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THE PRIVATE BAR'S EFFORTS TO SECURE PROPER REPRESENTATION FOR THOSE FACING EXECUTION

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The organized bar, most notably the American Bar Association, has attempted since the mid-1980s to ensure proper representation for people who may be executed. While these efforts initially focused on finding counsel for state post-conviction and federal habeas corpus proceedings, more recently efforts have also been undertaken to ensure effective representation in trial and appellate courts. The ABA has also sought to secure proper training and mentoring for the lawyers it recruits. Initial success in helping persuade Congress to fund post-conviction death penalty resource centers was followed by a major setback when Congress defunded the centers. The ABA has endeavored to find alternative funding sources. Meanwhile, since the mid-1980s, a series of technicalities created by the Supreme Court and Congress have made it far more difficult to secure federal habeas corpus remedies. The ABA has responded by trying to ensure that effective counsel are involved as early as possible and by bringing egregious examples of ineffectiveness to the Court's attention.

The American Bar Association (the ABA) and other bar groups have taken an active role since the mid-1980s in attempting to ensure that no one is executed in this country without having effective counsel at every stage of the legal proceedings against them, from pretrial to trial to direct appeal to state post-conviction and federal habeas-corpus proceedings to clemency proceedings. The ABA believes that everyone facing execution should have an opportunity to secure relief if a conviction or death sentence was prejudicially affected by a violation of the Constitution of the United States.

This article will focus primarily on the activities of the ABA, although similar activities have been undertaken by the Association of the Bar of the City of New York and by other bar associations, as well as by public interest law groups such as the Southern Center for Human Rights and the Equal Justice Initiative. The ABA and other bar associations originally became involved in seeking counsel to handle death penalty cases when some of their members became aware that there were hundreds of death-row inmates who had no counsel for state post-conviction or federal habeas-corpus proceedings. Given the complexities of the criminal-justice system and the special additional complexities of capital punishment jurisprudence, someone without counsel has little chance of securing redress for constitutional violations that may have tainted a conviction or death sentence.

THE LACK OF A RIGHT TO COUNSEL IN POST-CONVICTION PROCEEDINGS

How could it be that so many people facing execution have no lawyer in the later stages of litigation? In considering this, some context is useful.

The legal proceedings in a death penalty case begin with pretrial proceedings and trial. Since the 1970s, the trial of a capital case has consisted of two phases. First, the guilt or innocence phase of a trial is where the criminal liability of a defendant is determined. If a defendant is found guilty of an offense for which he or she may receive the death penalty, then the case, unless there is an agreement on a sentence less than death, proceeds to the penalty phase. In the penalty phase, the jury (or in some instances, the judge) considers aggravating and mitigating circumstances and decides whether a death sentence or a lesser sentence (usually, life without any possibility of parole) is warranted. A defendant sentenced to death is entitled under the Constitution to a "direct" appeal to a state appellate court. In some states this is a single appeal to the state's highest court sitting on criminal cases, and in other states it is an appeal to an intermediate appellate court, followed by a possible further appeal to the state's highest court sitting on criminal cases.

Almost all people facing the possibility of capital punishment cannot afford counsel. For them, the constitutional right to counsel means the right to have counsel appointed and paid for by the government. Yet this constitutional right ends after the trial and direct appeal, although there are many subsequent legal proceedings where a death-sentenced inmate may continue to challenge his conviction and death sentence.

First, after the final decision of the state appellate court, the defendant has the right to petition the United States Supreme Court to grant a writ of certiorari to review the case for federal constitutional errors. (As noted below, certiorari can also be sought following state post-conviction and following federal habeas proceedings.) Thereafter, all states allow for state post-conviction proceedings, sometimes referred to as state habeas, in which an inmate can collaterally attack his conviction and death sentence. An inmate can present both federal and state constitutional challenges, and in most states may also present state statutory challenges, to his conviction and death sentence, and may present new evidence not in the trial record in support of these challenges. An inmate who loses in a state post-conviction collateral proceeding can generally appeal within the state court system and, if unsuccessful, can seek to have the Supreme Court grant certiorari to review claimed federal constitutional errors. Indeed, the Court has granted certiorari following state post-conviction proceedings in some capital punishment cases.

A death-sentenced inmate may, following state post-conviction collateral proceedings, even without seeking certiorari, then seek relief through federal habeas corpus. These federal habeas corpus proceedings are limited to federal (not state) constitutional claims that have been presented to the state courts. If habeas corpus relief is not secured in the federal district court, an inmate can seek to appeal to a federal appeals court and can petition for certiorari from the federal appeals court to the Supreme Court.

If relief is denied in all of the direct and collateral proceedings, the inmate can also seek executive clemency from the state, as provided for by state constitution or law. Although clemency has been granted far less frequently in the "modern" era of

capital punishment than before 1972, it is a remedy that is still sometimes granted and, therefore, should not be ignored. In most jurisdictions, clemency can be granted for *any* reason.

The various legal proceedings that can follow direct appeal in state court are often extremely important to death-row inmates. Indeed, as of the mid-1980s, when the ABA decided to create a project to find counsel to handle such proceedings, a significant majority of death-row inmates who had been convicted and sentenced to death at trial and had lost on direct appeal were nonetheless successful in securing relief thereafter. The largest proportion of those death-row inmates who secured relief after direct appeal won their victories in federal habeas corpus proceedings. Many of them won their federal habeas corpus proceedings on federal constitutional issues that had been properly raised at trial or direct appeal but which the state courts had incorrectly rejected. However, a great many of the victories concerned federal constitutional claims that were first raised in state post-conviction proceedings. As matter of federal comity to the states, an inmate must raise his federal constitutional issues first in a state court proceeding before raising them in a federal habeas corpus proceeding. Thus, it was crucial to find competent counsel to handle state post-conviction proceedings and not just federal habeas corpus petitions.

One of the primary claims often raised in collateral proceedings for which investigation and presenting of new evidence is vital is a claim of ineffective assistance of counsel. Such a claim generally requires investigation and then presentation of evidence of what counsel could have done but did not do pretrial, at trial, or on appeal, and what difference that would have made to the result. Another frequently raised issue in collateral proceedings is that the government withheld crucial evidence that would have tended to undercut the prosecution's case for conviction or for the death penalty. Such a claim typically becomes available only after the trial and appeal because the evidence was concealed during trial and appeal. A third issue requiring evidence not available at trial concerns prosecutors engaging in secretive attempts to under-include people of color from the jury or jury pool.

Capital punishment cases involve not only state and federal constitutional issues that can arise in any criminal case, but also special constitutional issues that deal specifically with death penalty cases. For example, death penalty cases can include unique issues arising from the special jury-selection methods used in "death-qualifying" a jury and special issues relating to the penalty phase, where the sentencer may consider anything about the defendant's background that could be viewed as warranting a sentence less than death (i.e., mitigating evidence) and, in some jurisdictions, some "aggravating" evidence about the defendant that concerns facts other than the capital offense (see Hurwitz, 2008).

THE ABA'S EFFORTS

In the second half of the 1980s, the ABA began a substantial effort to find pro bono lawyers who would volunteer to represent indigent death-row inmates in state post-

conviction proceedings, federal habeas corpus proceedings, and clemency proceedings. This project, initially called the ABA Post-Conviction Death Penalty Representation Project, recruits lawyers mostly from the civil litigation bar, most of whom require an enormous amount of training and ongoing mentoring. Even the relatively few volunteers with criminal law experience usually have no experience with murder cases in general or capital punishment cases in particular, so they, too, need substantial training and mentoring.

Post-conviction lawyers do not merely have to understand the constitutional claims unique to death penalty cases that can arise on written trial and appeal records; they also must investigate and develop evidence for claims such as ineffective assistance of counsel. To assess counsel effectiveness, post-conviction lawyers need to know what kinds of evidence (whether or not known to trial counsel) existed and should have been developed at trial, and how to find that evidence long afterward. These types of inquiries are especially difficult because the passage of time makes post-conviction investigation particularly difficult. Other issues, such as claims relating to mental illness or mental retardation, involve additional complexity and the use of expert witnesses.

Dealing with the issues specific to capital cases, whether arising from the trial record or requiring further investigation, requires an expertise far beyond that of most criminal law practitioners—not to mention the civil lawyers who predominate among the volunteers whom the ABA recruits. Moreover, those recruited by the ABA have to understand the complex procedures and rules governing state post-conviction and federal habeas corpus cases. The failure to abide by these can literally prove fatal to clients.

In the late 1980s, with all these challenges in mind, and cognizant that it had not come close to finding enough lawyers to represent all unrepresented indigent death-row inmates, the ABA urged Congress to create resource centers in capital punishment states. The ABA hoped that these resource centers could represent some death-row inmates in federal habeas corpus proceedings and, if they received state funding, represent certain inmates in state post-conviction proceedings. Further, they could train and mentor volunteer lawyers handling state post-conviction and federal habeas proceedings in death penalty cases, and they could help find investigators, mitigation specialists, and expert witnesses for these pro bono lawyers. The ABA Project initially achieved substantial success in Congress, leading to the creation of federally funded resource centers in numerous states. In several states, such centers received state funding to deal with state post-conviction collateral proceedings.

Despite all these efforts, there were still a substantial number of death-row inmates with no counsel for state post-conviction and federal habeas corpus proceedings. Accordingly, the ABA Project filed amicus briefs in both the Fourth Circuit and the Supreme Court, in *Murray v. Giarratano* (1989), supporting the claim that the constitutional right of access to the courts required Virginia to provide indigent death-sentenced inmates with counsel to handle state post-conviction and federal

habeas corpus proceedings. By a 5-4 vote, the Supreme Court disagreed, holding that Virginia had not violated the Constitution. The door was not completely shut, however. The deciding vote was cast by Justice Kennedy, who stated in his concurrence that there might be an unusual circumstance in which he would reach a different conclusion. What might constitute such a circumstance was left for another day.

This defeat's impact was somewhat ameliorated by Congress's prior enactment in the late 1980s of a statutory right to appointed federal habeas corpus counsel for indigent death-row inmates. This statutory right was created, with the ABA Project's support, as part of a law providing for a federal death penalty for certain drug-related murders. While this federal statutory right has been of some help, its impact has been largely minimized by the prohibition on raising claims in federal habeas proceedings that have not been raised previously in state court. Thus, it has remained crucial that the ABA, other bar groups, and public interest law groups with which the ABA works closely, such as the Southern Center for Human Rights and the Equal Justice Initiative, succeed in recruiting pro bono counsel for state post-conviction proceedings.

TECHNICALITIES CREATING NEW PROBLEMS

The ABA Project early realized that lawyers for death-row inmates had to struggle against one especially difficult legal technicality, procedural default, that was making futile the efforts of many lawyers whom the ABA recruited. Legislative efforts being pushed by the Reagan and George H. W. Bush administrations to add additional technicalities led to further struggle.

The Supreme Court, beginning with its decision in *Wainwright v. Sykes* (1977), radically changed prior law. In *Sykes* and subsequent cases, the Court precluded federal habeas courts from deciding claims that had not been raised in state courts at the time prescribed by state law, even when the failure to object was due to counsel's ignorance of the law or inattention. Before *Sykes*, a lawyer's failure to raise a claim when required by a state procedural rule barred federal habeas review only if the defense made a deliberate, strategic decision not to object. *Sykes* created an incentive for states that did not already have contemporaneous objection rules to adopt them. Such rules could guarantee that meritorious constitutional claims would never be considered by federal courts.

One of the most egregious examples of the fatal effects of the procedural default doctrine involved Virginia death-row inmate Roger Coleman. His volunteer state post-conviction counsel inadvertently barely missed a state appeals court filing deadline by either one or three days, based on an understandable misunderstanding of how the state appeals court calculated the deadline. The U.S. Supreme Court held that this mistake by the volunteer lawyers foreclosed their client from having *any* ability to raise *any* federal constitutional claim—no matter how meritorious—in federal habeas corpus. In explaining why, Justice O'Connor began the Court's opinion by saying, "This is a case about federalism" (*Coleman v. Thompson*, 1991, at 726).

Then, in the late 1980s, the Supreme Court invented a second door-closing technicality: the "anti-retroactivity" doctrine, which began with *Teague v. Lane* (1989). Under this doctrine, if a federal habeas litigant seeks a favorable ruling on a federal constitutional claim, there must have been, by the time the litigant's direct appeal and ensuing certiorari petition (if any) were adjudicated, a Supreme Court decision either directly on point or so close that reasonable jurists could not disagree about the decision's applicability to the litigant's case. Thus, a litigant who raises a federal constitutional claim every step of the way—and hence has no procedural default problem—cannot get a federal habeas court to rule in favor of that claim if the Supreme Court does not address the precise constitutional issue until *after* the person's direct appeal and (if filed) the ensuing certiorari petition. This is so even if the Supreme Court rules squarely in favor of the same constitutional issue shortly after the inmate's direct appeal has ended, and long before the inmate even begins—no less ends—his first federal habeas corpus proceeding.

While the Supreme Court can, after *Teague*, decide such "new" issues of law in the context of direct appeal cases, it often fails to do so for many years after first being asked to adjudicate these issues. When it eventually *does* grant certiorari with regard to a direct appeal decision and upholds the constitutional claim, that decision comes too late for other inmates who raised the same claim in a timely way and tried in vain to get the Court to grant certiorari in their cases. They are out of luck, and in capital cases, they can be executed. This has happened even when, long before their executions, the Supreme Court has held that the Constitution does not allow convictions or death sentences rendered as they were in their cases. For example, Robert Sawyer was executed in 1993, three years after the Supreme Court barred him, under the anti-retroactivity doctrine, from relying on a 1985 Supreme Court holding (*Caldwell v. Mississippi*, 1985), because that holding had been handed down the year after his conviction had become final (*Sawyer v. Smith*, 1990). The anti-retroactivity doctrine thus makes the Supreme Court's delay in deciding "new" constitutional issues fatal for many inmates.

For many years, work by the ABA Project and others persuaded Congress not to enact even more draconian limitations on federal habeas corpus that were sought by Presidents Reagan and G. H. W. Bush. Then the Clinton Administration's insistence that Congress enact a crime bill within a year of the Oklahoma City bombing led President Clinton to sign the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Putting aside what it purports to do about terrorism, this law also shuts the door on many meritorious federal constitutional claims, in situations in which counsel object when required to do so by state law and the state courts erroneously rule against these constitutional claims. Under the AEDPA, a federal habeas court cannot grant relief on a federal constitutional claim it finds meritorious unless it further decides that the state court's erroneous ruling was an unreasonable interpretation of existing law.

While the Supreme Court has not yet definitively construed this provision, many lower courts have interpreted it as precluding them from granting relief in cases where they *would* have granted relief before the law's enactment. One example is a death penalty case where the Mississippi Supreme Court held that trial counsel performed ineffectively, but found no reasonable probability that if counsel had been effective, the sentence would have been life. The Fifth Circuit agreed that counsel's performance had been ineffective but disagreed regarding the prejudicial impact. It found that if counsel had performed effectively, there *was* a reasonable probability that the outcome would have been different, i.e., that the defendant would not have been sentenced to death. Nonetheless, the Fifth Circuit denied relief. It held that under the AEDPA it could not say that the Mississippi Supreme Court's erroneous holding was "unreasonable." Therefore, the inmate could be executed (*Neal v. Puckett*, 2002). The AEDPA also contains numerous other provisions that make representing death-row inmates considerably more difficult.

INCREASING THE FOCUS ON QUALITY OF COUNSEL

In 1996 the ABA was confronted by the reality that the AEDPA, when combined with the procedural default and anti-retroactivity doctrines, would make it far less possible for a death-sentenced inmate to secure relief in federal habeas corpus. Moreover, the situation was made materially worse by Congress's decision, also in the mid-1990s, to defund completely all of the death penalty resource centers that had been created to represent, and help pro bono lawyers represent, indigent death-row inmates.

In 1997 the ABA reacted by concluding that these congressional actions were the "last straw." The ABA decided that the death penalty had become so egregiously unfair *in practice* that there should be a nationwide moratorium on executions until all of the due process problems in the implementation of the death penalty were rectified. In this connection, with regard to the AEDPA and other restrictions on the ability to secure relief in federal habeas corpus, the ABA relied on policies it had adopted in 1989 concerning federal habeas corpus in the specific context of capital punishment.

At the same time, the ABA Project decided that, in addition to continuing to recruit pro bono lawyers to handle state post-conviction and federal habeas claims, it should look for alternative funding for some of the training and mentoring that death penalty resource centers had carried out. Moreover, the Project felt it had to refocus and pay attention to all phases of death penalty cases, including pretrial, trial, and direct appeal, in addition to state post-conviction, federal habeas, and clemency. One evidence of this new direction was renaming the Project to remove "Post-Conviction" from its title, making it the ABA Death Penalty Representation Project.

A major reason for the new focus on pretrial, trial, and direct appeal counsel was that the various limitations on state post-conviction and federal habeas corpus relief

made it even more important than ever to ensure that pretrial, trial, and appellate counsel were aware of the variety of often-complex constitutional claims that they had to make. If these claims were "available" to be made but were not raised and presented in the manner and with the factual support now required by the AEDPA, it was highly unlikely that any subsequent lawyer would be permitted to raise them. Moreover, because of other portions of the AEDPA not specifically discussed here and other Supreme Court rulings, it has become far more difficult, and often impossible, to flesh out in federal habeas corpus the factual bases for claims that *were* raised in state court. This is so even when the state court gave no indication that it would have treated these claims more seriously if presented with more facts.

In addition, it has become crucial to raise every constitutional claim that—no matter how negative the existing jurisprudence may be—might later be held to be meritorious. The Supreme Court has reversed course many times on death-penalty-related constitutional claims. For example, in one case, *Walton v. Arizona* (1990), the Supreme Court held that it was constitutional for a judge to make factual findings that were prerequisites to the defendant's being eligible for consideration of capital punishment. Twelve years later, in *Ring v. Arizona* (2002), the Supreme Court reversed itself and held that the Constitution requires Arizona to have a jury make those factual findings. Accordingly, the ABA Project has undertaken initiatives designed to improve the quality and performance of counsel at all stages of capital cases, beginning at the very outset of a potentially capital criminal case.

When firms decide to undertake representation in state post-conviction and federal habeas corpus proceedings, the Project now encourages them to start their involvement earlier—during, or even before, the time that a certiorari petition is filed in the Supreme Court following the direct appeal in state court. This encouragement arises from the AEDPA's creation of a one-year statute of limitations for filing a federal habeas corpus petition. The one-year clock begins running as soon as the deadline for filing for certiorari following direct appeal is reached (if no such petition is filed) or else when certiorari is denied. Thus, the clock *runs* during the time between the end of the certiorari process and the filing of the state post-conviction petition.

It takes an extraordinary amount of time and effort to review the existing trial and appellate record, to investigate facts that can be raised in state post-conviction and federal habeas corpus proceedings, and to research and apply the relevant substantive and procedural law bearing on all claims that can be raised in these proceedings. If a firm begins work only after certiorari is denied, the clock may run out before it can file a properly prepared state post-conviction petition. Therefore, the Project tries to get counsel involved in preparing certiorari petitions following direct appeal and to undertake intensive factual and legal investigation during the certiorari time frame. While the Project often fails to find counsel who can begin work that early, when counsel *does* get involved at this stage, the impact is often tremendous.

ADDITIONAL WORK OF THE ABA PROJECT

The Project devoted several years and much time and energy to preparing a 2003 update of the ABA's death penalty counsel guidelines, originally adopted in 1989, regarding representation in all stages of capital cases, and also prepared extensive new commentary, published with the perspectives of counsel who have represented death-row inmates pro bono. (ABA, 2003). The Project has thereafter engaged in continuing efforts to try to get state bars and state courts to implement these guidelines. It has achieved notable progress in this regard in several states.

In addition, the Project, often alongside the ABA Section of Individual Rights and Responsibilities, has taken the lead in preparing ABA amicus curiae briefs on issues on which the Project has special expertise. In recent cases, these briefs have increasingly discussed, and urged the Court to rely on, the ABA counsel guidelines as a basis for concluding that trial counsel failed to follow contemporaneous legal standards for the effective assistance of counsel. These briefs likely helped persuade the Supreme Court to hold capital defense counsel ineffective in several cases during Justice O'Connor's final years on the Court (e.g., *Wiggins v. Smith*, 2003; *Williams v. Taylor*, 2000). In these decisions, and in several speeches she has given in this decade, (e.g., Lane, 2001), Justice O'Connor has shown a sophisticated recognition of the failings of a great many counsel for death-sentenced inmates and of the impact of such failings. This contrasts to her earlier decisions in her Supreme Court tenure, in which she regularly rejected strong claims of ineffective assistance (e.g., *Strickland v. Washington*, 1984; *Burger v. Kemp*, 1987). Indeed, the performances of counsel in many of the earlier cases were more ineffective in prejudicial ways than were counsel's performances—as horrible and prejudicial as they were—in the more recent cases in which she voted to grant relief, as one can see by comparing, e.g., the performance of counsel in *Strickland v. Washington*, 1984 (claim denied) with that in *Rompilla v. Beard*, 2005 (claim granted). Justice Alito's appointment to the Court in place of Justice O'Connor may eventually lead to the scaling back or even reversal of the ineffectiveness holdings during her last years on the Court, but those decisions currently provide a fertile basis for saving lives in situations that might have been hopeless in the not too distant past.

Another effect of the ABA's increased focus on effective assistance of counsel is that an increasing number of state judges have begun to take a more realistic view of the problems posed by ineffectively performing pretrial, trial, appeal, and state post-conviction lawyers. This has made it slightly less difficult to secure relief in state post-conviction proceedings. However, for every step forward, there are often steps backward. For example, just a few years ago, Georgia made great strides to improve the quality of indigent defense generally, and in capital cases particularly, especially at the trial level. But now, the capital indigent defense situation in Georgia is in complete chaos. Due to outrage at defense legal fees in one huge, controversial case—fees that still are substantially less than the prosecution's expenditures in that case—

Georgia has cut drastically the funds available for all other capital cases. This has led to the departure of the leader of the capital indigent defense office and many of the office's best lawyers.

The ABA Project has encouraged pro bono lawyers who secure new trials, new appeals, new post-conviction hearings, or mental retardation trials to participate in these additional proceedings. The Project has also supported those firms that have decided to become involved in the initial trials of capital cases. And the Project has recruited pro bono counsel to undertake systemic attacks, such as on the inadequate provision of counsel at various stages of capital cases, and has provided testimony where its expertise can be useful to courts.

The Project also continues to expand into additional areas of the country for its recruitment of pro bono lawyers for death-row inmates. At the same time, however, it faces the challenge of sustaining, and increasing, pro bono involvement in places that have long been the source of volunteer lawyers for death-row inmates. Some large law firms that have previously handled one or more capital punishment cases now take the view—which some of them first started asserting over a decade ago—that representing a death-row inmate takes so much time that doing even one case swamps all other pro bono work. Some firms say that they will never do such a case again; others say they will do so only rarely.

The Project tries to brings several facts to these firms' attention. It points out that (as discussed further below) there are now many resources—on the Internet, via listservs, through treatises and otherwise—not previously available that can avoid a firm's spending countless hours "reinventing" (or mis-inventing) "the wheel." There is no reason for a firm to go down blind alleys that anyone with suitable experience in death penalty cases could tell them to avoid. Moreover, the Project, through its two decades of experience, can advise firms on how to avoid overstaffing cases. It can guide firms in how they can handle cases in a manner entirely consistent with the firm taking on many other types of substantial cases in their pro bono programs.

The Project has also made a great effort to make pro bono lawyers aware of available training and substantive resources. It has created a password-protected Web site for pro bono lawyers with a wealth of materials, including key decisions, research memoranda, briefs, and forms. These have been created by or for the Project, or are available by links to other Web sites. The Project also encourages pro bono lawyers to participate in a listserv in which they can obtain advice and information from highly experienced death penalty practitioners.

As a result of these activities, and initiatives by others, including the regular updating of the treatise on habeas corpus by Hertz and Liebman (2005), pro bono lawyers find it far easier than in the past to learn from the most proficient practitioners of capital defense. Hence, there is less reason than ever before for pro bono lawyers to try to "reinvent the wheel" by acting as if the issues they face have never arisen before. Indeed, there are many more training sessions, including those for trial

counsel, than when the ABA Project was created, and some include opportunities to go over case strategies in detail with national experts. **jsj**

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