in what it saw as a clear case.<sup>550</sup>

The case was remanded for further proceedings.<sup>551</sup> The Fifth Circuit Court of Appeals now must evaluate whether Miller-El can successfully establish by clear and convincing evidence that the state court's ruling is incorrect as required by 28 USC §2254(e)(1) for habeas relief.<sup>552</sup>

*ii. Justice Scalia Concurring Opinion*

Justice Scalia did not join the majority's opinion for two reasons.<sup>553</sup> First, Justice Scalia wanted to clarify what he believed to be the reasoning behind the majority opinion that corrected the lower court's application of the AEDPA standard.<sup>554</sup> Second, Justice Scalia wanted to evaluate the evidence not addressed by the majority that supported the State's argument.<sup>555</sup>

Justice Scalia explained that many circuits were improperly denying applications for the COA because they applied too rigorous of a standard when they merged the requirements of § 2253 and § 2254 together.<sup>556</sup> The result was a decision on the merits of the claim and not on whether the petitioner had made a substantial showing as required by the AEDPA.<sup>557</sup> The majority opinion emphasized that the issuing judge or justice must evaluate "*the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason."<sup>558</sup>

Scalia pointed out that the AEDPA has no relationship to the substantial showing standard in § 2253(c)(2), an issue that the majority does not directly address.<sup>559</sup> Just because a petitioner has made a substantial showing, does not guarantee that a COA would be granted.<sup>560</sup> Because the substantial showing standard is not an exclusive factor, other requirements can be imposed, Scalia argued.<sup>561</sup> The majority opinion adds the requirement that a COA must be denied "if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief."<sup>562</sup> Therefore, according to Justice Scalia, the relevant question is actually whether the

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549. *Id.* at 343-46.

550. *Id.* at 347-48.

551. *Id.* at 348.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.* at 350.

557. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 348 (2003).

558. *Id.* at 336 (emphasis added).

559. *Id.* at 350.

560. *Id.*

561. *Id.* The court has previously imposed the requirement that when a habeas claim was denied on procedural grounds the petitioner must establish that the court's procedural ruling was debatable in addition to the denial of a constitutional right. *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

562. *Id.*

“petitioner has made a substantial showing of a *Batson* violation *and* also whether reasonable jurists could debate petitioner’s ability to obtain habeas relief in light of AEDPA.”<sup>563</sup>

Faced with this question, Justice Scalia looked to the facts in *Miller-El* to support a *Batson* violation.<sup>564</sup> Ultimately, Scalia determined that the debatability was very close rather than clear cut as suggested by the majority.<sup>565</sup> Differing from the majority, Scalia applied the standard established in § 2254(e)(1).<sup>566</sup> Doing so would have required Miller-El to put forth a substantial showing of clear and convincing evidence that the state court’s finding were incorrect and should be overturned.<sup>567</sup>

The comparative juror analysis that Scalia employed to evaluate the evidence put forth by *Miller-El* was one commonly used to prove discrimination in *Batson* cases.<sup>568</sup> A comparative juror analysis identifies similarities in unchallenged white jurors to African Americans who were excused by a peremptory strike.<sup>569</sup> The voir dire transcripts revealed that it was only arguable that white jurors were not excused when exhibiting the same or stronger opinions than the excluded African Americans.<sup>570</sup>

iii. *Justice Thomas Dissenting Opinion*

Justice Thomas dissented on the grounds that the § 2254(e)(1) standard can not be ignored when evaluating whether to grant the COA.<sup>571</sup> Accordingly, Miller-El’s appeal should have been denied because he failed to present clear and convincing evidence that any of the strikes were the result of race.<sup>572</sup>

The majority did not integrate the standard of § 2254 into the COA determination, because it viewed it as a separate proceeding.<sup>573</sup> Justice Thomas suggested that the majority’s justification for this conclusion was based on the ruling in *Slack*.<sup>574</sup> However, according to the dissent, this case differed from the ruling in *Slack*, because it marked the first time that the Court ever addressed a claim based entirely on fact.<sup>575</sup>

Thomas viewed the COA as part of the habeas corpus proceeding.<sup>576</sup> If the COA was part of the habeas proceeding, then the clear and convincing evidence requirement in § 2254 would have applied in the COA determination.<sup>577</sup> To support this conclusion, Thomas pointed out that § 2254(e) does not make a “distinction

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563. *Id.* (emphasis added).

564. *Id.*

565. *Id.*

566. *Id.*

567. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 350 (2003).

568. *Id.* at 351.

569. *Id.* at 351-54.

570. *Id.*

571. *Id.* at 354.

572. *Id.* at 354-55.

573. *Id.* at 355.

574. *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

575. *Id.*

576. *Id.* at 356.

577. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 355 (2003).



between the merits of the appeal and the COA.”<sup>578</sup> In fact, because the COA is a “jurisdiction prerequisite[, it] requires that *both* the COA determination *and* the merits appeal be considered part of the same ‘proceeding.’”<sup>579</sup>

Thomas argued that pre-AEDPA practices do not support the majority’s interpretation.<sup>580</sup> Just as the COA replaced the CPC, § 2254(e)(1) replaced a prior statute giving state court’s factual determinations deference.<sup>581</sup> Under the pre-AEDPA and post-AEDPA regulations, the deference requirement was held to apply directly to the CPC (or COA) determination.<sup>582</sup>

Thomas then examined the evidence in *Miller-El* to determine if it met the clear and convincing criteria necessary for purposeful discrimination.<sup>583</sup> In this search, Justice Thomas never considered the statistical evidence, which was sufficient to meet the threshold inquiry standard in the view of the majority.<sup>584</sup> Justice Thomas wrote off the evidence of historical discrimination and the improper use of the jury shuffle as circumstantial evidence entitled to little weight.<sup>585</sup> When evaluating the similarities between the white jurors who were not struck to African American jurors who were struck, Justice Thomas deferred to Justice Scalia’s analysis of the evidence.<sup>586</sup> However, he disagreed with Justice Scalia’s ultimate conclusion that it was a close case, and stated that this evidence made it a losing case.<sup>587</sup> Justice Thomas discounted evidence of the disparate treatment because when viewing “all available evidence,” he determined that race had no bearing in the type of questioning the potential juror received.<sup>588</sup> The different questioning was directly correlated to each juror’s level of certainty in responding to questions about the death penalty.<sup>589</sup>

#### IV. ANALYSIS

Instead of neutral principles controlling capital convictions, emotions and politics often play a large role. Unfortunately, this results in unfair or even erroneous convictions. In 2003, Illinois Governor George Ryan granted clemency to 156 death row inmates because our capital system is “haunted by the demon of error.”<sup>590</sup> Establishing solid neutral procedures is one way of reducing the error in the system by decreasing the ability for emotion and politics to play a role in the criminal

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578. *Id.* at 356.

579. *Id.*

580. *Id.*

581. *Id.* at 356-57.

582. *Id.* at 357. *See, e.g.,* Barnard v. Collins, 13 F.3d 871, 876-877 (5th Cir. 1994) (holding that the state court’s factual finding regarding the defendant’s competency to be executed was supported by the record and entitled to a presumption of correctness); Cordova v. Collins, 953 F.2d 167, 171 (5th Cir. 1992) (finding that the petitioner did not overcome the presumption of correctness in regards to the exculpatory evidence).

583. *Miller-El VI*, 537 U.S. at 360-61.

584. *Id.* at 357-369.

585. *Id.* at 360.

586. *Id.*

587. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 360-61 (2003).

588. *Id.* at 365.

589. *Id.* at 365-66.

590. Robert E. Pierre & Kari Lydersen, *Illinois Death Row Emptied: Citing ‘Demon of Error,’ Ryan Commutes Sentences*, WASH. POST, Jan. 12, 2003, at A1.

proceedings. *Miller-El* is another example of the Court expanding defendant's rights in pursuit of unbiased procedures in capital cases.<sup>591</sup>

*Miller-El* creates no new law but is an important step in restoring the breadth of both the Certificate of Appealability standard and the *Batson* evidentiary framework which had been constricted by the lower appellate courts. The result is to expand the rights and protections of prisoners.

#### A. Revised COA Standard

The Supreme Court ruling reaffirms the prior standard for granting a COA, but dramatically alters the way it is applied.<sup>592</sup> Two common interpretations have emerged in the Circuit Courts for interpreting the *Barefoot* standard. Many just recite the standard and devote little other consideration to it, starting right into the merits analysis without considering whether the petitioner in fact made a substantial showing.<sup>593</sup> Others apply a more stringent standard by merging the requirements necessary for winning the habeas appeal into the COA standard.<sup>594</sup> The Supreme Court does not appear to approve of either of these interpretations.<sup>595</sup>

The first interpretation the Court objects to is when courts skirt around the standard, concluding that it has not been met by evaluating the merits.<sup>596</sup> The extent to which a reviewing court should examine the details of a claim when evaluating a request for a COA is limited to a threshold inquiry.<sup>597</sup> Instead, the courts determine that the petitioner's claim fails on the merits and therefore isn't debatable

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591. Chemerinsky, *supra* note 7, at 373. Other recent cases that further defendant's rights include *Atkins v. Virginia*, *Ring v. Arizona*, and *Wiggins v. Smith*. The Court held in *Atkins* that executing the mentally retarded is cruel and unusual punishment and thus unconstitutional. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Ring v. Arizona*, the Court held the jury must find the aggravating factors sufficient to warrant the death penalty. *Ring v. Arizona*, 536 U.S. 584, 606-07 (2002). The Court found that failing to present evidence of childhood mistreatment in sentencing constituted ineffective assistance of counsel in *Wiggins*. *Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003).

592. *Miller-El VI*, 537 U.S. at 327.

593. See, e.g., *Kasi v. Angelone*, 300 F.3d 487 (4th Cir. 2002) (turning to the merits of Kasi's constitutional claim to determine whether a COA should be granted instead of meeting the substantial showing of the denial of a constitutional right); *Wheat v. Johnson*, 238 F.3d 357 (5th Cir. 2001) (denying Wheat's request for a COA after considering whether his claims contained any merit).

594. See *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000) (to grant a COA, the petitioner must rebut the presumption of correctness by clear and convincing evidence); *Hill v. Johnson*, 210 F.3d 481, 486 (5th Cir. 2000) ("Hill has not made a substantial showing of the denial of a constitutional right .... Hill has not come close to rebutting by clear and convincing evidence the presumption of correctness ...."); *McWee v. Weldon*, 283 F.3d 179, 182 (4th Cir. 2002) (denying a COA because the state court decisions were not an "unreasonable determination of facts in light of the evidence presented"); *Cooley v. Coyle*, 289 F.3d 882, 897 (6th Cir. 2002) (assuming that inquiry under § 2253(c) must take into account § 2254(d) & (e)(1)); *Coleman v. Ryan*, 196 F.3d 793, 799-800 (7th Cir. 1999) (denying the COA because Coleman's competency claim "was not unreasonable in light of the evidence"); *Nevius v. McDaniel*, 218 F.3d 940, 948 (9th Cir. 2000) (concluding that Nevius failed to show "an unreasonable application of, clearly established federal law" and therefore that "failed to make a substantial showing that his execution will constitute cruel and unusual punishment").

595. *Miller-El VI*, 537 U.S. at 341.

596. *Id.* at 336-37.

597. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 342 (2003).

among jurists.<sup>598</sup> By doing so, the court is in essence deciding the appeal without jurisdiction.<sup>599</sup>

The importance of keeping the standard at a threshold inquiry relates directly to the purpose of the COA. It was created to eliminate the frivolous claims that have no merit.<sup>600</sup> This does not necessarily mean that the claim can be successful. A losing claim can have merit and should be heard by appellate courts despite the fact that it may never succeed.<sup>601</sup> By jumping directly into a merit analysis and determining the ultimate result, courts undermine the very purpose of having the COA process. If this is acceptable, there would be no reason to require the COA.

While the Court clearly states its intention is to limit a COA analysis to a threshold inquiry, it appears to violate the same standard it is endorsing.<sup>602</sup> When considering Miller-El's evidence of a *Batson* violation, the Court concluded in the first paragraph of its analysis that "the statistical evidence alone raises some debate."<sup>603</sup> This seems to be enough to meet the threshold standard that the Court is endorsing. However, the Court does not stop its analysis. It continues into a detailed discussion of all of the evidence Miller-El asserts and stops just short of reaching a conclusion.<sup>604</sup> By proceeding in a manner not consistent to its holding, the Court suggests that a threshold inquiry is actually more than just a minimal evaluation of the evidence but permits a substantial evaluation.

The second misapplication of the COA standard the Court addressed was the integration of the applicable standards for the merits evaluation into the COA standard.<sup>605</sup> In the instant case, the standard for the merits of a habeas appeal is 28 USC § 2254.<sup>606</sup> Relevant sections, (d) and (e), require that decisions based on factual determinations be unreasonable in order to proceed, and state court determinations of fact are presumed to be correct, respectively.<sup>607</sup> The Fifth Circuit, along with several other circuits, have overwhelmingly merged the requirements of § 2254 into the COA standard.<sup>608</sup>

Integration of the § 2254 standard into the COA standard forces the petitioner to meet a higher benchmark.<sup>609</sup> Instead of establishing the denial of a constitutional right, the petitioner is forced to overcome presumptions that are typically only challenged with clear and convincing evidence.<sup>610</sup> This causes two negative effects. First, it will decrease the total number of certificates granted. Second, it will prevent

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598. *Id.* at 336.

599. *Id.* at 337.

600. Robbins, *supra* note 44, at 314.

601. *Miller-El VI*, 537 U.S. at 337.

602. *Id.*

603. *Id.* at 342.

604. *Id.* at 342-47.

605. *Id.* at 342.

606. *Id.*; 28 U.S.C. §§ 2254(d)(2), (e)(1) (2000).

607. 28 U.S.C. §§ 2254(d)(2), (e)(1) (2000).

608. *See* Barrientes v. Johnson, 221 F.3d 741, 772 (5th Cir. 2000); Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000); McWee v. Weldon, 283 F.3d 179, 182 (4th Cir. 2002); Cooley v. Coyle, 289 F.3d 882, 897 (6th Cir. 2002); Coleman v. Ryan, 196 F.3d 793, 799-800 (7th Cir. 1999); Nevius v. McDaniel, 218 F.3d 940, 948 (9th Cir. 2000).

609. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 341 (2003).

610. 28 U.S.C. § 2254(e)(1) (2000).

courts from evaluating a COA application without inquiring into the merits. Both of these effects oppose the COA's basic principles by eliminating claims that are not frivolous and allowing the courts to engage in more than a threshold inquiry.

The effect of returning the COA standard to a threshold level will greatly increase the number of COA applications granted. The circuit courts have been abusing the COA which in turn enabled them to eliminate more claims than was ever intended by the creation of the COA. By ending this practice, more petitioners will be able to reach the appellate level. In this case, the Supreme Court has used procedural guidelines in a manner that helps petitioners bring legitimate claims to the appellate level. Admittedly, this is still a procedural barrier that petitioners have to comply with in order to bring a constitutional claim.<sup>611</sup> However, in *Miller-El* the Court lowered the standard, making it substantially easier for claims to be heard.

In order to prevent courts from looking to a merits evaluation or applying a more rigid standard, the petitioner must frame relevant questions properly.<sup>612</sup> In the instant case, the court of appeals asked whether the state trial court acted unreasonably or against clearly established federal law.<sup>613</sup> This is the relevant question the court addresses to resolve the appeal on the merits.<sup>614</sup> However, it is not appropriate for consideration at the COA level. The court of appeals should have asked "whether the District Court's application of AEDPA deference ... to petitioner's *Batson* claim was debatable amongst jurists of reason."<sup>615</sup> The petitioner must show that the district court's assessment of the constitutional claim was debatable.<sup>616</sup> The question, therefore, is not whether the petitioner made a substantial showing of the denial of a constitutional right but must be framed in a way that asks whether the district court's assessment of the substantial showing of the denial of a constitutional right was debatable.

#### *B. Batson Evidentiary Framework*

The Court made no actual holding regarding the *Batson* test. However, concern over the misapplication of the evidentiary framework seems to be one major reason why the Supreme Court granted certiorari.<sup>617</sup> By undertaking a more thorough examination of the *Batson* claim than needed for the COA, the Court reaffirmed that all types of evidence may be used in determining if purposeful discrimination exists.<sup>618</sup> The effect will be to allow claimants to use "historically *Swain* evidence" in addition to the case specific evidence permitted through *Batson* in proving purposeful discrimination.<sup>619</sup>

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611. *But see* Welty, *supra* note 6, at 903.

612. Priya Nath, Note, *United States Supreme Court: Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003), 15 CAP. DEF. J. 407, 416 (2003).

613. *Miller-El v. Johnson (Miller-El IV)*, 261 F.3d 445, 452 (5th Cir. 2001), *rev'd*, 537 U.S. 322 (2003).

614. 28 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 671.13[2][a] (2003).

615. *Miller-El VI*, 537 U.S. at 341.

616. *Id.*

617. *Id.* at 1036-39.

618. Nath, *supra* note 276, at 416-17.

619. *Id.* at 417.

The Supreme Court decision in *Batson* was intended to reduce discriminatory practices in jury selection.<sup>620</sup> However, *Batson* did not have the overarching effect the Court had hoped for. The Court itself has recognized this fact, acknowledging that “[d]espite the clarity of ... [our] commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist.”<sup>621</sup> Critics believe that these problems persist because *Batson* is “toothless” and courts would not apply it strictly enough to make an impact.<sup>622</sup>

The problem with the *Batson* test is the subjectivity that is inherently part of the credibility evaluation. The Court itself acknowledges this subjectivity, noting that “the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be *believed*.”<sup>623</sup> When determining if the explanation is believable, the lower court must consider “such circumstantial and direct evidence of intent as may be available” and “all relevant circumstances.”<sup>624</sup> In *Batson*, the Court deferred to the lower courts to be trustworthy in the application, noting: “We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.”<sup>625</sup>

The subjectivity of the *Batson* analysis in the third step created different applications across the circuits. The Second, Third, Sixth and Seventh Circuits abided by the Court’s intention by examining “the totality of the circumstances ... of whether the defendants have met their ultimate burden of proving discrimination.”<sup>626</sup> These circuits also did not exclude evidence that was used to support the prima facie case, what the Fifth Circuit refers to as traditionally *Swain* evidence.<sup>627</sup> In considering Miller-El’s case, the Fifth Circuit failed to apply *Batson* in the manner stipulated by the Court in *Batson*. By neglecting to consider all relevant evidence, ignoring the totality of the circumstances, and refusing to consider evidence established in the prima facie case, the courts improperly condensed the necessary analysis of the third step.<sup>628</sup> If unchallenged, this interpretation cultivates the belief that courts will not be inconvenienced with a claim of discrimination, even if it is based on solid evidence.<sup>629</sup>

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620. Brief of NAACP Legal Defense and Educational Fund, Inc. and the League of Women Voters of the United States as Amici Curiae in Support of Petitioner at 13, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (No. 01-7662).

621. *Id.* at 24 (quoting *Powers v. Ohio*, 499 U.S. 400, 402 (1991)).

622. *See, e.g., id.* at 25 n.24.

623. Brief of Amici Curiae, Former Prosecutors and Judges, in Support of Petitioner at 9, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (No. 01-7662) (emphasis added) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)).

624. *Id.* at 9 (quoting *Batson v. Kentucky*, 476 U.S. 79, 93, 96-97 (1986)).

625. *Batson*, 476 U.S. at 97.

626. Brief of Amici Curiae, Former Prosecutors and Judges, in Support of Petitioner at 13, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (No. 01-7662).

627. *Id.* at 13.

628. *Id.* at 14.

629. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 81 (2001).

The court of appeals only considered the evidence regarding the disparate questioning evidence and race-neutral explanations in determining that Miller-El's case failed.<sup>630</sup> It refused to consider any historical evidence, because that amounted to the *Swain* evidentiary framework which had been overruled by *Batson* and thus believed to be irrelevant.<sup>631</sup> Based on the amount of time the Court devoted to the *Batson* evidence in this case,<sup>632</sup> it appears that it wanted to eliminate this misapplication and reprimand the Fifth Circuit for showing poor judgment when faced with strong discrimination cases. The Court considered the statistical data, the extended time period between the jury selection and the *Batson* hearing, a comparative analysis of jurors, disparate questioning, questionable uses of the jury shuffle, and the historical evidence of a discriminatory culture in the District Attorney's Office.<sup>633</sup> This step by step walkthrough of Miller-El's evidence was intended to provide an example of giving due consideration to all pieces of evidence.<sup>634</sup> The Court's purpose in such an expansive consideration of the evidence, particularly in view that this was intended to only be a threshold inquiry sufficient to determine whether a COA was appropriate, seems to be in response to its concern that when presented with a clear cut case the state trial court could not even find an "inference of discrimination to support a prima facie case."<sup>635</sup>

Recently the Court has "become 'increasingly emphatic, even strident' in its insistence that lower courts follow all extant Supreme Court precedent until and unless it has been expressly overruled."<sup>636</sup> The Fifth Circuit Court of Appeals determined the *Batson* evidentiary formulation overruled the *Swain* formulation.<sup>637</sup> However, it is clear that this is not the result the Supreme Court intended. The *Batson* decision gives examples of "all relevant circumstances" that the trial court should consider.<sup>638</sup> The first example listed was "a 'pattern' of strikes against black jurors."<sup>639</sup> This is an example of evidence that could be used under the *Swain* formulation and, accordingly, would be banned under the Fifth Circuit's interpretation. Considering the Court's insistence that only it has the ability to overrule one of its precedents,<sup>640</sup> it is not surprising that the Court took steps to correct the Texas court's blatant disregard of the evidentiary formulation established in *Batson* and refusal to follow precedent.

By undermining the Court in this way, the Fifth Circuit projected the appearance that eliminating this type of racial discrimination is actually less important than convicting the accused. It ignored the negative ramifications that prosecutorial

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630. *Miller-El v. Johnson (Miller-El IV)*, 261 F.3d 445, 452 (5th Cir. 2001), *rev'd*, 537 U.S. 322 (2003).

631. *Id.* at 451.

632. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 341-49 (2003).

633. *Id.*

634. *Id.*

635. *Id.* at 347.

636. Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 970 (2000) (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

637. *Miller-El IV*, 261 F.3d at 450.

638. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

639. *Id.* at 97.

640. Bhagwat, *supra* note 300, at 968.

discrimination generates in addition to undermining the very principles that habeas corpus is built on, that all men are guaranteed the procedural protections and due process given by the Constitution. Undoubtedly, pressure exists to successfully convict those who harm our communities. The Texas courts put this objective above upholding the procedures that guarantee the basic principles of liberty. The Supreme Court's decision prohibits ignoring evidence sufficient to support an inference of discrimination no matter what crime has been committed.<sup>641</sup> As noted in the majority opinion, "If these general assertions were accepted ... the Equal Protection clause 'would be but a vain and illusory requirement.'"<sup>642</sup>

### C. Deference

Deference is given to state court factual determinations; however, it is not absolute.<sup>643</sup> The Court held that, "in the context of federal habeas, deference does not imply abandonment or abdication of judicial review."<sup>644</sup> The idea that deference would "by definition preclude relief" disturbed the Court.<sup>645</sup> When guided by the AEDPA, a federal court can disagree with a state court's credibility determination, and rule that the determination was unreasonable or incorrect by clear and convincing evidence.<sup>646</sup> Faced with a fact pattern that it believed to clearly be a *Batson* violation, the Court saw the appellate review process fail when the district court applied deference and accepted without question the state court's evaluation.<sup>647</sup>

The state trial court determined at the *Batson* hearing that the first level of *Batson*, an inference of discrimination, could not even be established after the court of criminal appeals already determined that an inference had been shown.<sup>648</sup> This clearly is erroneous. Subsequent appellate courts upheld the trial court's decision despite being troubled by some of the evidence and the appearance of some level of prejudice at the trial court level.<sup>649</sup>

The *Miller-El* case is unique because in this case the trial court may be in no better of a position to make this determination because the *Batson* hearing occurred nearly two years after the trial.<sup>650</sup> In this case, the trial court is subject to the same "risks of imprecision and distortion from the passage of time" as the appellate courts are.<sup>651</sup> Because the trial court was also subjected to this type of time distortion usually only applicable to the appellate courts, the reason to give it deference was weaker. The appellate courts would have looked to the same records the trial court

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641. *Miller-El VI*, 537 U.S. at 347-48.

642. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 347 (2003) (quoting *Batson*, 476 U.S. at 98).

643. *Id.* at 339.

644. *Id.* at 340.

645. *Id.*

646. *Id.*

647. *Id.* at 341.

648. *Miller-El v. State (Miller-El I)*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988), *rev'd*, 537 U.S. 322 (2003).

649. *Miller-El VI*, 537 U.S. at 329-30.

650. *Id.* at 342-43.

651. *Id.* at 343.

did in reviewing the *Batson* claim. The appellate courts never considered that this distortion existed before extending deference to the trial court.<sup>652</sup>

The AEDPA allowed the lower courts to interpret the amended § 2254(d)(1) to require “a federal habeas corpus court to give nearly blanket deference to state court determinations ... even when a federal court had some confidence that a state court determination was erroneous.”<sup>653</sup> The Supreme Court did not accept this and interpreted the standard in a way that “recognizes the continuing obligation of federal habeas corpus courts to scrutinize state court rulings.”<sup>654</sup> Limitations are placed on the appellate court’s ability to grant relief.<sup>655</sup> These include when mixed questions are presented, when it is a very close decision, and when the federal court can gather no assurance that the state court decision was wrong.<sup>656</sup>

The Court re-affirmed this interpretation which disapproves of absolute deference. The appellate courts in this case were concerned with the amount of evidence but did not re-evaluate the trial court’s determination. In addition to this concern, the appellate courts did not consider that the time distortion affected the trial court as much as it did them. Combined, this should have provided enough support to deny deference and review the case. However, the appellate courts did not do this. Instead, its actions are an example of the absolute deference the Supreme Court prohibited.<sup>657</sup> In general, the potential for abuse is greater if a trial court knows that its decisions are unlikely to be overturned no matter how questionable they may be. The Supreme Court has given power to the appellate courts to disagree with findings of fact when supported by the underlying statute.<sup>658</sup> By empowering appellate courts to review questionable decisions, the Court is effectively strengthening doctrines, such as *Batson*, that rely on the subjective determination of trial judges. The Court has given permission to lower appellate courts to use their discretion on issues that appear to infringe upon constitutional protections.<sup>659</sup>

## V. CONCLUSION

*Miller-El v. Cockrell* is an example of the Rehnquist Court’s focus on procedural guidelines. Circuit Judge Stephen Reinhardt characterized the Rehnquist Court’s primary interest as “establishing procedural rules that preclude federal courts from considering even the most egregious violations of a defendant’s constitutional rights.”<sup>660</sup> The Court is still focusing on procedural rules; however, at least in this

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652. *Miller-El v. Cockrell (Miller-El VI)*, 537 U.S. 322, 340 (2003).

653. 1 HERTZ & LIEBMAN, *supra* note 15, § 2.4, at 79.

654. 1 *id.*

655. 1 *id.*

656. 1 *id.*

657. *Miller-El VI*, 537 U.S. at 340. The Court rejected the principle of absolute deference in the landmark case, *Brown v. Allen*, 344 U.S. 443 (1953). The Court determined that a state-court judgment of conviction is not *res judicata* on federal habeas with respect to federal constitutional claims, even if the state court has rejected all such claims after a full and fair hearing. *Id.* at 458-59. A district court must instead determine whether the state-court adjudication has resulted in a satisfactory conclusion. *Brown v. Allen*, 344 U.S. at 458, 463.

658. *Miller-El VI*, 537 U.S. at 340.

659. *Id.*

660. Reinhardt, *supra* note 2, at 352.



case, the Court is not impeding the ability for petitioners to obtain relief. The Court has in fact made it easier. *Miller-El v. Cockrell* lowered the certificate of appealability standard back to the level originally intended, to exclude only frivolous claims. It does this by overruling the circuit court's interpretation of the standard for granting a COA which merged § 2254 requirements, those necessary to win the appeal, into the COA standard. By lowering the standard, the Court's holding will result in more habeas appeals reaching the appellate level. The Court also re-addressed two other doctrines and altered their application to better protect prisoner's rights. First, the evidentiary requirement under the *Batson* doctrine was being applied differently across circuits. Some circuits, including the Fifth Circuit, were limiting the evidence that a petitioner could use to bring this type of claim by prohibiting all evidence that was allowed under *Swain*. This expressly contradicts the intention of the Court to allow all relevant circumstances to be considered. By broadening the permissible evidence, petitioners have a greater ability to establish a solid case. The other doctrine addressed was the practice of giving broad deference to trial courts. The Court here gives power to lower appellate courts to deny deference to a trial court when questionable practices are used by the lower court. Giving more power to appellate courts to check the decisions of trial courts conveys that abuses of power will not be tolerated. The Rehnquist Court is clearly using procedural barriers to define death penalty jurisprudence; however, it is not directed at eliminating prisoner's rights but rather at establishing equitable guidelines.