

# THE DEATH OF FAIRNESS: THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN THE 1980s

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\*\* It is the policy of the *Review* to use female pronouns for the third person singular when the pronoun is used generically. However, since an overwhelming majority of criminal defendants are male, male pronouns will be used in reference to members of this group. See U.S. Department of Justice, Bureau of Justice Statistics, PRISONERS IN 1985 (June 1986), at 1 (only 4.6% of all prisoners nationwide are women); U.S. Department of Justice, Bureau of Justice Statistics, REPORT TO THE NATION ON CRIME AND JUSTICE (1983), at 83 (less than 1% of the 3800 persons executed since 1930 were females).

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## INTRODUCTION

A popular misconception about capital punishment is the belief that our legal system guarantees the fair imposition of the death penalty. The Supreme Court has fostered this belief.<sup>1</sup> After holding prior death penalty laws unconstitutional in 1972, in large part because capital punishment was being imposed arbitrarily and capriciously,<sup>2</sup> the Court upheld new death penalty laws in 1976.<sup>3</sup> The Justices who cast the crucial votes did so on the basis that the new laws ensured fairness and objectivity in the imposition of capital punishment.<sup>4</sup> Indeed, from reading subsequent Supreme Court pronouncements, one could readily conclude that death row inmates are abusing this fair system by using a large cadre of attorneys to present an endless series of clearly frivolous arguments.<sup>5</sup>

Until early 1983, I held such beliefs based on the court decisions and articles I had read. Although I was generally opposed to capital punishment because I did not believe it to be an effective deterrent, I felt that at least it finally was being administered in a relatively fair manner.

Near the end of 1982, the large law firm for which I worked agreed to let me spend a substantial amount of my time representing indigent clients. In early 1983, I contacted the NAACP Legal Defense and Education Fund to volunteer my services. I expected to be assigned to an employment or housing discrimination case. To my surprise, the Fund's Director-Counsel said that I would be most useful by representing clients on death row. This statement was inconsistent with my impression that death row inmates had more than

1. See, e.g., *Spaziano v. Florida*, 468 U.S. 447 (1984) (stressing that fairness and reliability are now guaranteed by the Court's eighth amendment decisions).

2. In *Furman v. Georgia*, 408 U.S. 238, 309 (1972), Justice Stewart stressed that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Justice White asserted "that the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

3. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

4. *Id.* at 198 (opinion of Stewart, Powell and Stevens, JJ.) (the jury's discretion is now "controlled by clear and objective standards" such that the death penalty is applied in a non-discriminatory manner, in which there is a meaningful basis for distinguishing the few cases where death is imposed from the many where it is not).

5. See, e.g., *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (opinion of Powell, J., joined in by a majority of the Court) (asserting that an abusive pattern has developed of presenting claims, "often in a piecemeal fashion — only after the execution date is set or becomes imminent."); *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring) (attacking death row inmates' lawyers for "seeking to turn the administration of justice into [a] sporting contest . . .").

enough lawyers who were clogging the courts with repetitious, losing arguments. I was also incredulous that someone with no criminal trial experience and barely any criminal appellate experience could be of great help to defendants on death row.

As of this writing, I have represented seven death row inmates and written amicus briefs in an eighth case. My experiences over the last four years — which have ranged from a victory in the United States Supreme Court to the execution of a client — have left me shaken by the inability of our legal system to treat fairly the indigent defendants accused of capital crimes. I have been amazed to find an extreme lack of fairness in every stage of death sentence cases and at least one fundamentally unfair aspect to every capital case I have handled.

Unfortunately, I have learned that my cases are typical of capital punishment cases in the 1980s. Many of the illustrative examples cited in this article are from cases I have handled, and were only uncovered during my work thereon. I became aware of many other examples through legal research for my cases and meetings with experienced death penalty defense attorneys. These attorneys uniformly maintain that, if one delves deeply enough into a capital case, one is likely to discover one or more of the types of egregious problems described below.

This article discusses each stage of a death sentence case. I describe both the unfair practices unique to death penalty cases and the unfair aspects of our criminal justice system that have their most devastating effects in capital cases. These descriptions show that indigent death row inmates, far from regularly abusing the legal system, are all too frequently its victims.

## I

### THE PROSECUTOR'S DECISION ON WHETHER TO SEEK THE DEATH PENALTY

For a case to become a capital case, the prosecutor must decide to seek the death penalty. This decision frequently involves political considerations. Since most prosecutors are elected officials, they are subject to community pressure in deciding what penalty to seek. For example, Marion Farmer, as the District Attorney for the 22nd Judicial District of Louisiana, came under severe public criticism for not seeking the death penalty in certain cases.<sup>6</sup> Despite his decision to ask for the death penalty in some subsequent cases, he was defeated for reelection in 1984.<sup>7</sup>

Some prosecutors seek the death penalty primarily because doing so enables them to secure convictions more easily. Bob Wilson, the District Attorney of Dekalb County, Georgia, conceded that he seeks the death penalty so that strong opponents of it will be automatically excluded from the jury,

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6. See DeParle, *A Matter of Life and Death*, New Orleans Times-Picayune, Apr. 7, 1985, (Special Report), at 6.

7. *Id.*

thereby increasing his likelihood of securing a conviction.<sup>8</sup> In one Arkansas case, the prosecutor actually dropped his demand for the death penalty once the conviction-prone jury convicted the defendant.<sup>9</sup>

Other defendants have not been so fortunate and have become, instead, fatalities of prosecutors' use of the death penalty as a tactic in plea-bargaining. In Louisiana, the district attorney who prosecuted Timothy Baldwin followed a general policy of giving every person who was charged with a capital crime the chance to avoid the death penalty by pleading guilty to second-degree murder.<sup>10</sup> A defendant could, of course, choose to maintain his innocence, but the district attorney would then charge him with first-degree murder and seek the death penalty.<sup>11</sup> Baldwin asserted his innocence but lost the "roll [of] the dice;"<sup>12</sup> he was convicted and subsequently executed in September 1984.<sup>13</sup> A Georgia defendant, John Michael Davis, turned down a plea bargain under which he would receive a life sentence, but then quickly changed his mind. However, the prosecution refused to revive its offer. The Georgia Supreme Court recently held that the State had no obligation to reinstate its offer, and it affirmed Davis' death sentence.<sup>14</sup>

Some prosecutors earnestly desire not to be arbitrary in deciding when to seek the death penalty. Unfortunately, they receive little, if any, guidance from state laws about when to ask for capital punishment. The State Attorney of Montgomery County, Maryland became so frustrated with this lack of instruction that he wrote an article in his state's bar journal urging the courts to provide him some guidance on how to exercise his discretion.<sup>15</sup> However, neither the Maryland courts nor the United States Supreme Court has provided such guidance.<sup>16</sup>

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8. See Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 620 and n. 218 (1985).

In many states, juries in capital cases must be "death qualified," *i.e.*, jurors will be excluded from service if they would automatically refuse to vote for a death sentence. Danc, *'Death-Qualified' Jury Standard Needs Probing*, The Atlanta Constitution, July 9, 1986, at A23. "All of the available evidence on death qualification leads to the inescapable conclusion that death-qualified jurors are more willing to convict defendants than are their 'unqualified' colleagues." *Id.* See *infra* text accompanying notes 118-124.

9. Grigsby v. Mabry, 569 F. Supp. 1273, 1276 (E.D.Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd*, Lockhart v. McCree, 106 S. Ct. 1758 (1986).

10. See DeParle, *supra* note 6.

11. *Id.*

12. *Id.* (quoting former Ouchita Parish District Attorney Johnny Carl Parkerson).

13. See Baldwin v. Maggio, 715 F.2d 152 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984); *Louisianian Who Killed Neighbor Executed After Appeal Is Refused*, N.Y. Times, Sept. 10, 1984, at A10, col. 1.

14. Davis v. State, 255 Ga. 598, 613-14, 340 S.E.2d 869, 883, *cert. denied*, 107 S. Ct. 245 (1986).

15. Sonner, *Prosecutorial Discretion and the Death Penalty*, MD. B.J. Mar. 1985, at 6, 7.

16. See DeGarmo v. Texas, *cert. denied*, 106 S. Ct. 337, 338-39 (1985) (Brennan, J., dissenting).

## II TRIAL ATTORNEYS

When a prosecutor decides to seek the death penalty for an indigent defendant, the court appoints either a public defender or a local attorney to represent the defendant. Far too often, these defense attorneys are too inexperienced to handle death sentence cases. Those who do have adequate experience are usually vastly overworked, underpaid, and provided with little, if any, funding to investigate or to hire expert witnesses.<sup>17</sup>

In many states, only hard-pressed county governments, not state governments, provide funds for the defense of indigents charged with capital (or other) crimes.<sup>18</sup> In 1982, Georgia counties provided an average of only \$131 per defendant for the defense of people facing prison terms.<sup>19</sup> As a result, indigent criminal defendants often receive ineffective legal representation in Georgia. This phenomenon is dramatically illustrated by the case of an indigent Vietnamese refugee charged with murder and facing a possible life sentence. The court-appointed defense lawyer did not realize for the first two days of trial that the person sitting next to him was not the defendant. The error was spotted only by the third witness who testified at the trial.<sup>20</sup> It is highly unlikely that this mistake would have occurred if the defense lawyer had had adequate time and resources to hire an interpreter and otherwise prepare for trial.

Even where state governments do fund defense counsel, the money provided is generally grossly inadequate. Nationally, the typical maximum fee for felony cases is between \$500 and \$1000.<sup>21</sup> The situation is particularly acute in death penalty cases, where the responsibilities of defense counsel "far exceed those [in] all other state criminal cases."<sup>22</sup>

Virginia's payment of private defense counsel is among the worst in the country. Although its trial judges can award "reasonable" fees in death penalty cases, capital defense lawyers are only paid an average of \$687 per case — "peanuts," as the Virginia State Bar's president has aptly stated.<sup>23</sup> The previous Bar president noted, in May 1985, that such payments amount to only \$1

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17. See DeParle, *supra* note 6; Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 356 (1983).

18. U.S. Department of Justice, Bureau of Justice Statistics, SPECIAL REPORT: CRIMINAL DEFENSE SYSTEMS (Aug. 1984) [hereinafter cited as SPECIAL REPORT: CRIMINAL DEFENSE SYSTEMS], at 6.

19. *Id.* at 7.

20. Dolman, *Georgia's System of Justice Shortchanges the Penniless*, The Atlanta Constitution, Nov. 22, 1985, at 31, col. 1; Clendinen, *Race and Blind Justice Behind Mixup in Court*, N.Y. Times, Nov. 3, 1985, § 1, at 26, col. 1.

21. SPECIAL REPORT: CRIMINAL DEFENSE SYSTEMS, at 5.

22. Spangenberg, Rose, Smith and Thayer, *Analysis of Costs of Court-Appointed Counsel in Virginia, Final Report*, Apr. 1985, at 55 (on file with the New York University Review of Law & Social Change).

23. Springsteen, *Virginia Death Penalty Follows Course Different From Country, World*, News Leader, June 27, 1985.

per hour in some cases.<sup>24</sup> He stated that "asking [an attorney] to take a court-appointed case, especially a capital murder case, is asking [an attorney] to take an economic bath and lawyers are beginning to say no."<sup>25</sup>

Florida has been more generous, allowing a maximum payment of \$3,500.<sup>26</sup> Even that amount, however, has frequently been completely inadequate. For example, in 1984, the court-appointed lawyers of Jerry Layne Rogers received only \$4.07 per hour in preparing for his capital trial and *nothing* for the two-week trial itself.<sup>27</sup> In addition, because their representation of Rogers was so time-consuming, they lost several potential clients.<sup>28</sup>

On July 17, 1986, the Florida Supreme Court held that the \$3500 maximum fee is "unconstitutional when applied to cases [such as the particular death penalty case in question] involving extraordinary circumstances and unusual representation."<sup>29</sup> The Court stated that the "statute, as applied to many of today's cases, provides for only token compensation," and thereby "interferes with the sixth amendment right to counsel."<sup>30</sup> In the Court's view, "[t]he link between compensation and the quality of representation remains too clear."<sup>31</sup>

However, other state Supreme Courts have refused to overturn the extremely low limits on payments to defense counsel. A recent Georgia lawsuit challenging the ludicrously low payments to defense counsel was summarily dismissed by the State Supreme Court.<sup>32</sup> The Alabama Supreme Court held in 1985 that the statutory limits of \$1000 for compensation and \$500 for expenses do not deprive a capital defendant of any constitutional rights, because attorneys are "directed by their consciences and the ethical rules enforced by the state bar association" to serve their capital clients "well."<sup>33</sup>

The Florida Supreme Court has recognized what many lawyers and defendants have known for a long time: that a good attorney with sufficient funds can make a dramatic — indeed, a dispositive — difference in the adequacy of defense. In New Orleans, for instance, a furniture store executive was charged with murder. His attorney developed a defense which included the use of a Minnesota psychologist in jury selection and the presentation of

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24. Walker, *State's Law Fees Said to Create 'Disaster' in Legal Help to Poor*, Times-Dispatch, May 29, 1985.

25. *Id.*

26. FLA. STAT. § 925.036(2)(d) (1985).

27. *Minimum Wage Justice*, Lakeland Ledger, Dec. 18, 1984 (Editorial).

28. *Id.*

29. *Makemsom v. Marin County*, 491 So. 2d 1109, 1112 (Fla. 1986), *cert. denied*, 55 U.S.L.W. 3471 (U.S. Jan. 12, 1987).

30. *Id.*

31. *Id.* at 1114.

32. *Holbrook v. Georgia*, No. 42-970, slip op. (Ga. Nov. 27, 1985). See also Alexander and White, *Suit Demands That State Hike Funding For Indigent Defense*, The Atlanta Constitution, Nov. 16, 1985.

33. *Ex parte Grayson*, 479 So. 2d 76, 78-80 (Ala. 1985).

scientific experts from throughout the country.<sup>34</sup> The client spent \$250,000 on the defense.<sup>35</sup> He was acquitted after an 11-day trial and then commented: "Thank God I had the resources. . . . If not, they would have had me in jail."<sup>36</sup>

The problems of inexperienced, overworked, and inadequately funded defense counsel are often compounded by other factors. In many cases, the court-appointed attorney representing a capital defendant is isolated in a small community which is outraged about a heinous violent crime. Unfortunately, some attorneys fear the reactions of the community or local judiciary, and fail to protect their clients' legal rights. The Eleventh Circuit found that the court-appointed Georgia defense counsel for Terry Lee Goodwin, fearing community reproach, did not challenge a jury selection method that discriminated against blacks and women.<sup>37</sup> He even permitted the jury to learn that he was representing Goodwin only because he had to do so.<sup>38</sup> For similar reasons, or because of incompetency, many defense lawyers fail to ask questions during jury selection that could disqualify potential jurors who will automatically vote for the death penalty if guilt is found.<sup>39</sup>

Moreover, defense counsel have been found ineffective for failing to take rudimentary steps to challenge crucial, but highly vulnerable, aspects of the prosecution's guilt/innocence case. The Eleventh Circuit recently ruled that the Florida defense attorney for Dennis Wayne Smith was ineffective in failing to bring certain key facts to the jury's attention. Smith's defense attorney failed to reveal to the jury that Wesley Irvin Johnson — the sole witness to place Smith at the scene of the crime and to name him as perpetrator — had gone to the police, had confessed to being the principal perpetrator, and had initially made no mention of Smith. Furthermore, the jury never learned that Johnson's wife — whom the prosecution used to buttress Johnson's testimony — had told the police about Johnson's account, and had not initially mentioned Smith.<sup>40</sup>

Defense counsel often fail to recognize the importance of the additional preparation needed for the separate penalty phase of a capital trial.<sup>41</sup> Indeed, some of them do not even know that there will be a separate penalty phase until they are in the middle of it. By then, they have ended up being ineffec-

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34. DeParle, *Executions Aren't News, Why They Should Be*, WASH. MONTHLY, Mar. 1986, at 12, 20, col. 1.

35. *Id.*; DeParle, *supra* note 6.

36. *Supra* note 35.

37. *Goodwin v. Balkcom*, 684 F.2d 794, 805-10 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983).

38. 684 F.2d at 805.

39. *See Goodpaster, supra* note 17, at 326.

40. *Smith v. Wainwright*, 799 F.2d 1442, 1442-43 (11th Cir. 1986) (*per curiam*). For other examples of ineffectiveness in dealing with guilt/innocence phase evidence, see the descriptions of the *House* and *Young* cases, *infra* note 42.

41. *See Goodpaster, supra* note 17, at 323-24.

tive in both phases of the trial.<sup>42</sup>

Even if defense counsel do wish to prepare properly for the penalty phase, they often lack the skills, time, and resources necessary to do so. Inexperience often accounts for the lack of skills. As for the lack of resources, the money provided to such counsel by states and counties is generally far below the amount needed even in a routine criminal trial, where the jury determines only the defendant's guilt or innocence. It is all the more inadequate in a death penalty trial, where the jury must also determine whether to impose the death sentence or a life sentence.

In the penalty phase, a defendant may present witnesses who can describe aspects of his background, past good deeds, or psychological makeup which might persuade jurors to vote for a life sentence. Counsel to indigent defendants generally lack sufficient time, funds, and staff and are therefore unable to make the comprehensive investigation into their clients' past that is necessary for this phase. Few have adequate funds to pay for psychiatrists or other expert witnesses. Moreover, many of these attorneys are middle class and white, while their clients are poor and black.<sup>43</sup> Hence, the attorneys frequently are unable to enter their clients' communities and gain the trust of residents who can provide potentially helpful accounts of their clients' background, character, and emotional makeup.<sup>44</sup> Thus, as the *Times-Picayune* of New Orleans recently reported: "[m]any court-appointed attorneys — short on time and money — channel their energies into the first phase of the trial. They often find themselves exhausted and without new witnesses or arguments when they

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42. See, e.g., *House v. Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984). The defendant's counsel were held ineffective at both phases of the trial. Counsel interviewed no witnesses, sought no discovery, never visited the scene of the crime, and failed to take steps to substantiate the existence of bruises on the defendant's body. Furthermore, lead counsel failed to prepare an available response to significant prosecution evidence and was absent from the courtroom during the direct testimony of a witness whom he then cross-examined and during half of the prosecutor's guilt/innocence phase closing argument. Since counsel were unaware that there was a separate sentencing phase, they prepared neither evidence nor argument and failed to secure affidavits from available witnesses who stated after the trial that they had seen the two victims alive several hours *after* the time the prosecution alleged they were killed. *Id.* at 612-13.

See also *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). Here, too, counsel was held ineffective at both phases of the trial. Counsel was unaware that there would be two phases of the trial, and therefore conceded his client's guilt and pleaded for mercy during the guilt/innocence phase. He did so despite the existence of "extremely thin" evidence to indicate that the defendant was guilty of malice murder, as opposed to the lesser, non-capital offense of manslaughter. Young's counsel never even sought a charge to the jury on the lesser-included offense. Similarly, defense counsel's cross-examinations of the prosecution's witnesses were at best "cursory and superficial," and no defense witnesses were presented. Because the defense presented no penalty phase case, the jury never learned that the college-educated defendant had no prior record and had received a favorable recommendation from a local sheriff. *Id.* at 796-97.

43. Conversation with John Charles Boger, Staff Attorney, NAACP Legal Defense Fund (December 1985); Remarks of Cessie Alphonso, NAACP Legal Defense Fund Annual Capital Punishment Conference, Warrenton, Virginia (Aug. 8, 1986).

44. *Supra* note 43.



reach the sentencing hearing."<sup>45</sup>

Recent court decisions provide several examples of court-appointed defense lawyers who were ineffective in the penalty phase. According to a federal appeals court, the Georgia lawyer who represented Joseph James Blake did not prepare at all for the penalty phase of Blake's trial.<sup>46</sup> When asked why, the attorney explained that he had thought the defendant would be found not guilty by reason of insanity. He did not choose to "prepare for losing it."<sup>47</sup> The court found that, as a result of the defense counsel's ineffectiveness, the jury never heard available character evidence in the sentencing phase.<sup>48</sup>

In a Florida case, the Eleventh Circuit found that the appointed counsel for Amos Lee King, Jr. acted ineffectively. He never discussed King's background with him, did not search carefully for helpful sentencing phase evidence, and made a closing argument in which he indicated to the jury that he was representing the defendant reluctantly.<sup>49</sup> The same circuit found ineffectiveness on the part of the inexperienced court-appointed Georgia lawyer representing Shirley Tyler. That lawyer neglected to inform the jury that Mrs. Tyler had never before been in trouble with the law and that she had been severely beaten by her husband for many years before she allegedly poisoned him.<sup>50</sup> And, in a Mississippi case, a federal district court held that defense counsel's failure to present any sentencing phase evidence prevented the jury from learning that defendant Larry Jones was mildly mentally retarded.<sup>51</sup>

Such omissions are routine, yet they may be critical. The experience of Elvin Myles in Louisiana is a case in point. According to the *Times-Picayune* of New Orleans, no mitigating evidence and only a cursory defense argument were presented in Myles' original sentencing trial, and the jury returned the death sentence.<sup>52</sup> At the retrial, the defense put on a crucial witness, the defendant's sister, who was a deputy sheriff. She testified that Myles had been traumatized after his father killed his mother when Myles was two years old. The jury at the retrial voted for a life sentence.<sup>53</sup>

Unfortunately, several other capital defendants whose counsel also failed to present even rudimentary sentencing phase arguments have not succeeded

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45. DeParle, *supra* note 6, at 7.

46. Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 106 S. Ct. 374 (1985).

47. 758 F.2d at 533.

48. *Id.* at 534.

49. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

50. Tyler v. Kemp, 755 F.2d 741, 745-46 (11th Cir.), *cert. denied*, 106 S. Ct. 582 (1985). See also Straus, *Indigent Legal Defense Called 'Terrible,'* The Atlanta Journal and Constitution, July 7, 1985, at A1, col. 1. Other examples can be found in Goodpaster, *supra* note 17, at 300-05, 337 n.151.

51. Jones v. Thigpen, 555 F. Supp. 870, 878-79 (S.D. Miss. 1983), *modified*, 741 F.2d 805 (5th Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1172 (1986).

52. See DeParle, *supra* note 6.

53. *Id.*

in overturning their death sentences. Professor Stephen Gillers recently cited one such example:

James Messer, a poor man, was charged with murder. The first lawyer appointed to defend him begged off, citing community outrage at the crime. So did the second. A third lawyer adopted a low-key strategy. . . . At the sentencing hearing following conviction, he did not ask the jury to spare Mr. Messer's life, did not offer mitigating details inviting mercy and hinted that execution was appropriate. Mr. Messer is now on Georgia's death row.<sup>54</sup>

Indeed, "at the prompting of Messer's attorney, his only mitigating witness [Messer's mother] related both her opinion and [Messer's] that the balance of aggravating and mitigating circumstances would yield a sentence of death."<sup>55</sup> Furthermore, the jury was never told that Messer had "no prior arrest record," had served honorably in the military, and "had been satisfactorily employed."<sup>56</sup>

Similarly, Earnest Knighton's attorney was held not to have been ineffective,<sup>57</sup> notwithstanding these facts summarized by Professor Gary Goodpaster:

[C]ounsel did not attempt to pierce his client's alibi story or claim of innocence. Counsel also prepared an alibi case without alibi witnesses, and he continued this defense even after he learned the prosecution had charged a major alibi witness. In a capital case, he did not anticipate a death-qualifying guilt verdict, and neither investigated nor otherwise prepared for a capital sentencing hearing [and thus did not present available mitigating evidence]. Even after the guilty verdict was returned, he did not request a continuance so that he could attempt to do so.<sup>58</sup>

The claims of ineffective assistance of counsel made by both Knighton (who has been executed) and Messer were rejected under the constitutional standard articulated by the Supreme Court in *Strickland v. Washington*.<sup>59</sup> Under *Strickland*, defense counsel's performance is to be evaluated under a standard of "reasonableness under prevailing professional norms."<sup>60</sup> Trial counsel enjoy a strong presumption of competency,<sup>61</sup> and no one, apparently,

54. Gillers, *Poor Man, Poor Lawyer*, N.Y. Times, Feb. 28, 1986 (Op-ed page).

55. *Messer v. Kemp*, 760 F.2d 1080, 1096 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 106 S. Ct. 864 (1986).

56. *Id.* at 1096 n.2. Similarly, no relief was granted in *Martin v. McCotter*, 796 F.2d 813 (5th Cir. 1986), even though defense counsel presented no evidence and no argument during the sentencing phase.

57. *Knighton v. Maggio*, 740 F.2d 1344, 1350 (5th Cir.), *cert. denied*, 469 U.S. 924 (1984).

58. Goodpaster, *The Adversary System, Advocacy, Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 77 (1986).

59. 466 U.S. 668 (1984).

60. *Id.* at 688.

61. *Id.* at 696.

is to be held responsible for such factors as insufficient time or money.<sup>62</sup> Moreover, even if counsel is shown to have been ineffective, the defendant must also establish prejudice: In the context of a capital sentencing proceeding the defendant must show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."<sup>63</sup>

This prejudice standard unfairly places on capital defendants the burden of persuading a court that a jury would have acted differently given another set of circumstances.<sup>64</sup> Decisions in such cases as *Knighton* and *Messer* indicate that once a jury recommends death, appellate court judges have difficulty imagining that the jury would have done otherwise even under any number of hypothetical circumstances. Judges in such cases appear to overlook the fact that many juries confronted with extremely egregious murders have nevertheless voted life sentences.<sup>65</sup>

A recent Fifth Circuit opinion highlights the incredible impact of *Strickland*.<sup>66</sup> Two of the three circuit judges who denied relief to Raymond G. Riles joined in an opinion which stated the following:

To me, a sufficient showing has been made that trial counsel did not provide this accused with the quality of defense essential to adequate representation in any serious felony case, and particularly in a capital case.

. . . The briefs and argument of current counsel . . . together with the record, indicate that, if Riles' trial counsel had been able, the jury might not have imposed the death penalty.

Precedent requires me to agree that this is not enough to justify a certificate of probable cause. The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standard set by *Strickland v. Washington*. Proof that the lawyer was ineffective requires proof not only that the lawyer bungled but also that his errors likely affected the result. Ineffectiveness is not measured against the standards set by good lawyers but by the average — "reasonableness under prevailing professional norms" — and "judicial scrutiny of counsel's performance must be highly differential [sic]." Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency

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62. *Id.* at 681.

63. *Id.* at 695.

64. See *infra* text accompanying notes 323-331.

65. See *infra* note 329.

66. *Riles v. McCotter*, 799 F.2d 947 (5th Cir. 1986) (Rubin, J., joined by Johnson, J., concurring).

of a life sentence.<sup>67</sup>

It is cold comfort, indeed, to Mr. Riles that two of the three federal circuit judges would have ordered an evidentiary hearing on the effectiveness of his counsel were it not for their interpretation of *Strickland*.<sup>68</sup> Mr. Riles' death sentence stands.

The Supreme Court will soon have an opportunity to explain further the *Strickland* standard in deciding *Burger v. Kemp*<sup>69</sup> during the October 1986 term. The Court may review the lower federal courts' holdings that Berger was not denied the effective assistance of counsel when his attorney chose not to present any mitigating evidence during the sentencing phase of his capital trial.<sup>70</sup>

Many defense lawyers confront a starkly different type of problem in capital sentencing proceedings: their passive incompetency in the guilt/innocence phase of the trial may destroy the possibility of a life sentence before the sentencing phase even begins. These lawyers have failed to impress upon their clients the critical importance of not doing anything in the first phase — the guilt/innocence phase — which will destroy the defense's credibility in the second phase — the life-or-death phase.<sup>71</sup> In a case where the evidence of guilt is overwhelming, an effective defense attorney should advise her client to express remorse for his guilty conduct during the sentencing phase. If, in the guilt/innocence phase, the defendant takes the witness stand to deny his obvious guilt, any chance of success at the sentencing phase will usually be eliminated because he will have antagonized the jury.<sup>72</sup> Unfortunately, many defense counsel never provide that advice. By affirmatively claiming innocence in the guilt/innocence phase rather than putting the prosecution to its proof, their uncounseled clients unwittingly bring about their own death sentences.<sup>73</sup>

Supreme Court Justice Thurgood Marshall recently pointed out another serious failing of many capital defense lawyers.<sup>74</sup> Many of them are unaware of applicable legal principles and numerous rapid developments in the complex body of law affecting death penalty cases.<sup>75</sup> They neither make crucial

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67. *Id.* at 955 (citations omitted) (emphasis in original).

68. *See id.*

69. *See Burger v. Kemp*, 753 F.2d 930 (11th Cir.), *vacated and remanded on other grounds*, 106 S. Ct. 41 (1985), *adhered to as to other grounds*, 785 F.2d 890 (11th Cir.), *cert. granted*, 107 S. Ct. 397 (1986).

70. *See id.*

71. *See Goodpaster, supra* note 17, at 324-25, 329-30, 333-34, 345.

72. Of course, this problem and others could be avoided if different juries were used in the guilt/innocence phase and in the sentencing phase. Under such a system, a defendant could steadfastly deny guilt at the guilt/innocence phase but then, before a new jury at the penalty phase, credibly express remorse and present witnesses to *explain* his guilt.

73. *See Goodpaster, supra* note 17, at 324-25, 329-30, 333-34, 345.

74. Marshall, J., *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986).

75. *Id.* at 1-2.

objections at trial nor seek jury findings that might enable their clients to win on appeal.<sup>76</sup> Indeed, when these same defense counsel submit appellate briefs, they often fail to mention fundamental constitutional errors that have tainted the defendant's trial, or take only cursory note of them.<sup>77</sup>

Physical isolation and lack of resources help in explaining some counsel's failures to keep up with important legal developments. A federal appeals court found in *Jurek v. Estelle*<sup>78</sup> that a court-appointed Texas attorney was either completely unaware of, or misunderstood, an important five-year-old decision of the Supreme Court.<sup>79</sup> The attorney lived more than 100 miles away from the nearest publicly available copy of the Supreme Court's official decisions.<sup>80</sup>

The ineffectiveness of court-appointed attorneys in capital cases need not be inevitable, and its frequency may be diminished by taking a variety of measures. For example, Justice Marshall recently urged bar associations to establish training programs on representing capital defendants, to provide assistance when lawyers handle actual capital cases, and to create clearing-houses for information about capital cases.<sup>81</sup> In February 1985, the House of Delegates of the American Bar Association (the "ABA") unanimously approved a resolution concerning representation of death penalty defendants.<sup>82</sup> Under the resolution, two trial counsel would be appointed for each defendant in a case in which the death penalty is sought.<sup>83</sup> The primary attorney would be required to have substantial experience, including trial work involving serious felonies.<sup>84</sup> This basic approach has been followed by North Carolina, which recently enacted a statute requiring two defense counsel for each indigent defendant in capital cases.<sup>85</sup>

In May 1985, the Louisiana Supreme Court recommended a similar remedy to deal with the "recurring problem" of defense counsel who "vigorously" contest the State's case at the guilt phase but then do little to challenge it at the penalty phase.<sup>86</sup> The Court noted that a possible explanation for this

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76. *Id.*

77. A particularly egregious example of appellate ineffectiveness is discussed in *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984). The Florida Supreme Court held that "Barclay had no appellate representation," due to his appellate counsel's conflict-of-interest in representing both Barclay and his co-defendant, and the attorney's ineffectiveness. *Id.* at 959. The appellate brief never mentioned Barclay except on the title page, completely failed "to question the propriety of Barclay's death sentence," and argued "neither the inapplicability of the aggravating circumstances found by the trial court nor the possibility that the court erred in finding no applicable mitigating circumstances." *Id.*

78. 593 F.2d 672 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

79. 593 F.2d at 682.

80. See Goodpaster, *supra* note 17, at 325.

81. See Remarks of Justice Marshall, *supra* note 74, at 4.

82. *ABA Criminal Justice System Wins Approval For Two Resolutions*, 36 CRIM. L. REP. 2427 (BNA) (March 6, 1985).

83. *Id.*

84. *Id.*

85. N.C. GEN. STAT. § 7A-450 (b1)(1985).

86. *State v. Williams*, 480 So. 2d 721, 728 n.14 (La. 1985).

problem is that "the emotional and physical strain on the sole defense counsel in the losing effort in the guilt phase lessens his ability to maintain the same performance level in the immediately following penalty phase."<sup>87</sup> Hence, the Court suggested that more trial judges appoint two defense attorneys and allocate "specifically to one the *principal* responsibility for preparing evidence and argument for the penalty phase."<sup>88</sup>

Obviously, states will be inclined to resist the imposition of the extra financial burden involved in such appointments. However, their failure to allocate funds necessary for adequate representation may subject them to challenges in the courts. The Supreme Court's 1985 decision in an Oklahoma capital murder case may provide a basis for defendants to force states to pay for critically important experts. In *Ake v. Oklahoma*,<sup>89</sup> the Supreme Court held that in certain circumstances the Constitution requires that the State "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."<sup>90</sup> The State must provide a competent psychiatrist when a defendant's "sanity at the time of the offense [will] be a significant factor at trial," or when, during the sentencing phase of a capital trial, "the State presents psychiatric evidence of the defendant's future dangerousness."<sup>91</sup> Mr. Ake's original trial resulted in a death sentence. At his retrial, a psychiatrist testified on Ake's behalf, and he received a life sentence.<sup>92</sup>

Unfortunately, initial indications are that state courts will not extend *Ake* beyond situations involving critically important experts. The Georgia Supreme Court held recently that a murder defendant should have been given funds for a forensic dental expert who might have challenged the reliability of "critical" dental impression evidence.<sup>93</sup> The Court also stated, however, that its ruling "cannot serve as a basis for wide-ranging demands on behalf of indigent defendants for scientific investigative funds."<sup>94</sup>

For defendants in capital cases, inadequate representation may prove fatal. Such chronic problems as insufficient funding, lack of experience, and overwhelming workloads lead all too frequently to incredibly poor representation of capital defendants. Unless corrective measures are taken, many indigent capital defendants will continue to suffer "the consequences of having trial counsel who are ill-equipped to handle capital cases."<sup>95</sup>

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87. *Id.*

88. *Id.*

89. 470 U.S. 68 (1985).

90. *Id.* at 83.

91. *Id.*

92. *High Court Appellant Found Guilty in 2d Trial*, N.Y. Times, Feb. 14, 1986, at A15, col.

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93. *Thornton v. State*, 255 Ga. 434, 435, 339 S.E.2d 240, 241 (1986).

94. *Id.*

95. See Remarks of Justice Marshall, *supra* note 74, at 2.

### III SELECTION OF JURIES

Obtaining an impartial jury in a capital case is an extremely difficult undertaking. Even when defense counsel make concerted efforts to secure fair juries, they are often undermined by legal procedures and court rulings. For example, the law grants almost limitless discretion to judges regarding venue. A trial judge's decision not to move a trial is almost never reversed on appeal, even if — as often occurs in death penalty cases — the trial is held in the local community where the murder was committed, and the community has been saturated with prejudicial pretrial publicity.<sup>96</sup>

The Mississippi Supreme Court recently recognized this problem when it held that the site of a capital trial should be changed “‘when it is doubtful’ that a fair and impartial jury may be impaneled in the county where the crime occurred.”<sup>97</sup> The trial in question “should have been transferred to a county substantially outside the [media] coverage area . . . .”<sup>98</sup>

Some state statutes, however, provide only illusory relief: changes of venue are limited to nearby counties which often also have been saturated by the prejudicial publicity.<sup>99</sup> In the Arkansas trial of Marion Albert Pruett, potential jurors in the nearby community to which the trial was moved conceded

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96. See *Willie v. Maggio*, 737 F.2d 1372, 1386-87 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984). A recent decision holding a venue change to be required under exceptional circumstances is *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 2289 (1986). In *Coleman*, the court accepted the petitioner's showing that the community in which his trial occurred “was deeply prejudiced as to both guilt and innocence.” *Id.* at 1538. The court concluded that this showing met “the extremely high standard necessary for a successful claim of presumed prejudice,” *id.* at 1543, and thus constitutionally required a change of venue. *Id.* at 1538.

The particular publicized facts cited by the court as prejudicial included: (a) the arresting official's description of the evidence against the defendants as “‘overpowering,’” *id.*; (b) the defendants' escape from prison and involvement in a crime spree of which the murders were a part, *id.*; (c) Coleman's confession to a murder in Pennsylvania, *id.*; (d) the description by Coleman's half-brother of “the horrible manner” in which the victims were killed, *id.*; (e) “egregious remarks,” *id.*, by the county's chief law enforcement officer, including “widely reported and outrageous statements as to the need for vengeance, retribution, and capital punishment,” *id.* at 1539; (f) descriptions of the defendants' “remorselessness,” *id.* at 1538; (g) remarks by the defendants' mother that “mercy was inappropriate,” *id.*; (h) statements and efforts by defense attorneys to avoid appointment, *id.* at 1538-39; (i) the fact that the family of the victims — well-known and well-respected by the community and by several jurors — wanted the death penalty to be imposed, and had retained a special prosecutor to prosecute the case, *id.* at 1539; and (j) numerous editorials and articles “repeatedly suggesting the appropriateness of the death penalty.” *Id.* In addition, the court cited the “testimony of several local residents and . . . several journalists whose jobs included reporting the atmosphere of the community at the time,” to support its conclusion that “the community was predisposed as to both guilt and sentence.” *Id.*

97. *Fisher v. State*, 481 So. 2d 203, 220 (Miss. 1985), *quoting Eddins v. State*, 110 Miss. 780, 783, 70 So. 898, 899 (1916).

98. *Id.* at 223 (footnote omitted).

99. See, e.g., ARK. CONST. art. II, § 10 (change of venue limited to “any other judicial district in which the indictment is found. . .”).

that almost everyone in the area knew a great deal about the case.<sup>100</sup>

Many judges add to the likely prejudice at the jury selection stage by declining to excuse for cause potential jurors who have heard about a defendant's alleged crime(s). In Pruett's case, a prospective juror knew the victim's sister, had heard that the defendant was later going to be tried in another state for the murder of his wife, and had watched the defendant on television characterize himself as a "mad dog killer" and admit to killing people.<sup>101</sup> The judge refused to excuse the juror for cause.<sup>102</sup>

In the Georgia retrial of Ronald Spivey, the judge refused to excuse for cause a prospective juror who repeatedly said that the retrial was a waste of time and that the prosecution's evidence stacked up to the ceiling, and who laughed while responding to questions.<sup>103</sup> On appeal, the State argued that the prospective juror had eventually recognized the seriousness of his obligation to be fair.<sup>104</sup> When defense counsel pointed out that the prospective juror had laughed while responding to the final questions, Justice Weltner of the Georgia Supreme Court asked whether we don't need some foolish people on our juries.<sup>105</sup> Thereafter, he wrote the court's decision upholding Spivey's conviction and death sentence, despite the clear evidence of unfair jury selection and the trial judge's awareness of it. The United States Supreme Court declined to review the decision.<sup>106</sup>

Appellate courts may be even less likely to grant relief when the unfair aspects of jury selection are discovered *after* the trial. For example, it was recently discovered that a juror in Pruett's Arkansas trial had been so mentally ill that he deluded himself into believing that he had read that the defendant's lawyer was having an affair with a woman with whom the juror was enamored.<sup>107</sup> Even though the juror signed a statement admitting that he had been unfairly biased against Pruett, the Arkansas Supreme Court denied the petition for relief.<sup>108</sup>

Similarly, state and federal courts refused to grant relief to Robert Lee

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100. See, e.g., Transcript of trial of Marion Albert Pruett, vol. VII, at 2123, Pruett v. State, 287 Ark. 124, 607 S.W.2d 872 (1985).

101. Transcript of trial of Marion Albert Pruett, *voir dire* of Diane Brandenburg, vol. VII, at 2123, 2127, 2128, Sept. 4, 1982, Pruett v. State, 287 Ark. 124, 607 S.W.2d 872 (1985).

102. *Id.*

103. Transcript from retrial of Ronald Spivey, *voir dire* of Venireman Lynes, vol. II, at 665-95, Nov. 15, 1983, Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984).

104. Oral argument, May 8, 1984, Spivey v. State, 253 Ga. 187, 319 S.E. 2d 420 (1984), in which the author appeared for Mr. Spivey.

105. Question of Justice Charles Weltner, directed at the author during Oral Argument, May 8, 1984, Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985).

106. Spivey v. State, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985).

107. See Pruett v. State, 287 Ark. 124, 128, 697 S.W. 2d 872, 875 (1985).

108. *Id.* Pruett was more successful in his appeal of another capital trial. The Fifth Circuit recently affirmed a district court decision holding that Pruett's right to an impartial jury had been violated by a Mississippi trial court. The trial court had refused to excuse a juror whom both the defense and the prosecution challenged for cause after he (the juror) stated that the



Willie.<sup>109</sup> Court transcripts revealed that four jurors who voted to convict Willie had been sent to his trial from another courtroom where his co-defendant, Joseph Vaccaro, was being tried.<sup>110</sup> All four had heard both the prosecutor and defense counsel state that Vaccaro's defense was that Willie was solely responsible for the killing.<sup>111</sup> This knowledge defeated the purpose of trying these two defendants separately: to prevent the jury in each man's trial from knowing that his co-defendant, whose account could not be challenged through cross-examination, had accused him of committing the crime.

Biased jurors also find their way onto juries because defense counsel in capital cases are often given an inadequate number of discretionary challenges. Indeed, in capital cases counsel are sometimes given no more challenges than in less publicized, non-capital felony trials.<sup>112</sup> Counsel need additional challenges in capital cases for two reasons. First, tremendous publicity surrounds such cases, far more so than other felony cases. Consequently, many more potential jurors are likely to be biased in some way. Second, defense counsel in death penalty cases need to challenge not only (as in all felony cases) prospective jurors who might be biased on the issue of guilt, but also those who might be biased in the sentencing phase, *i.e.*, predisposed to disregard even compelling mitigating evidence and vote for the death penalty.

In the retrial of Ronald Spivey, the few discretionary challenges available to the defense were inadequate to counterbalance the tremendous pretrial publicity and the judge's refusal to excuse for cause such people as the man who stated that the retrial was a waste of time.<sup>113</sup> Because of the judge's refusal to excuse for cause, the defense attorney did not have enough challenges to disqualify many people whom no competent defense lawyer would ever want to see on a jury. These people included one juror whose best friend was the victim's cousin; one whose only two brothers had been shot dead; one who learned about the case from a witness' brother; one who said she might not be objective if (as occurred) gruesome pictures were presented; one who had met the victim's wife socially; and one who automatically favored the death penalty for anyone who killed willfully and without cause.<sup>114</sup>

A further impediment to proper jury selection in capital cases is that many trial judges refuse to give defense counsel the tools needed to properly exercise their limited number of discretionary challenges and to secure ex-

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defense would have to present evidence to overcome what he had heard about Pruett. *Pruett v. Thigpen*, No. 86-4236, slip op. at 6-11 (5th Cir. Nov. 7, 1986).

109. *Willie v. Maggio*, 737 F.2d at 1375, 1395.

110. 737 F.2d at 1377.

111. *Id.* at 1377-78.

112. *See, e.g.*, GA. CODE ANN. § 15-12-165 (1982). Indeed, in 1983, Louisiana *reduced* from twelve to eight the number of peremptory challenges in both capital cases and cases where conviction would mean imprisonment at hard labor. *State v. Jones*, 474 So.2d 919, 924-25 (La. 1985) (upholding as constitutional the amendment of LA. CODE CRIM. PROC. art. 799).

113. *See supra* text accompanying notes 103-106.

114. Transcript from retrial of Ronald Spivey, vol. II, *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984) (voir dire).

cusals for cause. In particular, many judges refuse, even in highly publicized cases, to allow individual questioning of jurors concerning their knowledge of the case or their predisposition to vote for guilt or for the death penalty. The attorneys must rely instead on general questions to the jurors *en masse*, asking for a show of hands of those who are biased or predisposed. That this show-and-tell approach fails to uncover many actually biased jurors is evident from those trials in which the show of hands is followed by detailed, private questioning of each prospective juror. In Ronald Spivey's retrial and Marion Albert Pruett's Arkansas trial, many prospective jurors who did not raise their hands in the *en masse* questioning were later excused for cause when their biases were revealed during private questioning.<sup>115</sup>

The Mississippi Supreme Court recently observed that "[e]lementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases."<sup>116</sup> Other courts should follow the Mississippi Court's lead by recognizing the inherent shortcomings of *en masse* questioning in highly publicized death penalty cases. If they do, they will hopefully also recognize that those shortcomings are not alleviated by detailed individual questioning of prospective jurors in the presence of all other prospective jurors. Such a format forces a Hobson's choice on defense counsel: by questioning a particular juror on her knowledge of prejudicial publicity, counsel risks informing the entire panel about that publicity.<sup>117</sup> Such a dilemma can be avoided only by private individual questioning.

The United States Supreme Court recently refused to grant relief in a case concerning an additional problem with jury selection in capital trials. In *Lockhart v. McCree*,<sup>118</sup> the Court held constitutional Arkansas' jury selection method.<sup>119</sup> This method tends to generate juries more prone than the public at large to vote for guilt. Scholarly studies, which the Court assumed for pur-

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115. Transcript of retrial of Ronald Spivey, vol. II, at 665-95, *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984) (voir dire); Transcript of trial of Marion Albert Pruett, vol. VII, at 2123, *Pruett v. State*, 287 Ark. 124, 607 S.W.2d 872 (1985).

116. *Fisher v. State*, 481 So. 2d at 221. The Mississippi Supreme Court used this perspective in reaching the conclusion that in some cases the likelihood of impaneling a fair and impartial jury in the county of a capital murder "is so doubtful that the prosecution should be saddled with a heavy burden of showing why venue should not be changed." The court indicated that, in practice, even skillful questioning at voir dire may fail to reveal the extent of actual prejudice in jurors' minds. *Id.*

117. See Goodpaster, *supra* note 17, at 327. See also *Berryhill v. Kemp*, No. C85-258R, slip op. at 18-19 (N.D. Ga. June 30, 1986). As the voir dire continued in *Berryhill*, fewer and fewer of the jurors who knew about the defendant's original trial admitted that they had an opinion about the defendant's guilt. The federal district judge held that the state trial judge, by injecting Georgia's conclusory statutory questions, had effectively denied defense counsel the chance to question the prospective jurors adequately. The federal district judge declined to accept at face value the jurors' assertions of impartiality, in view of the pre-trial publicity and the way the voir dire was conducted. *Id.* at 19-20.

118. 106 S. Ct. 1758 (1986).

119. *Id.* at 1760.

poses of its legal analysis to be correct,<sup>120</sup> indicated that potential jurors who would never vote for the death penalty — and who thus are automatically excluded from capital juries — would be more likely than other potential jurors to vote not guilty during the guilt/innocence phase.<sup>121</sup>

Nevertheless, the Court held that the defendant was not deprived of his right “to a jury selected from a representative cross-section of the community,”<sup>122</sup> because it is legitimate for the State to secure a single jury that can properly decide *both* the guilt and sentence of a capital defendant.<sup>123</sup> The Court further held that the defendant was not deprived of his right to an impartial jury. “[I]t is simply not possible to define jury impartiality, for constitutional purposes,” the Court stated, “by reference to some hypothetical mix of individual viewpoints.”<sup>124</sup>

Even if the jury selection proceeds fairly, defense counsel may still have to contend with an improperly functioning jury. A recent *en banc* decision of the Eleventh Circuit concerned the alleged coercion by a majority of jurors of a holdout who had decided to vote in favor of the defendant, David Peek.<sup>125</sup> The jury began deliberating at approximately 10:30 P.M. At 12:30 A.M., the jury foreman told the judge and counsel that one juror felt “extremely nervous and almost at the breaking point,” and had requested to be excused.<sup>126</sup> Both sides’ attorneys stipulated to excusing that juror, Mr. Greeson, although neither they nor the judge had questioned him about this reported nervousness.<sup>127</sup> It later turned out that Mr. Greeson had been the lone holdout for a verdict of not guilty.<sup>128</sup> Once Mr. Greeson was replaced, the jury took only a few minutes to vote Mr. Peek guilty, and by 2:00 A.M. it had also voted to impose the death penalty.<sup>129</sup>

The Eleventh Circuit found Mr. Greeson’s excusal legitimate and upheld the conviction and death sentence.<sup>130</sup> The court held that “the record supports a finding that Greeson was too ill to continue in the deliberations at the time he was dismissed . . . .”<sup>131</sup>

Yet, as the dissenters pointed out, the “circumstances of Greeson’s removal strongly suggest that, at the time Greeson was excused, he was not too ill to continue serving as a juror but, rather, had been pressured into resigning

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120. *Id.* at 1764.

121. *Id.* at 1772-73 (Marshall, J., dissenting).

122. *Id.* at 1764.

123. *Id.* at 1764-70.

124. *Id.* at 1770.

125. *Peek v. Kemp*, 784 F.2d 1479, 1481-82 (11th Cir.) (*en banc*), *cert. denied*, 107 S. Ct. 421 (1986).

126. *Id.* at 1482; *id.* at 1504 (Johnson, J., dissenting).

127. *Id.* at 1504 (Johnson, J., dissenting).

128. *Id.* at 1482.

129. *Id.* at 1504 (Johnson, J., dissenting).

130. *Id.* at 1484.

131. *Id.*

his position on the jury.”<sup>132</sup> At the state habeas corpus hearing, held years after the trial, Greeson testified that he had been upset and had had difficulty during the deliberations, given that the other eleven jurors had decided to vote “guilty.” Greeson added that after he had been excused from the jury, he immediately began to feel better and drove home unassisted. The jury foreman testified that during the deliberations, Greeson had a flushed complexion, was sweating, had gone to the restroom frequently and “wasn’t cooperative. . . . [H]e just couldn’t participate in . . . my idea of a jury deliberation.”<sup>133</sup> In view of these circumstances, the dissenters concluded that given the “highly unusual request to replace a juror at 12:30 A.M. and permit the jury to continue deliberating, the judge could have inferred that a juror was being pressured into resigning from the jury so that the remainder of the jurors could reach a unanimous verdict.”<sup>134</sup>

#### IV

#### JURORS WHO ARE MISGUIDED IN DECIDING GUILT OR IN IMPOSING THE DEATH SENTENCE

Jurors’ decisions in death penalty cases are frequently distorted by prosecutorial argument or by their own misunderstandings. A review of many closing arguments reveals that in these most visible and dramatic of public trials, prosecutors frequently succumb to the temptation to ask the jury to vote for guilt and to impose the death sentence for improper or legally irrelevant reasons.

The transcript of Ronald Spivey’s Georgia retrial reveals a particularly egregious example of prosecutorial misconduct in the guilt/innocence phase.<sup>135</sup> Spivey was seeking a verdict of guilty but mentally ill. He sought this verdict for two reasons. First, a jury that found him guilty but mentally ill in the first phase of the trial would be less likely — though still able — to impose the death sentence in the second phase. Second, if he did get a life sentence, he would be eligible to have his mental illness treated — albeit in a custodial setting.<sup>136</sup> But if the jury returned a verdict of guilty but mentally ill, a sentencing phase would have followed, at which Spivey would have received at least a life sentence or else the death sentence. These potential punishments would have been the same if he were simply found guilty. Obviously, a verdict of guilty but mentally ill would have been far different from a verdict of not guilty, under which Spivey would have received no punishment.<sup>137</sup>

In his closing argument at the guilt/innocence phase, however, the prosecutor did everything in his power to mislead the jury about the consequences

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132. *Id.* at 1505 (Johnson, J., dissenting).

133. *Id.* at 1506 (Johnson, J., dissenting).

134. *Id.* at 1507 (Johnson, J., dissenting).

135. Transcript of retrial of Ronald Spivey, vol. II, *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985).

136. *See* GA. CODE ANN. § 17-7-131(a) (1982).

137. *See id.*

of a guilty but mentally ill verdict and about why Spivey was seeking it. He repeatedly said, falsely, that a verdict of guilty but mentally ill would be the same as a verdict of not guilty.<sup>138</sup> He argued, again falsely, that Spivey wanted the jury to send him to the hospital rather than where he belonged.<sup>139</sup> Incredibly, the prosecutor went on to exhort the jury not to apply the new law providing for a possible verdict of guilty but mentally ill, because it had not yet been enacted at the time of the killing.<sup>140</sup> The prosecutor climaxed his argument by sarcastically asking whether the victim's family would feel that a jury verdict of guilty but mentally ill would make everything "all right."<sup>141</sup> After the trial judge rejected defense counsel's objections to the prosecutor's closing argument, the jury found Spivey guilty, and it then imposed the death sentence. On appeal, it was argued that the prosecutor's arguments were unconstitutional, but the Georgia Supreme Court ruled that there was "no reversible error," and upheld Spivey's conviction and death sentence.<sup>142</sup>

The United States Supreme Court recently held constitutional another prosecutor's improper closing argument at the guilt/innocence phase. The Court stated that the prosecutor's closing argument in the Florida trial of Willie Jasper Darden "deserves the condemnation it has received from every court to review it . . . ."<sup>143</sup> Nevertheless, it held that the argument did not deprive Darden of a fair trial.<sup>144</sup> Darden's prosecutor argued irrelevant matters, such as the prison system's responsibility for having released Darden; expressed the personal opinion that Darden was guilty; asserted that the public was unlucky that Darden had not been killed by a shotgun, car accident, or suicide; and contended at the guilt/innocence phase that Darden should be executed, lest he get out and commit other crimes.<sup>145</sup>

The four dissenting Justices stressed that the prosecutor had made "a calculated and sustained attempt to inflame the jury. Almost every page [of the transcript of that argument] contains at least one offensive or improper statement; some pages contain little else."<sup>146</sup> The dissenters contended that the key evidence against Darden was "sufficiently problematic" to make it uncertain whether a jury not exposed to the prosecutor's "sustained assault on Darden's very humanity" would have convicted him.<sup>147</sup>

The *Darden* dissent concludes with an extensive quotation from a 1946 dissent by Judge Jerome N. Frank attacking the practice of affirming convic-

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138. Transcript of retrial of Ronald Spivey, vol. II, *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Spivey v. State*, 253 Ga. 187, 190, 319 S.E.2d 420, 426 (1984), *cert. denied*, 469 U.S. 1132 (1985).

143. *Darden v. Wainwright*, 106 S. Ct. 2464, 2471-73 (1986).

144. *Id.* at 2473.

145. *Id.* at 2471-72.

146. *Id.* at 2478 (Blackmun, J., dissenting).

147. *Id.* at 2481-82 (Blackmun, J., dissenting).

tions while simultaneously denouncing government counsel for misconduct.<sup>148</sup> Judge Frank asserted that such "helpless piety" condones the misconduct by sending a message to prosecutors that the rules against misconduct are "pretend-rules" which are "purely ceremonial."<sup>149</sup> He stressed that: "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court — recalling the bitter tear shed by the Walrus as he ate the oysters — breeds a deplorably cynical attitude towards the judiciary."<sup>150</sup>

My first encounter with a prejudicial closing argument in the *sentencing* occurred when I represented Robert Lee Willie of Louisiana in post-conviction proceedings. Willie's retrial was ordered by the Louisiana Supreme Court because of the prosecutor's improper closing argument in the sentencing phase of the original trial.<sup>151</sup> In the closing at the retrial, the prosecutor argued that, if the jurors had come upon the scene while the crime was in progress, they would have been correct and applauded under Louisiana law if they had killed the defendant.<sup>152</sup> Therefore, the prosecutor said, the jurors should impose the death penalty.<sup>153</sup> This argument completely distorted Louisiana law.<sup>154</sup> While the Fifth Circuit recognized that the prosecutor's arguments were highly improper, it nevertheless refused to order a new sentencing hearing.<sup>155</sup>

Similarly, at the trial of William Boyd Tucker, a Georgia prosecutor secured the death sentence after making several improper arguments.<sup>156</sup> These included assertions that he (as an unsworn expert, not subject to challenge by cross-examination) knew a death sentence was justified in that case; that the State should not have to spend huge sums to keep the defendant in jail for the

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148. *Id.* at 2485.

149. *Id.*

150. *Id.* (Blackmun, J., dissenting), quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).

151. See *State v. Willie*, 410 So. 2d 1019 (La. 1982).

152. *Willie v. Maggio*, 737 F.2d at 1390.

153. *Id.*

154. "The use of lethal force against the assaulter after the fact of the victim's death is not justified under Louisiana law. Moreover, under the argument that the prosecutor made to the jury, the death penalty could automatically be imposed in every homicide case [contrary to Louisiana law] because lethal force would always be justified in saving the victim's life." *Willie v. Maggio*, 737 F.2d at 1390 n.27.

Another kind of misleading prosecutorial argument in capital sentencing proceedings is described in Weisberg, *Deregulating Death*, SUP. CT. REV. 305, 375-79 (1983). Apparently, many California prosecutors attempt to mislead jurors into believing that they have a "legal duty" to vote for the death penalty rather than a "moral choice." *Id.* at 375-76. These prosecutors invite juries to avoid making personal judgments and to use instead "legal arithmetic," whereby they tote up more aggravating factors than mitigating factors. This practice, the prosecutors suggest, makes juries' decision-making simple. *Id.* at 377-78. However, such arguments ignore the possibility of voting for a life sentence even when aggravating circumstances outweigh mitigating circumstances.

155. *Willie v. Maggio*, 737 F.2d at 1391.

156. *William Boyd Tucker v. Kemp*, 762 F.2d 1480 (11th Cir.) (en banc), *vacated*, 106 S. Ct. 517 (1985), *adhered to on remand*, 802 F.2d 1293 (11th Cir. 1986) (en banc).

rest of his life; and that the trial jury had no greater role in imposing the death sentence than the grand jury, police, prosecutor, or trial judge.<sup>157</sup> Like the Fifth Circuit in *Willie*, the Eleventh Circuit criticized the prosecutor's arguments but refused to order a new sentencing hearing.<sup>158</sup>

Even when there is no prosecutorial misconduct, jurors may mislead themselves into voting for the death sentence. For example, a justice of the Georgia Supreme Court is convinced that many Georgia juries impose death sentences not because they believe the defendants should be executed but rather to ensure that they spend longer periods of time in jail.<sup>159</sup> Such jurors have read news accounts about a few murderers being considered for or released on parole within a few years of conviction. They vote death sentences in the erroneous expectation that some higher court or clemency board will eventually order a life sentence.<sup>160</sup>

Juries often pause during deliberations to ask the judge what a "life" sentence means, *i.e.*, when, if ever, the defendant may be paroled.<sup>161</sup> Yet where, as in Georgia, the judge is required to say that he is not allowed to explain what a life sentence means, these inquisitive juries frequently go back and return the death sentence.<sup>162</sup>

A particularly unsettling example of this phenomenon is the March 1985 retrial of Johnny Mack Westbrook.<sup>163</sup> First, the jury asked about parole and the judge refused to answer. Then, the jury returned a verdict of life without parole on both murder counts. Judge Joseph Duke refused to accept that verdict and instructed the jurors to deliberate further. They finally returned the death sentence on one murder count and a life sentence on the other. Mr. Westbrook's appeal of his death sentence is pending in the Georgia Supreme Court.

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157. William Boyd Tucker v. Kemp, 762 F.2d at 1484-86.

158. William Boyd Tucker v. Kemp, 762 F.2d at 1508-09; see *supra* text accompanying notes 151-155.

159. Remarks of Justice Charles Weltner during panel discussion in Atlanta, Georgia on June 29, 1985.

160. *Id.* See also Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 927 n.119 (1982).

161. See, e.g., Remarks of Justice Weltner, *supra* note 159. Affidavit of Fred Gordon Codner, April 6, 1986, at 8-11 n.4 (reporting on random sample of thirteen Georgia death penalty cases, in eight of which juries returned with questions about parole).

162. See Remarks of Justice Weltner, *supra* note 159. The Georgia Supreme Court recently refused to overturn a death sentence imposed by a jury which had asked first if a life sentence meant that the defendant would spend the rest of his life in jail and later if a person convicted of a capital murder could be paroled. The Georgia Supreme Court held that the trial judge had been correct and had followed a "salutary policy" in refusing to answer these questions. Davis v. State, 255 Ga. 598, 612-14, 340 S.E. 2d 869, 883-85 (1986). *Accord*, Andrade v. McCotter, 805 F.2d 1190, 1192-93 (5th Cir. 1986) (since jury is not allowed to consider the possibility of parole, an instruction on the unavailability of parole for the first twenty years of a life sentence is not constitutionally mandated, even when jury asks about parole).

163. State v. Westbrook, No. 85-1160, slip op. (Superior Ct. Morgan County, Mar. 25, 1985); telephone interview with Patsy Morris, American Civil Liberties Union ("ACLU") of Georgia (Nov. 6, 1986).

Jurors' expectations that someone will eventually order a life sentence if they impose the death sentence are often unfounded. Some defendants may receive a life sentence if a legal error is later discovered. The remaining defendants will be executed.<sup>164</sup>

## V

### JUDGES WHO CAN OVERRULE JURIES ON SENTENCING

In most states, the decision to impose the death sentence is solely up to the jury.<sup>165</sup> In many states, a single juror's vote for a life sentence will cause that sentence to be imposed.<sup>166</sup> However, in three states — Florida, Alabama and Indiana — the trial judge can overrule the jury even if a majority, or all, of the jurors vote for a life sentence.<sup>167</sup> In a fourth state, Nevada, a panel of three judges imposes the sentence if the jury is not unanimous.<sup>168</sup> And in Arizona, Idaho, Montana and Nebraska, the court alone imposes the sentence.<sup>169</sup>

In Florida, as of December 1984, judges had overruled eighty-seven juries whose majorities recommended life sentences.<sup>170</sup> Thus, almost one-fourth of all Florida death sentences were due to jury overrides.<sup>171</sup> Perhaps unsurprisingly, Florida has the nation's largest death row population.<sup>172</sup> As of December 1984, there had been two such overrides in Indiana and six in Alabama.<sup>173</sup> While many of the Florida sentences discussed above were reversed in later proceedings, the United States Supreme Court allowed Ernest John Dobbert, Jr. to be executed in Florida even though his jury voted 10-2 for a life sentence.<sup>174</sup>

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164. See *infra* text accompanying notes 332-352 for discussion of the unavailability of clemency. Fewer death sentences would be imposed if a life sentence meant, and the jury believed it meant, that the defendant would receive a life sentence without possibility of parole. Few states provide that sentencing option. Indeed, Georgia's governor vetoed a 1982 bill that would have provided for life without parole. United Press Int'l, Mar. 27, 1983 (LEXIS, Nexis library, Omni file). According to a recent poll conducted by Georgia State University's Center for Public and Urban Research, 53% of Georgia adults would favor abolition of capital punishment if state law provided for life sentences with no parole for at least 25 years, and for a restitution program. Thomas and Hutcheson, *Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues* (Georgia State University, Dec. 1986), at 24-25.

165. See *Spaziano v. Florida*, 468 U.S. at 463.

166. See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 102-19 (1980).

167. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C.D. L. REV. 1409, 1412 (1985).

168. NEV. REV. STAT. §§ 175.554, 175.556 (1981).

169. ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1983-1984); IDAHO CODE § 19-2515 (1979); MONT. CODE ANN. § 046-18-301 (1983); NEB. REV. STAT. § 029-2520 (1979); See *Spaziano v. Florida*, 468 U.S. at 463-64 n.9.

170. Mello and Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 32-33 (1985).

171. *Id.* at 33 n.9.

172. See *supra* note 167, at 1409.

173. *Id.* at 1412.

174. *Dobbert v. Florida*, 432 U.S. 282, 304 n.1 (1977) (Stevens, J., dissenting).



In 1984, the Supreme Court held that Florida's jury override practice is constitutional.<sup>175</sup> That decision was the final step in the Court's retreat from its earlier stress on the importance of juries in death penalty cases. In 1976, the Justices who cast the decisive votes to uphold Georgia's new death penalty statute had stressed the vital function of jurors as the conscience of the community effectuating the public will.<sup>176</sup> But as early as 1977, in first considering *Dobbert's* case, the Supreme Court had already retreated from its emphasis on the jury's role.<sup>177</sup> The Court held that capital defendants would receive "crucial protection"<sup>178</sup> from the Florida Supreme Court's "exacting" standard for reviewing a trial court's rejection of a jury's recommendation of life: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so *clear and convincing* that virtually no reasonable person could differ."<sup>179</sup>

The Supreme Court did not explain how such a standard could be met when a majority of the jury has voted for a life sentence. Were the ten jurors who voted that *Dobbert* should receive a life sentence not "reasonable" people? If so, how could they have all managed to get onto the jury?<sup>180</sup> An answer has been provided by one judge who has overridden several juries. She interprets the "reasonable person" standard to mean "a reasonable person in the eyes of the beholder. . . . If I believe the penalty is appropriate, the jury won't affect me."<sup>181</sup>

Clearly, the Supreme Court was incorrect in stating in 1977 that defendants such as *Dobbert* "are not significantly disadvantaged [by a jury override] vis-a-vis the recommendation of life by the jury . . . ."<sup>182</sup> If a defendant is

175. *Spaziano v. Florida*, 468 U.S. at 447.

176. *See Gregg v. Georgia*, 428 U.S. at 190 (opinion of Stewart, Powell and Stevens, JJ.).

177. *Dobbert v. Florida*, 432 U.S. at 295.

178. *Id.*

179. *Id.* at 295 (citations omitted) (emphasis in original).

180. In most cases in which the Florida Supreme Court affirms the trial judge's override, at least one Justice of the Florida Supreme Court disagrees. Mello and Robson, *supra* note 170, at 62-64, and n. 159. Thus, "[u]nless one is willing to conclude that majorities of various juries, numerous circuit judges, and . . . justices of the Florida Supreme Court are not 'reasonable persons,' their differing conclusions in capital cases militate against any reasonable person accepting the validity of the [Florida] standard." *Id.* at 64.

181. Lowenstein, *Overriding the Jury, Some Florida Judges Impose Death Penalty*, Wall St. J., Jan. 6, 1986, at 1, 17, col. 1.

182. *Dobbert v. Florida*, 432 U.S. at 296. Mr. *Dobbert* was also disadvantaged by the courts' refusal to order a new trial after the sole witness who had testified that Mr. *Dobbert* had deliberately killed his daughter recanted. That witness, Mr. *Dobbert's* son John *Dobbert III*, was thirteen years old at the time of the trial. Eight years later, at the age of twenty-one, he swore under oath that Mr. *Dobbert* did not kill John *III's* sister, but that she had actually choked to death despite Mr. *Dobbert's* attempt to give her mouth-to-mouth resuscitation. John *III* swore that he had perjured himself at the trial because he had wanted to be safe from his father (who had beaten him and his sister), had been undergoing hypnosis, had been on Thorazine, and had felt that the staff at the children's home where he was living wanted him to implicate his father. Notwithstanding John *III's* sworn recantation, the state and federal courts held that there was no evidence to support Mr. *Dobbert's* allegation that his conviction had

not "significantly disadvantaged" by being executed, it is hard to imagine what would significantly disadvantage him.

## VI

### ALLOWING APPELLATE COURTS TO DECIDE A FACTUAL PREREQUISITE TO IMPOSITION OF THE DEATH SENTENCE

A recent Supreme Court decision explicitly sanctions the bypassing of the trial jury — and sometimes even a trial-level judge — in determining an essential prerequisite to the imposition of capital punishment.<sup>183</sup> The prerequisite is set forth in *Enmund v. Florida*, a 1982 Supreme Court decision holding that the eighth amendment bars the death penalty where the defendant does not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."<sup>184</sup>

In 1986, the Court considered the case of Mississippi death row inmate Crawford Bullock, at whose trial "the jury may not have found that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be employed . . . ."<sup>185</sup> The Fifth Circuit had vacated Bullock's death sentence, but had given Mississippi the option to conduct a new sentencing hearing at which a jury could determine whether the intent prerequisite was satisfied.<sup>186</sup> The Supreme Court overturned that holding and held, 5-4, that the standard set forth in *Enmund* could be satisfied through means other than a determination by a trial jury.<sup>187</sup> The Court stated that "[i]f a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability . . . ."<sup>188</sup> Hence, the Court concluded, if somewhere in the state court system that determination has been made, it must be presumed correct.<sup>189</sup>

Fortunately, the Supreme Court did recognize, in a footnote, that the presumption of correctness would not apply to a determination made by a state appeals court if the determination of "whether the defendant killed, attempted to kill, or intended to kill" turns on "credibility determinations that could not be accurately made by an appellate court on the basis of a paper record."<sup>190</sup> But the Court added that "it is by no means apparent that appel-

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been based on perjured testimony, and the Supreme Court refused to stay his execution. *Dobbert v. Wainwright*, 468 U.S. 1231, 1231-33 (1984) (Brennan, J., dissenting).

183. *Cabana v. Bullock*, 106 S. Ct. 689 (1986).

184. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

185. *Cabana v. Bullock*, 106 S. Ct. at 696.

186. *Bullock v. Lucas*, 743 F.2d 244, 248 (5th Cir. 1984), *rev'd sub nom*, *Cabana v. Bullock*, 106 S. Ct. 689 (1986).

187. *Cabana v. Bullock*, 106 S. Ct. at 696-98.

188. *Id.* at 697.

189. *Id.* at 697-98.

190. *Id.* at 698 n.5 (citations omitted).

late factfinding will always be inadequate.”<sup>191</sup> Moreover, the Court said that even where appellate factfinding *would* be inadequate, there need not be a new sentencing hearing before a jury. Instead, the trial judge could make the requisite findings.<sup>192</sup>

It remains to be seen how often appellate factfinding will occur in capital cases, or how it will work. Clearly, though, as the principal dissent in *Bullock* states, appellate factfinding in the context of a constitutional prerequisite to the death sentence “turns on its head the heightened concern with reliability” that the Court has expressed in numerous capital punishment decisions.<sup>193</sup>

## VII THE LACK OF PROPORTIONALITY REVIEW

When a defendant is sentenced to death, he is typically entitled to a direct appeal to his state’s highest court.<sup>194</sup> In such cases, some states require their appellate courts to perform a “proportionality review,” *i.e.*, to determine whether the sentence is “disproportionate to that imposed in similar cases.”<sup>195</sup> Such a review ensures that a death sentence is not imposed on a defendant in one murder case unless in most similar murder cases defendants have received the death sentence.<sup>196</sup>

However, many state supreme courts have failed to comply with their states’ laws. Recent studies have concluded, for instance, that the Georgia Supreme Court “has failed to develop any coherent method for distinguishing between those defendants who deserve the death penalty and those who do not” and “displays an unwillingness to develop any effective appellate review of death sentences.”<sup>197</sup> Instead of comparing the facts and mitigating circumstances of a defendant’s crime with those of all similar Georgia cases, the court uses a “mechanical, almost ritualistic approach” under which it has never vacated a death sentence for murder based on a comparison with one or more other cases.<sup>198</sup>

One justice of the Georgia Supreme Court has flatly conceded that the court does not engage in proportionality review, despite the statutory requirement that it do so.<sup>199</sup> Indeed, he says the court upholds death sentences even when it thinks the jury really intended that the defendant be kept in jail without an early opportunity to seek parole, or when it cannot think of any reason

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191. *Id.*

192. *See id.* at 700.

193. *Id.* at 704 (Blackmun, J., dissenting).

194. *See, e.g.*, FLA. STAT. ANN. § 921.141(4) (1985); GA. CODE ANN. § 17-10-36 (1982); CAL. PENAL CODE § 190.6 (Deerings 1985).

195. *Pulley v. Harris*, 465 U.S. 37, 44 (1984).

196. *Id.*

197. Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C.D. L. REV. 1433, 1434 (1985); *accord*, Bentele, *supra* note 8.

198. Liebman, *supra* note 197, at 1440-41, 1458, 1445.

199. Remarks of Justice Charles Weltner, *supra* note 159.

why the jury imposed the death sentence.<sup>200</sup>

The lack of legitimate proportionality review means that defendants with similar backgrounds who commit similar crimes may receive strikingly different sentences. This inequity exists, for example, in Louisiana, even though the state supreme court is required to do a proportionality review within each judicial district.<sup>201</sup> The *Times-Picayune* recently highlighted glaring sentencing disparities in Louisiana, in a quiz for its readers entitled "Life or death? You're the jury."<sup>202</sup>

200. *Id.*

201. Cf. Baldus, Pulaski, Woodworth and Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 2-3 n.2 (1980) (citing LA. CODE CRIM. PRO. ANN. art. 905.9 (West 1980)).

202. The following quiz appeared in The *Times-Picayune* on April 7, 1985, see *supra* note 6, at 6, as part of an article entitled *A Matter of Life and Death, Quirky Judicial System Making Louisiana's Utimate Decision:*

*The crimes*

1. Shortly before daybreak, a 25-year old [sic] man climbed through the bathroom window of an elderly woman's apartment. Finding the 80-year-old woman at home, he raped her and beat her to death. In separate attacks, the defendant also raped two of the victim's elderly neighbors. Prior to these crimes, he had no record of violence.  
[     ] life  
[     ] death
2. A 19-year-old man and his companion stole a young woman's purse in the French Quarter, pushed her to the ground, and jumped in their nearby car. A taxi driver, observing the theft, attempted to block their getaway with his cab. The defendant shot and killed him. It was his first violent offense.  
[     ] life  
[     ] death
3. A 24-year-old man saw a young man and woman he knew walking home to her apartment late at night. He followed them home and knocked on their door. Knowing him, they let him in. He robbed the young man at gunpoint, then marched him out of the apartment and shot him to death. The defendant had prior convictions for attempted robbery and auto theft.  
[     ] life  
[     ] death
4. A 19-year-old man tried to grab the purse of a 54-year-old woman in a shopping center parking lot. She resisted and began screaming. They struggled for the purse and the man shot her once in the side, killing her. He had prior misdemeanor convictions for shoplifting and simple battery and a felony conviction for theft.  
[     ] life  
[     ] death
5. A 20-year-old man under the influence of drugs broke into a neighbor's apartment and bludgeoned her and her 8-year-old daughter to death with a hammer. He said later that he did it because he liked to see blood. He had past convictions for robbery and attempted aggravated rape.  
[     ] life  
[     ] death
6. A 35-year-old man and his brother broke into the apartment of a woman he once dated, planning a burglary. Inside they found two young children ages 6 and 11, who could identify them. Together, they slashed the children's throats, killing them. The man had a prior record that included manslaughter.  
[     ] life  
[     ] death

In the last 10 years, the United States Supreme Court has moved from a position of virtually requiring proportionality review of death sentences to rendering such review constitutionally superfluous. In upholding Georgia's new death penalty statute in 1976, the United States Supreme Court relied on the Georgia Supreme Court's promise that it would not uphold any death sentence unless death had generally been imposed throughout the state in similar cases.<sup>203</sup> As recently as 1983, in upholding the death sentence of Alpha Otis O'Daniel Stephens of Georgia, the United States Supreme Court appeared to consider proportionality review important.<sup>204</sup> It stated that "[o]ur decision in this case depends in part on the existence of an important procedural safeguard, the . . . review . . . to assure proportionality."<sup>205</sup> Less than a year later, however, the United States Supreme Court held that proportionality review is constitutionally unnecessary.<sup>206</sup> Hence, defendants in Georgia, Louisiana and elsewhere cannot secure relief from the federal courts despite tremendous disparities in sentencing.<sup>207</sup>

Consequently, the present system of capital punishment still suffers from the fatal flaw identified by Justice White in 1972, when he concurred in the Supreme Court's holding that the predecessors of today's death penalty statutes were unconstitutional: "There is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."<sup>208</sup>

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*The verdicts*

1. Willie Celestine was convicted of first-degree murder and sentenced to die. He awaits execution.
2. Troy Miller was convicted of first-degree murder and sentenced to life imprisonment.
3. Carlin Morgan was convicted of first-degree murder and sentenced to life imprisonment.
4. Tyronne Lindsey was convicted of first-degree murder and sentenced to die. He awaits execution. [After this newspaper article was written, the Fifth Circuit set aside Lindsey's sentence and ordered a new sentencing proceeding. *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985).]
5. Jeffrey Walker was convicted of first-degree murder and sentenced to life imprisonment.
6. Thomas Deboe was convicted of first-degree murder and sentenced to die. He awaits execution.

203. *Gregg v. Georgia*, 428 U.S. at 190.

204. *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

205. *Id.*

206. *Pulley v. Harris*, 465 U.S. 37, 46 (1984).

207. Indeed, following the Supreme Court's decision in *Pulley, id.*, Oklahoma retroactively repealed its statute requiring proportionality review. 1985 OKLA. SESS. LAWS c. 265 § 1 (amending 21 OKLA. STAT. § 701.13 (C), (E)).

208. *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring).

VIII  
THE MOUNTING EVIDENCE OF RACIAL DISCRIMINATION AND  
ARBITRARINESS IN THE IMPOSITION OF THE DEATH  
PENALTY

Increasing evidence indicates that problems such as prosecutors' abuse of their discretion in seeking the death penalty, biased jurors, and the lack of meaningful proportionality review lead to racial discrimination in the imposition of the death penalty. A nationwide survey conducted by the *Dallas Times Herald* revealed the following facts, set forth in a November 17, 1985 story:

[T]he killers of whites are prosecuted more vigorously than the killers of blacks and are being put to death at 11 times the rate of those who kill blacks.

In Maryland, for example, the killer of a white is eight times more likely to receive the death penalty than the killer of a black. In Arkansas, the likelihood is six times greater. In Texas, five times greater. In Dallas, the district attorney has not sought the death penalty in the murder of a black since the new statute was enacted in 1973, but has sent 27 killers of whites to Death Row.

Nationally, experience shows that the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black in the 32 states where the death penalty has been imposed

. . . .

. . . .

The . . . study shows that the probabilities of a death sentence in Texas by racial characteristics of the crimes are:

White kills black - 1.4 percent

Black kills black - 2.5 percent

White kills white - 9.5 percent

Black kills white - 13.2 percent.<sup>209</sup>

A similar study of 504 cases in Louisiana showed the following: "14.5 percent of the men who killed whites were sentenced to die. But only 4.1 percent of those who killed blacks received the death penalty, and no whites received the death penalty for killing a black."<sup>210</sup>

Two recent Supreme Court decisions highlight causes of the racial disparities in the imposition of capital punishment. In *Batson v. Kentucky*,<sup>211</sup> the Court held that a prosecutor's use of discretionary challenges to exclude potential jurors on the unconstitutional basis of race may be proved by the prosecutor's actions in a single case rather than a series of cases.<sup>212</sup> Hence, if a

209. *Killers of Dallas Blacks Escape the Death Penalty*, *Dallas Times Herald*, Nov. 17, 1985, at 1, 18, col. 4.

210. See DeParle, *supra* note 34, at 19.

211. 106 S. Ct. 1712 (1986).

212. *Id.* at 1722-23.

prosecutor uses discretionary challenges to dismiss members of the defendant's racial group, the defendant may be able to establish a *prima facie* case of purposeful discrimination without proving that the prosecutor has systematically followed the same practice in trial after trial. When the defendant does make a *prima facie* showing, the prosecution has the burden of presenting "a neutral explanation for challenging black jurors."<sup>213</sup> The Court held that the prosecutor's assumption or "intuitive judgement" that such jurors "would be partial to the defendant because of their shared race" is *not* a "neutral explanation."<sup>214</sup>

However, the Supreme Court quickly made it impossible for most black death row inmates to take advantage of *Batson*, even if their prosecutors excluded all blacks from their juries because of their race. The Court held that *Batson* could not be relied upon by anyone who had already lost a direct appeal<sup>215</sup> in state court when *Batson* was handed down.<sup>216</sup>

In a second case, *Turner v. Murray*,<sup>217</sup> the Supreme Court held it unconstitutional to deny the request of a defendant accused of an interracial capital crime "to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."<sup>218</sup> In vacating William Lloyd Turner's death sentence, but not his conviction, the Court stressed the tremendous "range of discretion entrusted to a jury in a capital sentencing hearing," which presents "a unique opportunity for racial prejudice to operate but remain undetected."<sup>219</sup> The Court said that a racially prejudiced juror might be unusually likely to hold that aggravating factors exist and that mitigating factors do not exist. "More subtle, less consciously held racial attitudes," such as "[f]ear of blacks . . . might incline a juror to favor the death penalty."<sup>220</sup>

Unfortunately, *Turner* will be of no help to most black death row inmates who were victimized by such prejudiced jurors. The ruling in that case is limited to instances in which defense counsel unsuccessfully sought to engage in the specific type of questioning requested by Turner's lawyer.<sup>221</sup>

In its October 1986 term, the Supreme Court will decide two cases concerning the effects of racial discrimination on the imposition of the death pen-

213. *Id.* at 1723.

214. *Id.*

215. See *infra* text accompanying notes 231-233 (chart indicating order of courts in which a death row inmate may raise serious constitutional claims).

216. *Allen v. Hardy*, 106 S. Ct. 2878, 2881 (1986) (*per curiam*). The Supreme Court held in January 1987 that *Batson* may be applied in cases that were still pending on direct appeal when *Batson* was handed down. *Griffith v. Kentucky*, 55 U.S.L.W. 4089 (U.S. Jan. 13, 1987).

217. 106 S. Ct. 1683 (1986).

218. *Id.* at 1688 (footnote omitted).

219. *Id.* at 1687. The Court did not vacate the conviction, since "the risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence." *Id.* at 1689 n.12.

220. *Id.* at 1687 (footnote omitted).

221. See *id.* at 1688.

alty. One case involves Georgia death row inmate, Warren McCleskey.<sup>222</sup> McCleskey's claim is supported by evidence presented by University of Iowa Professor David Baldus, who studied seven years of Georgia murder cases and took 230 variables into account.<sup>223</sup> Baldus concluded that in cases involving a moderate level of aggravating circumstances, killers of whites were five times more likely to receive the death penalty than killers of blacks.<sup>224</sup> In arguing against McCleskey's claim, the Georgia Attorney General has asserted that "the general arbitrariness and capriciousness which concerned the Court in 1972 is no longer a consideration if [as Georgia contends is the case] a state follows a properly drawn statute and if the jury's discretion is properly channeled."<sup>225</sup>

The other case involves Florida death row inmate James Ernest Hitchcock.<sup>226</sup> Hitchcock contends that he was improperly denied an evidentiary hearing on his claim that the Florida capital punishment system unconstitutionally discriminates on the basis of the victim's race.<sup>227</sup>

The arbitrariness of the death penalty also results from variations in economic status among the different defendants charged with capital crimes. For the reasons discussed above, court-appointed attorneys have been far less successful than counsel retained by solvent clients in both phases of death penalty trials. A 1976 study by the Texas Judicial Council showed that while capital murder defendants represented by court-appointed lawyers were convicted 93% of the time, capital murder defendants represented by retained counsel were convicted only 65% of the time.<sup>228</sup> The study also revealed that of those convicted of capital murder, the defendants represented by court-appointed lawyers were sentenced to death 79% of the time as compared to only 55% of the convicted defendants represented by retained counsel.<sup>229</sup>

Because of the arbitrariness of capital punishment in the United States, some who favor the death penalty in theory oppose it in practice. One such person is Dr. George Beto, who headed the Texas prison system from 1962-1972. He opposes the death sentence in practice because "in a democratic society like ours, the death penalty is capriciously and inequitably administered. Whether a person is convicted depends on the quality of his defense,

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222. *McCleskey v. Kemp*, 753 F.2d 877, 896 (11th Cir. 1985) (en banc), cert. granted, 106 S. Ct. 3331 (1986).

223. Baldus, *supra* note 201, cited in *McCleskey v. Kemp*, *id.*

224. *McCleskey v. Kemp*, 753 F.2d at 896.

225. Brief for Respondent, *McCleskey v. Kemp*, No. 84-6811 (United States Supreme Court), at 5.

226. *Hitchcock v. Wainwright*, 745 F.2d 1332, 1342 (11th Cir. 1984), reinstated, 770 F.2d 1514, 1516 (11th Cir. 1985) (en banc), cert. granted, 106 S. Ct. 2888 (1986).

227. Presentation at NAACP Legal Defense Fund Annual Capital Punishment Conference, Warrenton, Virginia by Richard H. Burr, Assistant Public Defender, West Palm Beach, Florida (Aug. 7, 1986); see *Hitchcock v. Wainwright*, 745 F.2d at 1342.

228. *Factors That Lead to Death Row*, Dallas Times Herald, Nov. 17, 1985, at 18, col. 3.

229. *Id.*

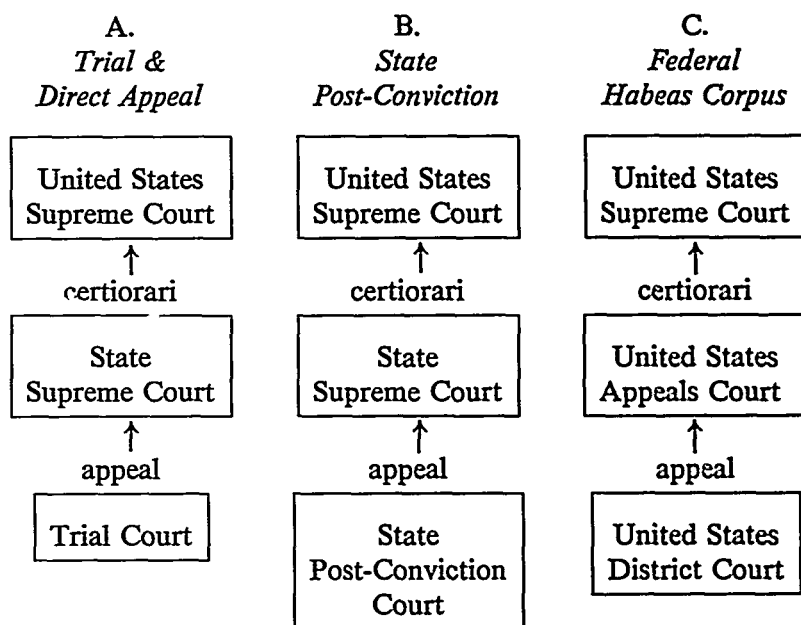


the hysteria of the moment in the community and the culture."<sup>230</sup>

## IX

### THE NEED TO RELY ON VOLUNTEER COUNSEL FOLLOWING DIRECT REVIEW

Once an indigent defendant's conviction and death sentence have been affirmed on direct appeal, many states terminate his right to have counsel paid for by the government.<sup>231</sup> The defendant then has the right to seek discretionary review by the United States Supreme Court, which is rarely granted, and then to raise constitutional claims in state post-conviction proceedings and federal habeas corpus proceedings.<sup>232</sup> State post-conviction proceedings provide death row inmates the opportunity to raise claims, such as ineffective assistance of counsel, which usually require evidence outside of the trial transcript. Claims of federal constitutional rights violations can be presented to the federal courts only after the prisoner has unsuccessfully presented his claims in state court. The following chart shows the various courts and the order in which death row inmates may raise serious constitutional claims.



These steps are integral parts of the review process. A great many death row inmates who have found counsel to handle such proceedings in the federal

230. *Texas Town Leading in Executions In a New U.S. Era of Death Penalty*, N.Y. Times, Sept. 6, 1986, at 8, col. 4.

231. See *Ross v. Moffitt*, 417 U.S. 600 (1974); *Jones v. Estelle*, 722 F.2d 159 (5th Cir. 1983) (en banc), cert. denied *sub nom.* *Jones v. McKaskle*, 466 U.S. 976 (1984); *Greenberg*, *supra* note 160, at 918 n.17.

232. See *supra* note 231.

courts have successfully secured rulings that their constitutional rights have been violated. The rate of success in these cases is much higher than is typical of criminal appeals.<sup>233</sup>

Until recently, various private organizations have managed to secure volunteers to handle some or all such proceedings on behalf of death row inmates facing imminent execution. Increasingly, however, such volunteers have entered cases so late that they have had inadequate time to become acquainted with their clients, the facts of their client's cases, the prior legal proceedings, and the legal issues already raised. Volunteers also have had insufficient time to analyze the issues properly and to develop evidence that might support a new trial. Aggravating this situation are the various steps courts have taken to speed up the review of death penalty cases.<sup>234</sup>

Moreover, death row inmates have been completely subject to the "luck of the draw" with respect to the quality of such volunteers and their ability and willingness to devote time and money to prepare their cases effectively. If a volunteer lawyer is ignorant of the pertinent law and incapable of developing the critical facts, a death row inmate has no recourse.

By late 1983, in view of the increasing number of death row inmates whose direct appeals had ended, it was apparent that the supply of willing volunteer attorneys was going to fall far below the number needed. Accordingly, in December 1983, the ABA's Board of Governors approved a proposal to seek \$150,000 in outside funding for a Post-Conviction Death Penalty Representation Project to coordinate the recruitment of volunteer lawyers.<sup>235</sup> This idea was in accordance with two prior resolutions approved by the ABA House of Delegates, which advocated that competent counsel be appointed for state and federal habeas corpus representation of indigent clients.<sup>236</sup> Yet, despite the prestige of the ABA, which takes no position on the death penalty itself, no outside money was raised.<sup>237</sup>

By early 1985, the situation became critical in a number of states. In Florida, for example, despite the state bar's organized recruitment of volunteers and provision of back-up assistance, there were no volunteers for two death row inmates whose execution dates were approaching,<sup>238</sup> or for thirty

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233. See Greenberg, *supra* note 160, at 918, for statistics as of a few years ago. While the success rate in federal appeals courts has decreased, the text's statement appears still to be true. See Draft Transcript of statement by Eleventh Circuit Chief Judge John C. Godbold before the Conference of Southern Bar Presidents, Feb. 6, 1986, at 4 (in cases completed in federal district courts and the circuit court for the Eleventh Circuit, habeas relief has been granted in half of the death penalty cases).

234. See *infra* text accompanying notes 270-294.

235. American Bar Association Internal Memorandum, Program/Activity Proposal (#5) (Jan. 17, 1984), at 3.

236. *Id.*

237. See Wise, "Unrealistic Goal" Undercuts ABA Unit's Death-Row Project, N.Y.L.J., Mar. 10, 1986, at 1, 3, col. 4.

238. *No Attorneys in Sight for Two Set to Die Tuesday*, United Press Int'l, Mar. 11, 1985 (LEXIS, Nexis library, Omni file).

other death row inmates whose time to file state post-conviction pleadings was about to expire.<sup>239</sup> When two volunteers came forth insisting that they could not provide adequate representation in the scant time remaining, Florida courts stayed the executions.<sup>240</sup> The State Attorney General sought to have the stays lifted by the Florida Supreme Court, but its chief justice asked, rhetorically, whether death row inmates are not "entitled to at least have some lawyers talk to them before they die when they haven't seen lawyers in years?"<sup>241</sup>

Florida's inability to proceed with these executions spurred its state legislature into action.<sup>242</sup> In 1985, the legislature passed a law providing for an Office of the Capital Collateral Representative, whose attorneys and investigators are to represent death row inmates in state and federal courts.<sup>243</sup> However, the Capital Collateral Representative's current funding of \$854,000 is far below the amount required to manage the large volume of urgent cases. Hence, the Capital Collateral Representative has been forced to beg for volunteer assistance from out-of-state attorneys, and many death row inmates continue to be inadequately represented.<sup>244</sup>

In Georgia, the difficult problem of finding volunteer lawyers for death row inmates has been exacerbated by the Georgia Attorney General's 1984 opinion disqualifying any law firm from handling both compensated civil work for the State of Georgia and a *pro bono* death penalty case.<sup>245</sup> However, a federal district judge, in October 1986, declined to apply the Attorney General's conflict-of-interest policy to disqualify a local attorney.<sup>246</sup> The court refused to do so even under state "appearance of impropriety" grounds,<sup>247</sup> and stated that ". . . an inquiry must be made, in each case similar to the instant one . . . to determine the likelihood of a true conflict of interest."<sup>248</sup> This ruling may help the efforts of the State Bar of Georgia which, at the urging of state and federal judges, began recently to recruit local lawyers to represent death row inmates.<sup>249</sup>

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239. *Supreme Court Stays Executions; Need for Lawyer Program Debated*, Tampa Tribune, Mar. 12, 1985.

240. *Id.*

241. *Id.*, quoting Chief Justice Joe Boyd.

242. FLORIDA HOUSE OF REP. COMM. ON CRIMINAL JUSTICE, *Collateral Appeals In Capital Cases*, HB 582 (1985) (Staff Analysis).

243. FLA. STAT. ANN. § 27.7001 (West Supp. 1986).

244. *Death Row Appeals: Hard Cases to Sell*, Miami Rev., Oct. 15, 1986, at 1, 4, col. 1.

245. *Lawyers Scarce for Death Row Inmates in Georgia*, The Atlanta Constitution, Oct. 15, 1986, at A1, A6, col. 2.

246. *Waters v. Kemp*, No. CV286-130, slip op. (S.D. Ga. Oct. 10, 1986).

247. *Id.*

248. *Id.*

249. *See Lawyers Scarce for Death Row Inmates in Georgia*, *supra* note 245. An effort is also being made to set up a capital defense resource center at Georgia State University Law School. *Id.* Moreover, in North Carolina, the State Bar Association is helping to set up a death penalty resource unit within the appellate defender's office. Statement by Richard Rosen, University of North Carolina Law School, NAACP Legal Defense Fund Annual Capital Punishment Conference, Warrenton, Virginia (Aug. 6, 1986).

In several other states the situation is becoming desperate. One of the worst examples is Texas. In Texas, with over 200 people on death row, there is an enormous shortage of volunteers and there has been no tracking system for capital punishment cases. There may be executions of death row inmates who lack lawyers within the next year.<sup>250</sup>

Without an adequate support system, it is likely that those who do volunteer to handle Texas cases either commit basic errors or spend inordinate amounts of already limited time researching the basics of death penalty litigation. This effort leaves them without the crucial time necessary to investigate the particular factual and legal issues peculiar to their clients' cases.

In August 1986, the ABA Board of Governors granted \$40,000 of the ABA's own funds as seed money for the ABA's Post-Conviction Death Penalty Representation Project.<sup>251</sup> The ABA project will encourage local bar associations to follow the example of the Association of the Bar of the City of New York in recruiting volunteers to handle habeas corpus cases.<sup>252</sup> Moreover, the ABA project will support efforts (a) to achieve adequate funding for the existing death penalty resource centers, (b) to establish resource centers in other states, and (c) to provide compensation to attorneys handling habeas corpus proceedings in death penalty cases.<sup>253</sup>

The need for this project and others like it has been dramatically underscored by a recent Eleventh Circuit decision, *Zeigler v. Wainwright*.<sup>254</sup> The case illustrates how the current haphazard and inadequate "system" by which volunteers are found to represent death row inmates can lead to denials of due process. The Eleventh Circuit's decision reflects an apparent unwillingness to countenance an execution where the death row inmate "has never had his federal habeas corpus claims effectively presented and fully considered in federal court. Confusion, misunderstanding, inadvertence, changes in representation, recalcitrant counsel — all may have contributed to the failure to afford Zeigler the full panoply of rights to which he is entitled."<sup>255</sup>

The problems with Zeigler's representation included the following: no one filed an amended habeas corpus petition on his behalf; some claims from

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250. Statement by Gara LaMarche, ACLU of Austin, NAACP Legal Defense Fund Annual Capital Punishment Conference, Warrenton, Virginia (Aug. 6, 1986). Other states where the representation crisis is becoming worse include Arizona, the eastern part of Pennsylvania, Oklahoma, and Alabama. Conference on Jan. 23, 1987 with Esther Lardent, Russell Canan, and Deborah Fins, consultants to ABA Post-Conviction Death Penalty Representation Project.

251. Letter from Sara-Ann Determan and Steven G. Raikin (American Bar Association Section of Individual Rights and Responsibilities) to Concerned Attorneys (Oct. 9, 1986) (on file at the New York University Review of Law & Social Change).

252. See *The Death Penalty*, 39 REC. A.B. CITY OF N.Y. 419 (Oct. 1984).

253. Consensus reached at December 17, 1986 meeting in Washington, D.C., of the Steering Committee on the ABA Post-Conviction Death Penalty Representation Project.

254. 805 F.2d 1422 (11th Cir. 1986).

255. *Id.* at 1425. Unfortunately, the Supreme Court and the Eleventh Circuit seem willing to countenance executions where the failings of volunteer habeas corpus counsel are not brought to the courts' attention until a successor petition is filed. See *infra* text accompanying note 309.

his inadequate original petition were deemed abandoned because they were not noted when a court checklist was completed; the federal "district court, in denying relief, failed to address one of the claims listed" on the checklist;<sup>256</sup> and no one filed a timely notice of appeal.<sup>257</sup> Much of the confusion resulted from the withdrawal of one of Mr. Zeigler's lawyers, the effort of his remaining lawyer to withdraw on grounds that he was leaving the state and was unqualified to handle the case in federal court, and the asserted unavailability of the attorney who had supposedly agreed to take over his representation.<sup>258</sup>

The Eleventh Circuit ordered the federal district court, *inter alia*, to vacate its judgments and to allow Zeigler "a reasonable time to file a new amended petition. . . ."<sup>259</sup> In so ruling, the court noted that it was not creating a right to effective assistance of counsel in capital habeas corpus cases.<sup>260</sup> Instead, the court focused on the need for "due process of law and the orderly and efficient administration of justice."<sup>261</sup> It stressed that when "an execution is contingent upon the resolution of a disputed issue, then that issue must be determined with the 'high regard for truth that befits a decision affecting the life or death of a human being.'"<sup>262</sup> The court held that Zeigler was entitled to replead his claims because the "protections intended to be afforded by federal habeas corpus were not available to this petitioner. . . ." and "the justice system failed to function properly."<sup>263</sup>

A potentially significant decision was rendered on December 18, 1986, when a federal district judge declared "that indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts."<sup>264</sup> The decision (which is now pending on appeal in the Fourth Circuit) was based on the court's conclusion that, absent the assistance of competent attorneys, death row inmates would be denied their constitutional right to "meaningful access to the courts."<sup>265</sup> In reaching that conclusion, the court pointed to "the limited amount of time death row inmates may have to prepare and present their petitions to the courts, . . . the complexity and difficulty of the legal work[,] . . . and [the fact that a death row inmate whose execution is imminent] is the least capable" of undertaking that "complex and difficult work."<sup>266</sup>

The court concluded "that only the continuous services of an attorney to

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256. *Id.* at 1424.

257. *Id.* at 1424-25.

258. *Id.* at 1423-24.

259. *Id.* at 1426.

260. *Id.*

261. *Id.*

262. *Id.* (quoting *Ford v. Wainwright*, 106 S. Ct. 2595, 2603 (1986) (plurality opinion)).

263. *Id.* (citation omitted). The court also noted that Zeigler asserted his factual innocence of the murders. *Id.*

264. *Giarratano v. Murray*, No. 85-0655-R (E.D. Va. Dec. 18, 1986) (final judgment order).

265. *Id.* Memorandum at 3-4 (quoting *Bounds v. Smith*, 430 U.S. 817, 824 (1977)).

266. *Id.* at 4-5.

investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.”<sup>267</sup> In short, the court held that, “[t]he matter of a death row inmate’s habeas corpus petition is too important — both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved — to leave to, what is at best, a patchwork system of assistance. These [death row inmates] must have the continuous assistance of counsel in developing their claims.”<sup>268</sup> The court stated that “the evidence conclusively establishes that today few — very few — attorneys are willing to voluntarily represent death row inmates in post-conviction efforts. . . . In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post-conviction relief, some relief is both necessary and warranted.”<sup>269</sup> It remains to be seen whether *Zeigler* and *Giarratano* will lead to a general recognition that the constitution forbids the execution of death row inmates who have not had competent counsel to represent them in state post-conviction and federal habeas corpus proceedings.

## X

### LACK OF ADEQUATE TIME TO PREPARE HABEAS CORPUS PAPERS

In certain areas of the country, those who volunteer to represent death row inmates in habeas corpus proceedings face extremely compressed schedules. These time frames frequently do not permit volunteer counsel to develop adequately the pertinent facts and legal arguments. This problem has arisen in the wake of a 1983 Supreme Court decision approving a federal appellate court’s denial of a stay of execution to Thomas Barefoot of Texas.<sup>270</sup> The appeals court gave Barefoot’s attorney barely over a day to prepare for oral argument and no opportunity to write a brief on the merits of the appeal.<sup>271</sup> One of the three judges had not seen any of the papers in the case and none of the judges had seen the transcripts of either the trial or the federal habeas

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267. *Id.* at 7.

268. *Id.* at 8.

269. *Id.* at 9. The court concluded that assistance need not be provided in the filing of certiorari petitions and that the state of Virginia need not appoint counsel for death row inmates in habeas corpus proceedings in federal court. *Id.* at 11-12. However, the judge noted that under 28 U.S.C. § 1915, the federal courts can appoint counsel for death row inmates and that “the substitution of counsel at the doors of the federal courthouse would have catastrophic effects on the ability of the new attorney to adequately prepare and present an inmate’s claims in the short time provided.” The court, however, envisioned “the creation of a system of representation in which the same attorney may provide representation in both state and federal courts, but is compensated by different sources for efforts in each.” *Id.* at 12-13.

270. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

271. See Note, *Summary Processes and The Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 350-51 (1985) [hereinafter cited as *Summary Processes*].

corpus hearing.<sup>272</sup> Moreover, the court's hastily written opinion "relied in part upon incorrect statements of what witnesses had testified in the court below."<sup>273</sup>

Unfortunately, some federal courts have used the *Barefoot* decision to justify new rules that provide habeas corpus counsel with far less time than that allotted counsel in appeals of non-capital felony cases.<sup>274</sup> Under some of these rules, the time between the district court's ruling and the appeals court's disposition of the case can be less than one day — even when the death row inmate has never before presented his claims in federal court.<sup>275</sup> This time constraint is particularly unjustifiable given that death penalty appeals are generally far more complicated than typical felony appeals. The complexity of death penalty litigation, as well as the frequent developments in death penalty jurisprudence, are major reasons why the time needed to prepare each capital case is "about the equivalent of 30 average cases."<sup>276</sup>

In non-capital felony cases, defense counsel have ten days after the district court enters its judgment in which to file a notice of appeal, additional time while the record on appeal is being assembled, and forty days to prepare the opening brief once the record on appeal is filed.<sup>277</sup> After receiving the state's responsive brief, defense counsel have two weeks in which to submit a reply,<sup>278</sup> and then usually a month or more before the oral argument.<sup>279</sup>

The Supreme Court assumed in *Barefoot* that a death row inmate's attorney does not need much time to prepare the federal appeals brief because she can essentially resubmit the brief submitted on the direct appeal to the state supreme court.<sup>280</sup> For several reasons, however, effective volunteer lawyers handling habeas corpus appeals in capital cases typically do not simply repeat the presentation made on direct appeal. First, the quality of many direct appeal briefs is embarrassingly poor. Moreover, there generally will have been many significant death penalty and other relevant criminal decisions rendered since the direct appeal brief was prepared which need to be considered in preparing the federal appeals brief. Furthermore, issues not raised on direct appeal, such as ineffective assistance of counsel, must be briefed in the federal appeals court.

Finally, *Barefoot*'s approach assumes that a district court's opinion counts for little or nothing. In reality, such an opinion is sometimes complex, and always requires the death row inmate's attorney to consider carefully and

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272. Amsterdam, *In Favorem Mortis, Postconviction Justice in Capital Cases* (Oct. 30, 1986 address to American Society of Criminology), at 23-24.

273. *Id.* at 24.

274. See, e.g., 3RD CIR. R. 29(3)(b); 5TH CIR. R. 8.

275. *Supra* note 274.

276. *U.S. Supreme Court Justice Speaks Here*, Mobile Register, May 8, 1984 (quoting then-Chief Judge Godbold of the Eleventh Circuit).

277. FED.R.APP.P. 4(b), 10, 31(a).

278. FED.R.APP.P. 31(a).

279. *Id.*

280. See *Barefoot v. Estelle*, 463 U.S. at 890.

respond to the indicated grounds for denying relief. Indeed, doing so successfully is the essential function of the federal appellate court brief.

Notwithstanding these serious problems, the Third Circuit recently adopted a rule which, perhaps inadvertently, appears to guarantee inadequate briefing time to counsel for death row inmates.<sup>281</sup> The rule requires that the parties fully brief all issues in a death penalty case whenever any party seeks to stay an execution or vacate a stay of execution.<sup>282</sup> Yet, it makes no provision for additional time to prepare such briefs. Unless the Third Circuit allows far more time to brief stays of execution than the few days provided by most courts, its new rule may have fatal consequences for death row inmates.

The Fifth Circuit's Local Rule 8, adopted in 1983 in the wake of *Barefoot*, permits almost instantaneous final action by the federal appeals court after a federal district court denies a stay of execution.<sup>283</sup> It appears already to have been fatal to at least one death row inmate, Johnny Taylor of Louisiana. Thanks to Local Rule 8, his case was decided for the first and only time in the Fifth Circuit on February 27, 1984, the same day that he lost in the district court and only three days after he lost in the Louisiana Supreme Court in a state post-conviction proceeding. Taylor was executed on February 29, only fourteen days after securing new counsel. The new, volunteer attorney had endeavored under an impossible time schedule to review the record, present an ineffective assistance of counsel claim (in view of trial counsel's failure to present *any* mitigating evidence), and to secure relief from four different courts.<sup>284</sup>

The volunteer attorney, who was in only his first year of practice, failed to request a court hearing at which he could present significant mitigating evidence which had not been introduced at trial.<sup>285</sup> Had the case not been rushed through the courts, he could have consulted more experienced lawyers who would have advised him to request an evidentiary hearing and provided him assistance in preparing for the hearing.

One experienced attorney who could have provided such support was Millard Farmer, an expert on ineffective assistance of counsel in death penalty cases.<sup>286</sup> Shortly after Taylor's execution, Farmer had learned enough about the case to be convinced that, with more time and proper guidance, the volunteer lawyer could have proven the ineffectiveness of Taylor's trial attorney.<sup>287</sup>

Farmer was informed of the following asserted facts: Taylor, who was black, was confronted with an all-white jury after his trial counsel failed to

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281. 3RD CIR. R. 29(3)(b).

282. *Id.*

283. 5TH CIR. R. 8.

284. *Taylor v. Maggio*, 727 F.2d 341, 345-46 (5th Cir.) *stay and certif. of prob. cause denied*, 465 U.S. 1075 (1984).

285. Telephone interview with Millard Farmer, Team Defense Project, Atlanta, Georgia (Nov. 1985).

286. *See Pickens v. Lockhart*, 714 F.2d 1455, 1467 (5th Cir. 1983) (describing Farmer as an attorney with "considerable experience in the trial and appeal of capital cases. . .").

287. Conference in New Orleans, Louisiana with Millard Farmer, Team Defense Project (Mar. 27, 1984).



exercise any of their discretionary challenges. The jury found Taylor guilty and the sentencing phase began, but Taylor's court-appointed lawyer started to argue to that same jury that Taylor had actually been innocent. When the trial judge ruled that it was too late to discuss guilt or innocence, the lawyer made no further argument and presented no mitigating evidence. Hence, during the brief sentencing hearing — which took up only three transcript pages — the jury was not told that Taylor had never before committed a violent crime. Moreover, family members who had come to Louisiana from Alabama were not used to present available mitigating evidence. And no one, not even Taylor's own counsel, argued to the jury that Taylor should not be killed.<sup>288</sup>

On the night of Taylor's execution, the Alabama attorney whom Taylor's family had retained to help with the trial admitted to a representative of the Louisiana Coalition on Jails and Prisons that he and Taylor's court-appointed defense counsel had not known how to handle the trial and had been ineffective.<sup>289</sup> But since that Alabama lawyer had never been contacted by Taylor's extremely rushed and inexperienced habeas corpus attorney, no court ever knew about his concession of ineffectiveness.<sup>290</sup>

I, too, have encountered the consequences of Local Rule 8. While representing Robert Lee Willie of Louisiana, my colleagues and I were forced, in only a few weeks' time, to perform a staggering amount of work. We had to investigate the facts, find witnesses concerning several significant issues, file petitions with two Louisiana courts, and file briefs and present witnesses and arguments in federal district court (which held its evidentiary hearing and ruled on the case only six days after it arrived from the state courts). In addition, on the day after the federal district court hearing, we filed a brief with the federal appeals court seeking a stay of execution, prepared for a possible instantaneously scheduled argument by telephone to the appeals court on both the stay and the merits of our appeal, and prepared to file a variety of papers with the United States Supreme Court.<sup>291</sup>

Fortunately, the United States Court of Appeals for the Seventh Circuit has adopted a rule much fairer than the Fifth Circuit's Local Rule 8. It guarantees counsel to all indigent death row inmates whose claims are not frivolous; provides that the merits of an appeal will not be decided at the same time as a stay application, unless the appeal is frivolous; and permits twenty-eight days for filing an opening brief.<sup>292</sup> Even this rule, however, provides substantially less briefing time than that provided in ordinary felony cases.

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288. Telephone interview with Thomas Dybdahl (Aug. 13, 1986). Dybdahl worked with the Louisiana Coalition on Jails & Prisons at the time of Taylor's execution. In late February and early March, 1984, Dybdahl spoke with Millard Farmer concerning the facts asserted in the text.

289. *Id.*

290. *Id.*

291. Letter from Ronald J. Tabak to Judges of United States Court of Appeals, Fifth Judicial Circuit (March 19, 1985) (on file with New York University Review of Law and Social Change).

292. 7TH CIR. R. 36(a)(5).

Because of the complex, ever-changing legal doctrines in capital cases, it would be difficult for volunteer counsel to meet even the more lenient deadlines applicable in non-capital cases. The problem is particularly severe where, as in Georgia, the attorney general's office routinely refuses all requests for extensions of time in capital cases.<sup>293</sup> Faced with such policies, and with local rules such as those of the Third and Fifth Circuits, volunteers face an extraordinary predicament. As Stephen Bright of the Southern Prisoners' Defense Committee has stated:

We don't get any continuances. We don't get any extensions of time. The whole thing is rushed through the court. Issues are missed, facts aren't developed and by the time you figure out what happened, your client is dead.<sup>294</sup>

## XI

### PROCEDURAL BARS TO CONSIDERATION OF MERITORIOUS CLAIMS

Even when a qualified volunteer attorney can clearly demonstrate that a death row inmate's constitutional rights were violated, she may find that no court is willing to consider the merits of that claim. This problem may develop because the court-appointed defense lawyer failed at trial (or thereafter) to make an objection or to pursue a claim under the procedures set forth by state law. Or it may be because the claim was not included in (or pursued on the appeal following) the client's first federal habeas corpus petition. In the former situation, the petitioner is said to have committed a "procedural default," and a federal court will usually not consider the court-appointed lawyer's negligence or mistake to constitute "cause" justifying its review of the "defaulted" claim.<sup>295</sup> In the latter situation, the petitioner is said to have "abused the writ" of habeas corpus, and his claims will usually not be considered.<sup>296</sup>

These procedural bars are increasingly being used to preclude considera-

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293. The Georgia Attorney General's unwavering policy was first explained to me by William B. Hill, Jr. and Susan V. Boleyn of the Georgia Attorney General's office in early March 1983, when I unsuccessfully sought consent to an extension of time on the ground that I was beginning work on my first death penalty case less than a week before my opening Eleventh Circuit brief was due.

294. *Fifth Circuit Death Penalty Appeals Move Faster Now; Some Say Too Fast*, Sunday Advocate, May 12, 1985, at A1, A14, col. 1. (quoting Stephen B. Bright).

Moreover, in several cases in which federal appeals courts *have* granted stays, the Supreme Court has summarily vacated the stays without hearing oral argument and sometimes without giving the death row inmate's counsel more than a few hours to submit written argument. See Amsterdam, *supra* note 272, at 30-31; Note, *Summary Processes*, *supra* note 271, at 366.

295. See *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

296. See *Woodard v. Hutchins*, 464 U.S. 377, 379 (1984) (Powell, J., concurring); *Jones v. Estelle*, 722 F.2d 159 (5th Cir. 1983) (en banc), *cert. denied sub nom. Jones v. McKaskle*, 466 U.S. 976 (1984).

tion of claims that would have been reviewed under the Supreme Court's previous view of habeas corpus procedure. Under the former doctrine, the writ of habeas corpus was available to any state prisoner with a meritorious claim who did not "deliberately bypass" the state courts.<sup>297</sup>

The Supreme Court applied the new stricter doctrines most recently on June 26, 1986.<sup>298</sup> It held by a 5-4 vote that Virginia death row inmate Michael Marnell Smith could not present his fifth amendment claim concerning a psychiatrist's testimony about incriminating statements that Smith made during a psychiatric examination.<sup>299</sup> The Court held that this claim was barred by procedural default because Smith's counsel, who objected to the psychiatrist's testimony at the trial, did not raise the issue on direct appeal — even though an *amicus curiae* brief *did* raise the issue on the direct appeal.<sup>300</sup> The Court considered "irrelevant" Smith's assertion that the Virginia courts would certainly have rejected Smith's fifth amendment claim at the time of the direct appeal but would now rule in favor of that claim.<sup>301</sup>

The Court went on to hold that even if defense counsel's decision not to raise the issue on appeal was made out of ignorance, that ignorance did not provide a "cause" excusing the procedural default either.<sup>302</sup> The dissent protested the application of the procedural bar in Smith's case, stressing that the record "unquestionably demonstrates that [Smith's] constitutional claim is meritorious, and that there is a significant risk that he will be put to death *because* his constitutional rights were violated."<sup>303</sup>

In another case decided on the same day as *Smith*, the Supreme Court held that the Second Circuit had erred in considering — and ruling favorably on — the sixth amendment argument of Joseph Allan Wilson, because that same argument had been raised in Wilson's original habeas corpus petition and had been rejected.<sup>304</sup> A plurality opinion representing the views of four of the Court's nine justices went on to say that a prisoner should be allowed to relitigate, through a successive habeas corpus petition, claims which were previously rejected on the merits "only where the prisoner supplements his con-

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297. See *Fay v. Noia*, 372 U.S. 391, 438 (1963).

298. *Smith v. Murray*, 106 S. Ct. 2661, 2664-65 (1986).

299. *Id.*

300. *Id.*

301. *Id.* at 2666.

302. *Id.* at 2666-67; accord *Murray v. Carrier*, 106 S. Ct. 2639, 2642-47 (1986). The Court also held in *Smith* that

even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

*Smith v. Murray*, 106 S. Ct. at 2668.

303. *Id.* at 2669 (Stevens, J., dissenting).

304. *Kuhlmann v. Wilson*, 106 S. Ct. 2616, 2621-22 (1986).

stitutional claim with a colorable showing of factual innocence."<sup>305</sup> Under this view, it would not suffice for the prisoner to show that all evidence of his guilt was admitted unconstitutionally.

Expansion of the plurality's view on this issue could have a devastating impact on many death row inmates. Conceivably, the plurality's concept of factual innocence may be accepted by a majority of the Court, then extended to cases involving successor petitions (whereby claims *omitted* from the first habeas corpus petition are included in a subsequent petition), and somehow utilized even with respect to the penalty phase of a capital trial.<sup>306</sup> This scenario would create insurmountable procedural hurdles for a great many death row inmates.

Even before these recent decisions were handed down, several legal scholars had concluded that procedural default and abuse of the writ — whatever their merits in other contexts — have devastatingly unfair, even fatal, consequences in capital cases.<sup>307</sup> Indigent death row inmates can suffer such consequences if their counsel fail to preserve at all times the host of special constitutional issues that are now involved in capital cases.<sup>308</sup> Indeed, the federal courts are refusing to consider death row inmates' claims even where the reason those claims were not previously raised is that volunteer counsel came into the cases barely before the scheduled executions, and were unable in their haste to become familiar with the inmates' cases.<sup>309</sup> Inmates thereby become victims of unjust procedural bars.

At least two people have already been fatalities of these procedural rules in just one state, Georgia. The first was John Eldon Smith.<sup>310</sup> The jury in Smith's case was selected from the same group used for the initial trial of Smith's wife, whose last name was Machetti. Her volunteer lawyer challenged the constitutionality of that group of prospective jurors, on the ground that it was selected in a way that excluded disproportionate numbers of blacks and women. Having raised the issue in a state habeas corpus proceeding, Machetti eventually won on this claim in federal court.<sup>311</sup>

Unfortunately, Smith's volunteer attorney, unlike his wife's, was not an employment discrimination lawyer, but instead had represented utilities.<sup>312</sup>

305. *Id.* at 2627 (plurality opinion of Powell, J.).

306. *Cf.* Smith v. Murray, 106 S. Ct. at 2668 (using modified version of factual innocence requirement in the context of the sentencing phase of a capital case, in applying "fundamental miscarriage of justice" exception to the cause and prejudice test for procedural default).

307. See Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C.D. L. REV. 1177 (1985); Batey, *Federal Habeas Corpus Relief and the Death Penalty: 'Finality with a Capital F'*, 36 U. FLA. L. REV. 252 (1984); Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371 (1985).

308. See *supra* note 307.

309. See Antone v. Dugger, 465 U.S. 200, 206 n.4 (1984) (per curiam); Adams v. Wainwright, 804 F.2d 1526, 1533-34 (11th Cir. 1986).

310. Smith v. Kemp, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

311. See Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

312. Telephone interview with Patsy Morris, ACLU of Georgia (July 11, 1985).

He did not realize that Smith had a claim based on the discriminatory jury selection method, and consequently did not raise it until after Machetti had won. At that point, the state habeas corpus court applied a procedural bar in Smith's case. The federal appeals court held that in view of Smith's procedural default, it would not consider the merits and would not grant Smith the same relief it had already granted his wife.<sup>313</sup> When the Supreme Court refused to grant a stay,<sup>314</sup> Smith was executed. His wife was given a fairly constituted jury at her retrial, and received a life sentence.<sup>315</sup>

Another man executed in Georgia was John Young.<sup>316</sup> The federal courts refused to consider the merits of Young's claim of ineffective assistance of counsel set forth in his second habeas corpus petition. The Eleventh Circuit held that he had "abused the writ" by not substantiating the claim in his first petition.<sup>317</sup> Young's trial counsel, however, could not be located in time for the original habeas corpus proceeding. The lawyer (who has been disbarred), was subsequently found and was prepared in the second proceeding to admit that he had been on drugs during Young's trial and had been ineffective in failing to offer important available mitigating evidence.<sup>318</sup>

As a result of this lawyer's incompetence, the jury never learned that Young, at the age of three, had witnessed the murder of his mother while he was in bed with her.<sup>319</sup> Nor was the jury told about a psychiatric evaluation which had found that Young may have suffered from post-traumatic stress syndrome, an illness often present in children who have been affected by homicides.<sup>320</sup>

The federal courts also refused to consider Young's claim that the prosecutor in his case had made the same type of closing argument that has been

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313. *Smith v. Kemp*, 715 F.2d at 1461, 1472. The Eleventh Circuit held, *inter alia*, that trial counsel should have known to raise the jury claim because of a Supreme Court decision handed down only six days before Smith's trial began. *See id.* at 1470. Yet, in other cases, when petitioners have contended that *their* trial lawyers should have raised arguments based on recent federal appellate court decisions, the Eleventh Circuit has rejected such claims of ineffective assistance of counsel. *See, e.g., Cape v. Francis*, 741 F.2d 1287, 1302 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 281 (1985).

314. *Smith v. Kemp*, 464 U.S. 1032 (1983).

315. Telephone interview with Patsy Morris, ACLU of Georgia (July 11, 1985); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). Machetti had herself committed a procedural default by not raising the jury selection claim at trial, but the State waived this point in her case. *Id.* After the Eleventh Circuit pointed out Machetti's default when ruling in her favor, the State refused to waive the point when Smith tried to raise the claim in his second state habeas corpus petition. *See Smith v. Kemp*, 715 F.2d at 1476 (Hatchett, J., dissenting).

316. *Young v. Kemp*, 758 F.2d 514 (11th Cir. 1985).

317. *Id.* at 516.

318. *See Affidavit of Charles Marchman, Jr.*, March 16, 1985, at 3-6; *Young v. Kemp*, 758 F.2d 514 (11th Cir. 1985).

319. *Id.* at 5-6.

320. Telephone interview with Patsy Morris and George Kendall, ACLU of Georgia (July 11, 1985).

held unconstitutional and highly prejudicial in other cases.<sup>321</sup> The courts held that Young was barred from raising that claim because his lawyers did not obtain a transcript of the closing argument and did not raise the issue sooner.<sup>322</sup>

In short, the federal courts are themselves now regularly "abusing the writ" by refusing to consider meritorious claims in death sentence cases. Instead of criticizing volunteer counsel, the Supreme Court should consider the injustice of allowing executions where the convictions or sentences were obtained unconstitutionally and in which no court ever considered the merits of the petitioners' claims. The federal courts' increasing use of procedural technicalities to bar consideration of meritorious constitutional claims is due, in part, to their failure to recognize the frequent reason why these claims are not raised earlier: because harried, inexperienced, time-pressured, underpaid or unpaid trial counsel and volunteer habeas counsel fail to recognize, preserve, and raise many meritorious constitutional claims.

## XII

### THE REQUIREMENT THAT DEFENDANTS SHOW THEY WOULD HAVE RECEIVED A DIFFERENT SENTENCE IF THE CONSTITUTIONAL VIOLATIONS HAD NOT OCCURRED

Even if an indigent death row inmate overcomes all of the procedural obstacles mentioned thus far, and a court does consider the merits of his constitutional claims and holds that his constitutional rights were violated, there is a growing likelihood that he will not be granted any relief. Federal courts have increasingly required petitioners to demonstrate a "reasonable probability" that, in the absence of the unconstitutionality, the sentencing outcome would have been different.<sup>323</sup> Moreover, this test is being applied in a manner that makes it almost impossible to satisfy.<sup>324</sup>

The test places on the defendant, rather than the State, the burden of proving the effect of the unconstitutionality. Its use is particularly pernicious where the State has deliberately provided the jury with an unconstitutional or irrelevant reason for imposing the death sentence. In such cases, there is generally no way to prove that any jurors were influenced to vote for death by the prosecution's improper presentation.

Once it finds that statutorily aggravating circumstances exist, a capital jury has great discretion in deciding whether or not to vote for the death penalty.<sup>325</sup> Certainly, prosecutors intend that their improper arguments influence

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321. Compare *Young v. Kemp*, 758 F.2d 514, 516 (11th Cir. 1985) with *Drake v. Kemp*, 762 F.2d 1449, 1460-61 (11th Cir. 1985) (en banc), cert. denied, 106 S. Ct. 3333 (1986).

322. *Young v. Kemp*, 758 F.2d at 516.

323. See, e.g., *Brooks v. Kemp*, 762 F.2d 1383, 1401 (11th Cir. 1985) (en banc), cert. denied, 106 S. Ct. 3337 (1986); *supra* text accompanying notes 63-65.

324. See *Brooks v. Kemp*, 762 F.2d 1383.

325. See *Zant v. Stephens*, 462 U.S. at 874.

jurors in the exercise of this power. Indeed, a Louisiana prosecutor stressed this intent when he tried to justify to an appeals court his colleague's closing argument in Robert Lee Willie's case about the jury's purported right to use lethal force.<sup>326</sup> The prosecutor urged the federal appeals court to recognize that no matter how strong the evidence of guilt, the prosecution has to present the jury with a convincing rationale (like the improper one argued to the jury in Willie's case) in order to persuade the jury to impose the death sentence.<sup>327</sup>

A substantial basis exists for that contention. As the Supreme Court recently reiterated: "In a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'"<sup>328</sup> In exercising that discretion, juries have often returned life sentences even in egregious cases, due to strong mitigating factors or unexplained exercises of their power to be merciful.<sup>329</sup> Since death sentences have not been returned in these cases, federal courts cannot fairly conclude that the death sentence would have been returned in *other* cases (such as Willie's) if the prosecutors had not urged upon juries unconstitutional or irrelevant reasons for imposing it.

Yet, that is precisely what federal appeals courts have purported to do in the *Willie* case and in a series of Georgia cases — including William Boyd Tucker's case.<sup>330</sup> These courts have effectively eliminated defendants' rights to have their fates determined by jurors who have not been influenced by improper arguments, who have heard and seen the witnesses, and who have understood their right to impose a life sentence even when there is little or no mitigating evidence.

One can only hope that the United States Supreme Court will consider

326. See *supra* text accompanying notes 151-154.

327. Oral argument of J. Kevin McNary in *Willie v. Maggio*, 737 F.2d 1372 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984), at which the author was present representing Mr. Willie.

328. *Turner v. Murray*, 106 S. Ct. 1683, 1687 (1986), *quoting* *Caldwell v. Mississippi*, 472 U.S. 320, —, 105 S. Ct. 2633, 2645-46 n.7 (1985), *quoting* *Zant v. Stephens*, 462 U.S. at 900 (Rehnquist, J., concurring).

329. In recent years, several juries in one state alone — Georgia — voted life sentences despite prosecutors' requests to impose the death penalty in gruesome murder cases. See, e.g., *Washington v. State*, 245 Ga. 117, 117, 263 S.E.2d 152, 153 (1980) (defendant bought shotgun with intent to kill a policeman, and then fired two shotgun blasts which killed one police officer and wounded other officers); *Duhart v. State*, 237 Ga. 426, 426-27, 228 S.E.2d 822, 823-24 (1976) (defendant, after robbing and badly wounding a married couple, fatally shot a taxi driver in the back); *Banks v. State*, 246 Ga. 178, 178-79, 269 S.E.2d 450, 451-52 (1980) (defendant assaulted three teen-aged girls in separate incidents, killing one of them by a shot in the head); *Jordan v. State*, 247 Ga. 328, 328-29, 276 S.E.2d 224, 228-29 (1981) (*per curiam*) (defendant stabbed two guards, one of whom died, during a prison riot); *United Press Int'l*, Sept. 1 and Sept. 2, 1983 (LEXIS, Nexis library, Omni file) (newsreports on retrial of James Walraven) with facts from the original trial set forth in *Walraven v. State*, 250 Ga. 401, 401, 297 S.E.2d 278, 279-80 (1982) (defendant strangled a woman and placed her body in her partially filled bathtub and separately attacked two other women, one of whom he choked unconscious).

330. *Willie v. Maggio*, 737 F.2d at 1391; *Brooks v. Kemp*, 762 F.2d at 1416; *William Boyd Tucker v. Kemp*, 802 F.2d at 1296; *Richard Tucker v. Kemp*, 762 F.2d 1496, 1509 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 3340 (1986). See *supra* text accompanying notes 151-158.

this issue and recognize the wisdom of what another court stated over two decades ago:

[T]he jury may conceivably rest the death penalty upon any piece of . . . data or any one factor in [the] . . . welter of matter [raised in the penalty phase]. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

. . . .

Thus *any* such substantial error in the penalty trial may have affected the result; it is 'reasonably probable' that in the absence of such error 'a result more favorable to the appealing party would have been reached.'<sup>331</sup>

### XIII

#### THE COMPLETE UNAVAILABILITY OF CLEMENCY

If a death row inmate loses his legal battle, he has the right to seek clemency from the executive branch of the state government: either the governor or the pardons board.<sup>332</sup> In a death penalty case, a grant of clemency changes the sentence to life imprisonment.<sup>333</sup> However, while clemency traditionally was granted frequently in appropriate cases,<sup>334</sup> today the "right" to consideration for clemency is more theoretical than real.

With the exception of Florida and Texas, not a single death row inmate has been granted clemency in any Southern state since 1981.<sup>335</sup> Florida and Texas last granted clemency in 1983 and 1984, respectively.<sup>336</sup> Florida's most recent former governor commuted only 7-8% of his state's death sentences, as compared with over 30% during the terms of some earlier Florida governors.<sup>337</sup> One Florida prisoner who was not granted clemency was John Spenkelink, who was a prime candidate for clemency because he was homosexually assaulted by his victim, turned down a chance to plead guilty to

331. *People v. Hines*, 61 Cal. 2d 164, 169, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964) quoting *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956).

332. See Note, *Executive Clemency In Capital Cases*, 39 N.Y.U. L. REV. 136 (1964); DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71 (1964).

333. *Supra* note 332.

334. *Id.*

335. "To the best of my knowledge, no other Southern governor has granted a single clemency in a capital case." Joseph Ingle, Southern Coalition on Jails and Prisons, Letter to N.Y. Times, July 14, 1985, § 4, at 26, col. 3.

336. List of Commutations since 1977, prepared by Clearinghouse on Georgia Prisons and Jails, January 21, 1987.

337. See *Death Penalty Opponents 'Congratulate' Graham*, Associated Press, Feb. 25, 1985 (LEXIS, Nexis library, Omni file); and *In Florida, A Story of Politics and Death: A Governor Controls the Ultimate Sentence*, Nat'l L. J., July 16, 1984, at 1, col. 2.



second-degree murder, and was a model prisoner.<sup>338</sup>

Similarly, Virginia's governor refused to grant clemency to Morris Odell Mason. The case for granting clemency was compelling because Mason was a mentally retarded young man who suffered from schizophrenia.<sup>339</sup> Moreover, he had called his parole officer two days before the killings, asking to be taken off the streets and put into a halfway house.<sup>340</sup>

Perhaps the most egregious refusal to grant clemency occurred in June 1986, when Kenneth Albert Brock was executed in Texas.<sup>341</sup> George Jacobs, who as an Assistant District Attorney had prosecuted Brock for the murder, asked the State Parole Board to grant clemency, because Jacobs was not sure the killing was intentional and felt Brock's life was "worth salvaging."<sup>342</sup> The victim's father also requested mercy for Mr. Brock.<sup>343</sup> Yet, the Parole Board voted 4 to 2 to uphold the death sentence and Governor White (in the midst of an uphill and ultimately unsuccessful re-election campaign) refused to grant a 30-day reprieve.<sup>344</sup>

In Georgia, the Board of Pardons and Paroles has in recent years been unwilling to consider commutation unless there is doubt as to guilt. As a result, the Georgia clemency rate is now 0%, compared to a rate of over 25% from 1949 to 1963.<sup>345</sup>

Several governors have justified their refusals to grant clemency by asserting that granting it would interfere with the functions of juries and the courts. In 1983, then-Governor Winter of Mississippi stated that he would not act as a "super-tribunal to second guess the state or federal courts," which had "carefully and painstakingly" reviewed the record.<sup>346</sup> In the same year, then-Governor Alexander of Tennessee vowed that he did "not intend to use . . . executive clemency generally to interfere with the decisions of juries and judges . . ."<sup>347</sup> In 1985, then-Governor White of Texas took "the position that once a death penalty case has run its course through the appellate courts he will not interfere."<sup>348</sup> Also in 1985, then-Governor Robb of Virginia stated that his principal role was to "make certain that a condemned person has had full access to the courts."<sup>349</sup>

In fact, these governors — unlike their predecessors — have been abdi-

338. Nat'l L. J., *supra* note 337.

339. Hopkins, *Just Like Killing an 8-Year-Old*, Wash. Post Nat'l Weekly Ed., Aug. 5, 1985.

340. *Id.*

341. *Slayer of Store Manager Executed Despite Plea By Father of Victim*, N.Y. Times, June 20, 1986, at A13, col. 1.

342. *Id.*

343. *Id.*

344. *Id.*

345. *A Citizen's Call to Halt Executions*, pamphlet distributed by Clearinghouse on Georgia Jails & Prisons, Atlanta, Georgia (June 1985), at 7-8.

346. United Press Int'l, June 21, 1983 (LEXIS, Nexis Library, Omni file).

347. United Press Int'l, Sept. 22, 1983 (LEXIS, Nexis Library, Omni file).

348. United Press Int'l, July 18, 1985 (LEXIS, Nexis Library, Omni file).

349. *Robb: Final Judge on Life, Death*, Wash. Post, May 9, 1985, at 1, 7, col. 6.

cating their independent responsibility to determine whether executions should go forward. Governors and pardon boards should make, not avoid, the final decision on whether an execution should take place. They should determine whether a death sentence is disproportionate to sentences in similar cases; whether a death sentence is imposed because of the race or social status of the victim, or because the jury wanted to keep the defendant in jail longer; and whether a death sentence is unfair in view of such mitigating factors as the defendant's mental retardation. Unfortunately, today's governors and pardon boards are not exercising their authority.

State officials responsible for clemency decisions will most likely continue to abdicate their responsibility until enough people have been executed to make the granting of clemency politically acceptable.<sup>350</sup> In the meantime, as one observer has noted: "It matters not what your clemency grounds may be, the condemned person is treated as a political pawn by the governor to be dispensed with and thus curry the favor of the electorate, which is overwhelmingly for the death penalty."<sup>351</sup>

#### XIV

##### POLLUTION OF STATE JUDICIAL ELECTIONS

Unfortunately, the merits of particular death penalty decisions have become political issues in numerous state supreme court election campaigns. This phenomenon was a growing threat to the integrity of the judicial process even before the success of the most recent effort to defeat sitting justices because of their death sentence votes.<sup>352</sup>

In 1982, Tennessee Supreme Court Justice Ray L. Brock was attacked as being "prejudiced in [capital punishment] cases" by his opposing party, and was criticized for his dissent in a particular case.<sup>353</sup> In 1984, Kentucky Chief Justice Robert Stephens circumvented another effort to inject the death penalty into a judicial election. After two thousand Powell County residents sought Stephens' removal because he had voted to vacate a conviction and death sentence imposed on a fifteen-year-old, Stephens successfully sought re-districting of his judicial district to exclude Powell County.<sup>354</sup>

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350. The Attorney General of Texas, James Mattox, recently acknowledged that the decision to deny clemency is, unfortunately, often made out of the decisionmaker's fear of being criticized. These politicians "too often . . . take the expedient way out." Indeed, Attorney General Mattox stated that "there has been at least one [person executed in Texas] that perhaps did not meet the full criteria" and "there perhaps are several [still on Texas' death row] that should have their sentences commuted." J. Mattox, Comments on ABC News *Nightline*, Show #1439, Transcript at 5-6 (Nov. 27, 1986).

351. Ingle, *supra* note 335.

352. See *infra* text accompanying notes 358-362.

353. United Press Int'l, Aug. 5, 1982 (LEXIS, Nexis Library, Omni file); *Supreme Court Upholds Death Penalty*, United Press Int'l, Aug. 17, 1982 (LEXIS, Nexis Library, Omni file).

354. *Kentucky Supreme Court Reverses Ice Murder Conviction*, United Press Int'l, Sept. 21, 1983 (LEXIS, Nexis Library, Omni file). United Press Int'l, Oct. 9, 1983 (LEXIS, Nexis Library, Omni file).

In 1984, North Carolina Supreme Court Justice Henry E. Frye was challenged for re-election in part on the ground that he had opposed capital punishment as a legislator.<sup>355</sup> And in 1983, the Maryland Coalition Against Crime warned that a recently-appointed judge who opposed capital punishment "could face unexpected opposition [that] could lead to his removal from the court."<sup>356</sup> The Coalition threatened to seek impeachment of judges who blocked "the just punishment of heinous murderers . . . ."<sup>357</sup>

The most intense campaign of all to unseat state judges has recently succeeded in California. Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso were denied reconfirmation by California voters in the November 1986 election. During the campaign, political conservatives, county prosecutors, and relatives of murder victims accused the justices of reversing death sentences because of personal opposition to the death penalty.<sup>358</sup> One anti-Bird mailing stated, "Charles Alan Green killed his wife in 1977. Three years later the California Supreme Court under Chief Justice Rose Bird saved his life."<sup>359</sup> In the face of a multi-million dollar campaign making such emotional appeals, it is unsurprising that most voters never focused on the fact that many of the reversals of death sentences were due to ambiguities and poor drafting in the California death penalty law approved by the voters in 1978.<sup>360</sup>

The defeat of the three California justices seems almost certain to have a chilling effect on the independence of the state judiciaries in states allowing capital punishment.<sup>361</sup> Hence, it is all the more vital that the federal courts, with their life-tenured judges, consider the merits of all serious constitutional challenges in capital cases.<sup>362</sup>

355. See *Hunt Endorsement Criticized*, United Press Int'l, May 4, 1984 (LEXIS, Nexis Library, Omni file).

356. United Press Int'l, July 15, 1983 (LEXIS, Nexis Library, Omni file).

357. *Id.*

358. *Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. Times, Nov. 6, 1986, at A30, col. 1-2.

359. Matthews, *California's Chief Justice Is Battling a Political Death Sentence*, Wash. Post Nat'l Weekly Ed., Nov. 11, 1985, at 12, col. 1.

360. Galante, *Calif. Justices Face Own 'Executions'*, Nat'l L. J., Nov. 3, 1986, at 1, 10, col. 1.

361. One commentator has suggested that constitutional challenges could be made to the capital punishment decisions of state courts if their justices are elected in campaigns whose particular death penalty decisions are raised as issues. See Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. OF L. & POL. 57, 132 (1985).

362. Another factor makes judicial decisions in capital punishment cases less fair over time. Justices on state supreme courts who spend up to 1/3 of their time on death penalty cases become less sensitive to constitutional rights after reading about so many heinous murders. Former Florida Supreme Court Justice England stated that as time went on, it "became more and more difficult to keep out personal feelings because the factual situations were so god-awful." He added, "[t]he ultimate consequence is that the U.S. Supreme Court's objective of absolute objectivity, non-discriminatory, non-freakish application of the death penalty is not possible . . . ." See *The South — Nation's Death Belt*, L.A. Times, Aug. 25, 1985, at 21, col. 5.

## CONCLUSION

Notwithstanding Supreme Court decisions which assert that capital punishment is now administered fairly, the plain truth is that the process is administered unfairly in a tremendous number of cases. Indeed, this unfairness can occur at every stage of the proceedings, from the decision on whether to prosecute to the failure to consider clemency seriously. Moreover, despite the utterly inadequate funding provided to defense counsel, the capital punishment process "costs more than a system [of] life imprisonment."<sup>363</sup>

Our legal system is incapable of providing justice in these highly emotional cases. Too many prosecutors are unable to restrain themselves from seeking the death penalty for tactical or political reasons, from demanding that trials occur in locales reeking with prejudicial publicity, from striving to keep biased people eligible for jury service, or from making highly misleading closing arguments. Too many attorneys for capital defendants, due to a combination of inexperience and lack of time and resources, fail to mount adequate defenses, particularly in sentencing proceedings. Too many jurors vote for the death penalty without really intending that the defendant be executed. Too many state judges seem insensitive to the federal constitutional rights of death-sentenced prisoners. Too many federal judges themselves "abuse the writ" of habeas corpus by imposing procedural bars, by adopting scheduling rules which turn death sentence cases into rollercoasters, and by placing on death row inmates the enormous burden of proving that the deprivations of their constitutional rights probably changed the outcomes of their cases. Too many state governments provide indigent capital defendants with egregiously underfunded or underqualified trial and direct appeal counsel and then deny them funds for counsel in subsequent judicial proceedings. Too many state governors and pardon boards are abdicating their responsibility to consider grants of clemency. And too many members of the public are blindly favoring capital punishment without really understanding how it operates.

In view of these basic problems with the death penalty and the arbitrary and capricious way in which it still operates, it is apparent that this country cannot administer capital punishment fairly. For that reason — if for no other — it should be abolished.

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363. See Note, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. D. L. REV. 1221, 1266-70 (1985) (concluding that "a criminal justice system that chooses the death penalty costs more than a system that chooses life imprisonment as its ultimate penalty."). *Id.* at 1270; see also Moran and Ellis, *Price of Executions Is Just Too High*, Wall St. J., Oct. 15, 1986, at 34, col. 3. Indeed, Florida's Chief Justice Boyd said in February, 1986 that death penalty cases are such a tremendous burden that they prevent the Florida Supreme Court from paying as much attention to other cases as the justices would like. Leonard, *Death Cases Are a Big Pain and No Deterrent*, Chief Justice Says, Tallahassee Democrat, Feb. 27, 1986.