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THE LAST BEST HOPE: REPRESENTING DEATH ROW INMATES

Esther F. Lardent and Douglas M. Cohen***

Most lawyers are acutely aware of the limitations of our justice system. Justice in America is slow, uncertain and erratic. The most disturbing aspect of the justice system is its inaccessibility for persons without resources. Unfortunately, that noble sentiment etched into the stone of the United States Supreme Court building, "equal justice under law," is often realistically translated as "equal justice—for those who can pay for it."

Nowhere has the goal of equal justice under law been violated so blatantly and so regularly as in the treatment of capital cases in our courts. Most lawyers are no more familiar with death penalty representation than the public at large. We get our information from newspapers and other media, even from *Perry Mason* and *L.A. Law*. Until very recently, capital representation was the province of a small group of practitioners; the bar in general was unaware of the terrible inequities faced by those defendants whose lives were at stake.¹

In the abstract, defendants in capital cases appear to be treated equitably by the justice system. While a constitutional right to counsel for indigent criminal defendants has been in existence for only twenty-five years,² defendants facing the death penalty have been assured access to counsel since the 1930s.³ In practice, however, the inadequate funding of indigent defense systems and the politically charged nature of capital cases render that assurance a sham. As Justice Thurgood Marshall pointed out:

[C]apital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases.

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1. See generally Hengstler, *Attorneys for the Damned*, 73 A.B.A. J., Jan., 1987, at 59-60; Lane, *Pro Bono and Death Row*, 19 A.L.I.-A.B.A., CLE REV., Dec. 23, 1986, at 4-6.

2. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at felony trials).

3. *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel in capital cases).

Death penalty litigation has become a specialized field of practice. . . . And even the most well-intentioned attorneys often are unable to recognize and preserve and defend their clients' rights. . . . Though acting in good faith, they often make serious mistakes.⁴

The reality of appointed counsel for indigent defendants at trial and on direct appeal is that these attorneys are often inadequately compensated, unaware of the complex procedure and jurisprudence in capital cases, novices in the practice of law, and unable to obtain critically needed support services such as investigators and expert witnesses.

Inevitably, these systemic inadequacies have resulted in numerous documented instances of deeply flawed representation.⁵ An attorney familiar with capital representation cited a particularly disturbing example of ineffective assistance of counsel:

In one case the former Imperial Wizard of the local Klan represented a black defendant charged with raping and murdering a white woman, referred to his client as a "nigger boy" in conversations, fell asleep during meetings with the [district attorney], and interposed both an insanity defense and a general denial defense simultaneously.⁶

Unfortunately, such examples are not isolated. Documented cases of inadequate representation include attorneys with serious substance abuse problems,⁷ attorneys who fail to introduce any evidence whatsoever at the critically important sentencing phase of the trial,⁸ attorneys who make inflammatory remarks at trial,⁹ and, most frequently, attorneys whose preparation for trial is pitifully inadequate even though the trial is literally a matter of life and death.¹⁰

In addition to their failure to provide an adequate and zealous defense, the overburdened attorneys in these cases often do not have the resources to identify exculpatory evidence and the instances of prosecutorial and police misconduct that appear with regularity in these emotionally charged cases. For example, in a Florida case, a federal judge found that the police withheld key evidence that would have sup-

4. Justice Thurgood Marshall, Remarks at the Judicial Conference of the United States Court of Appeals for the Second Circuit (September 6, 1985) (on file at Loyola of Los Angeles Law Review).

5. See Hengstler, *supra* note 1, at 59-60.

6. Lane, *supra* note 1, at 4-6.

7. Hengstler, *supra* note 1, at 59.

8. *Id.* at 58-60.

9. *Id.* at 59.

10. *Id.* at 59-60.

ported the defendants' alibi.¹¹ In a Louisiana case¹² where a defendant was sentenced to death on a rape conviction, the appellate court found a series of constitutional defects in the prosecution of the case and in the trial, which lasted less than one day.¹³ The appellate court affirmed the conviction, but set aside the imposition of the death penalty and remanded the case to the trial court for resentencing.¹⁴ Most notably, it was subsequently discovered that the defendant's blood type did not match that of the sperm found on the victim.¹⁵ The defendant was ultimately freed.¹⁶

The grave shortcomings in the trial and direct appeal phases of a capital case are exacerbated by the situation which exists in the post-conviction phases, in which collateral review¹⁷ may be sought in state and federal court. Two thousand, two hundred and ten inmates are presently on death rows throughout the United States.¹⁸ A majority of these people are entering or have entered the post-conviction stage of their appeals.¹⁹

Given the deficiencies that characterize the trial and direct appeal stages, it is not surprising that the rate of reversal and remand in these post-conviction reviews is very high, despite the narrow scope of that review. One commentator has reported that the courts have granted relief in sixty to seventy-five percent of capital habeas matters, as compared to a rate of less than seven percent in non-capital cases.²⁰ Judge John C. Godbold of the United States Court of Appeals for the Eleventh Circuit,

11. *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert. denied*, 457 U.S. 1111 (1982), *later proceeding*, 493 So. 2d 480 (Fla. 1986), *later proceeding*, 798 F.2d 426 (11th Cir. 1986), *vacated*, 480 U.S. 901 (1987); *Miller v. State*, 415 So. 2d 1262 (Fla. 1982), *cert. denied*, 459 U.S. 1158 (1983), *later proceeding*, 798 F.2d 426 (11th Cir. 1986), *vacated*, 480 U.S. 901 (1987). See generally Von Drehle, *Fairness Was Fatal Blow to Fast Executions*, Miami Herald, July 11, 1988, at 1A, col. 1.

12. *State v. Ross*, 343 So. 2d 722 (La. 1977); Von Drehle, *supra* note 11, at 1A, col. 1.

13. *Ross*, 343 So. 2d at 728-29. See also Von Drehle, *supra* note 11, at 1A, col. 1.

14. *Ross*, 343 So. 2d at 728.

15. Von Drehle, *supra* note 11, at 1A, col. 1.

16. *Id.*

17. Collateral review, which is provided for by state and federal statute, is available after the defendant has exhausted his direct appeals. These appeals, which are viewed in many states as non-criminal proceedings, address the adequacy of the representation and hearings at the trial and direct appeals stage as well as constitutional claims.

18. NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW USA 1 (July 14, 1989).

19. The Spangenberg Group (unpublished data on the status of death row appeals on file at Loyola of Los Angeles Law Review).

20. Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 521 (1988).

the federal circuit most actively involved in death penalty litigation,²¹ noted that the Eleventh Circuit granted relief in fifty percent of the first fifty-six death penalty cases that came before them.²² He also noted, as have other judges and practitioners, the extraordinary complexity of post-conviction death penalty representation, calling it "the most complex area of the law I deal with."²³

In light of the critical importance of post-conviction review and its complexity, it seems astonishing that there is no constitutional right to counsel in post-conviction representation. The issue of appointment of counsel as an essential component of meaningful access to the courts for persons sentenced to death, which had been the subject of much debate, was resolved negatively this term by the United States Supreme Court in *Murray v. Giarratano*.²⁴ The case involved a class action brought on behalf of indigent, unrepresented inmates on Virginia's death row.²⁵ The inmates alleged that, in complex death penalty appeals, the constitutional requirement of meaningful access to the courts required the appointment of counsel for those inmates financially unable to retain an attorney.²⁶

In a plurality opinion by Chief Justice Rehnquist, the *Giarratano* Court found that the Constitution does not require that a state provide counsel at the post-conviction stage.²⁷ Despite the overwhelming evidence of grave inadequacies and resulting inequities in the indigent defense system, particularly in the case of defendants in capital matters, the Court wrote: "The additional safeguards imposed by the eighth amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed."²⁸

Justice Kennedy, who concurred in the judgment, nevertheless noted that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death."²⁹ In his dissent, Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, cited with approval the district court's analysis regarding the

21. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. N.Y. CITY B.A. 859, 862 (1987).

22. *Id.* at 873. Judge Godbold also noted that relief is probably granted in only one-third of the death penalty cases that now come before the Eleventh Circuit. *Id.*

23. "You Don't Have to be a Bleeding Heart," *Representing Death Row: A Dialogue Between Judge Abner J. Mikva and Judge John C. Godbold*, 14 HUM. RTS., Winter, 1987, at 22, 24 (quoting Judge John C. Godbold).

24. 109 S. Ct. 2765 (1989).

25. *Id.* at 2767 & n.1.

26. *Id.* at 2767.

27. *Id.* at 2771.

28. *Id.*

29. *Id.* at 2772 (Kennedy, J., concurring in the judgment).

special circumstances in death penalty cases that require, as a matter of due process, that death row inmates be appointed counsel at the post-conviction stage in state court.³⁰ The dissent also recognized that state post-conviction proceedings are "the cornerstone for all subsequent attempts to obtain collateral relief."³¹

After the *Giarratano* decision, the courts, the legal profession and society face a growing crisis in securing counsel for these vitally important post-conviction appeals. Without a constitutional requirement that counsel be appointed, a growing number of death row inmates seeking post-conviction review must look to volunteer representation as their only hope. As Justice Marshall said:

As long as our nation permits executions, lawyers, judges and public officials have a duty. They must assure that people who face the ultimate sentence receive the same opportunity to present their best case to the court that non-capital defendants receive. Until the Supreme Court will make that guarantee, others must work within the existing system to provide that opportunity. The task might be formidable; but the consequences of any failure to undertake it are unacceptably severe.³²

Several years ago, in response to the growing crisis in securing volunteer counsel in these appeals, the American Bar Association created the Postconviction Death Penalty Representation Project. The Project has three goals. First, it seeks to educate the bar and the public about the current lack of inmates' access to counsel in post-conviction capital cases, in addition to the critical importance of that representation. Second, the Project has sought to expand the pool of volunteer attorneys, primarily civil practitioners from major firms, and to provide training and support to those volunteers. Finally, the Project's long range goal is the creation, in each death penalty state and in the federal courts, of a system ensuring that all death row inmates receive effective representation, including "properly qualified, compensated, assisted and monitored counsel."³³

The American Bar Association, acting in cooperation with the state and federal judiciary, public figures and bar leaders, has made surprising progress in developing long-term, systemic solutions to the crisis in post-conviction representation. In the past two years, thirteen states have es-

30. *Id.* at 2780 (Stevens, J., dissenting).

31. *Id.* at 2779 (Stevens, J., dissenting).

32. Justice Thurgood Marshall, *supra* note 4.

33. Amicus Curiae Brief of the American Bar Association in Support of Respondents at 8, *Murray v. Giarratano*, 109 S. Ct. 2765 (1989) (No. 88-411).

tablished death penalty resource centers,³⁴ funded by the federal government, state governments, and private funds.³⁵ The centers track death penalty cases to ensure timely intervention, keep abreast of developments in capital litigation, and recruit, train and support the work of the attorneys, either volunteer or compensated, who provide representation. More states will develop centers this year.³⁶

Although the resource center concept does not ensure adequate compensation for counsel, it does ensure that inmates will receive zealous and effective representation. It also promotes recruitment of counsel by making representation more rewarding and efficient.

A second significant development toward a systemic solution to the problem is the provision mandating the appointment and compensation of counsel in federal death penalty habeas cases. That mandate, contained in the Anti-Drug Abuse Act of 1988,³⁷ essentially codifies the initiatives undertaken by the federal judiciary, through the Administrative Office of the United States Courts and the Judicial Conference, to encourage appointment of counsel in these cases.³⁸

Although the resource centers and other systemic solutions will undoubtedly have the greatest long-term impact upon the crisis in post-conviction representation, the response of attorneys and law firms to the crisis is clearly the most dramatic and heartening development to date. Literally hundreds of attorneys—without any experience in death penalty or criminal matters—have willingly undertaken representation in post-conviction cases, despite the usual absence of compensation at the state level. In Washington, D.C., where attorneys have been particularly active in providing counsel in death penalty cases, a group of almost one hundred lawyers—all volunteers—meet monthly to discuss their cases

34. The thirteen states which now have operational death penalty resource centers are Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas.

35. Federal funds are provided pursuant to the Criminal Justice Act through the Administrative Office of the State Courts. A number of resource centers receive direct appropriations of state funds or IOLTA (interest on lawyers' trust accounts) funding. Finally, several private foundations have also provided support to resource centers.

36. The State of Missouri's resource center proposal has been approved by the United States Judicial Conference. That center began operations in October, 1989. In addition, a number of states, including Illinois, Indiana, Nevada, Ohio, Pennsylvania, and Virginia are currently exploring the creation of a resource center or other mechanism which will result in an effective system for the provision of counsel.

37. Pub. L. No. 100-690, § 7001, 7001 (q)(4)(A)-(B), 102 Stat. 4387, 4181, 4393 (1988) (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

38. MEMORANDUM ON RECENT JUDICIAL CONFERENCE ACTION RELATING TO THE CRIMINAL JUSTICE ACT (CJA), Administrative Office of the United States Courts, March 24, 1987.

and to receive training on death penalty litigation.³⁹

Several years ago, the post-conviction death penalty bar consisted of a handful of highly dedicated and intensely over-committed experts. Today, those critically important full-time specialists are being supplemented by a cadre of enthusiastic civil practitioners. The motivations of these attorneys vary. Some are ardent abolitionists. Others favor the death penalty, but strongly believe that if society imposes the death penalty, then society must provide counsel at every stage of the proceedings. Some are attracted by the challenging nature of the legal work. Michael Mello, a faculty member at the University of Vermont Law School, says that "[o]ne of the attractions of doing death penalty work for me, aside from the fact that I think it's extraordinarily important as a moral issue, is that it's also fascinating and, intellectually, one of the most rewarding areas of the law that there is."⁴⁰

Despite the enormous time commitment and emotional impact, post-conviction death penalty cases are appealing to many volunteers because they offer the chance to make the ultimate difference in the life of a person wrongly sentenced or convicted. Richard Blumenthal, a former United States Attorney, was pro bono counsel for Joseph Green Brown, who had spent thirteen years on Florida's death row. At one point, Brown was within thirteen hours of being executed, had been measured for his burial suit and had ordered his last meal.⁴¹ After obtaining a last-minute stay of execution, Blumenthal represented Brown in post-conviction appeals during which, for the first time, the perjury of the state's key witness was uncovered.⁴² Other significant exculpatory evidence was also uncovered,⁴³ Brown was released,⁴⁴ and is alive only because of the efforts of his volunteer counsel.

Most volunteers, however, have simply made themselves available at considerable personal sacrifice because the fairness of the system demands it. They have responded to the pleas of Justice Marshall and

39. The Washington, D.C. group, known colloquially as the "brown bag lunch" group, has been meeting for almost two years under the leadership of Seth P. Waxman, a private practitioner with substantial experience in post-conviction capital appeals. Additional information about the structure and operations of the brown bag group is available from the ABA's Postconviction Death Penalty Representation Project, 1800 M Street, N.W., Washington, D.C. 20036.

40. Greenya, *The Last Defense*, 2 WASH. LAW. 35, 35 (Nov.-Dec. 1987).

41. *20/20: Hours From Execution* (ABC television broadcast re: Joseph Green Brown (aka Shabaka), July 23, 1987) (transcript on file at Loyola of Los Angeles Law Review).

42. *Id.*

43. Experts found that Brown's gun was not the murder weapon. Von Drehle, *supra* note 11, at 1A, col. 1.

44. *20/20: Hours From Execution*, *supra* note 41.

others. Like the American Bar Association, they believe the provision of counsel for those on death row is society's responsibility. Until society recognizes that responsibility, they seek, as lawyers and officers of the court, to make the system just. In doing so, these volunteers offer the last, best hope not only to their clients—those whom society has forgotten—but also to our system of justice.