# THE CHIROPRACTOR AS BRAIN SURGEON: DEFENSE LAWYERING IN CAPITAL CASES

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Until sometime in the 1970s, the prevailing test for determining ineffective assistance of counsel was whether the attorney performed so poorly as to make the representation a "farce and a mockery of justice."[1] Judge Bazelon aptly dubbed this standard "a mockery of the Sixth Amendment."[2] In 1984, the Supreme Court in *Strickland v. Washington*,[3] a habeas challenge to a capital sentence, finally gave its imprimatur to the test by then universally adopted by the courts of appeals: that of reasonably effective assistance. Yet, whatever may be true in ordinary cases, in the capital setting defense counsel too often deliver — and courts at all levels too often tolerate, when indeed they do not encourage — performance so shoddy as to render the law in its application a mockery of the sixth *and* eighth amendments.[4]

A perfect illustration of this assertion is the capital trial of Jack House.[5] House ultimately became a client of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Like so many other defendants on trial for their lives, he received his first real representation after he had been convicted of murder and sentenced to death.

House was a white, twenty-seven-year-old father of three, living in Atlanta with his wife of eight years. Although alcoholic and possessing an IQ of seventy-seven, he had regular employment and supported his family. He also had no criminal record except for a number of traffic violations. One April morning, two young boys were found strangled in a wooded area of northwest Atlanta. They were nude, and one of them had been sodomized. Circumstantial evidence — mainly that on the previous day, shortly before the boys disappeared, they had taunted the falling-down drunk defendant, and that an inebriated white man had walked away from the direction of the woods which

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1. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).

2. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973); *see* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 65-71 (1986).

3. 466 U.S. 668 (1984).

4. *See, e.g.*, Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 801-10 (1986); Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-4 (1986).

5. *See* House v. Balkcom, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984).

the boys had entered earlier — led the police to arrest House. He was then "half-drunk" by his own admission and according to witnesses. The police kept House incommunicado for two days and subjected him to various procedures. After four to five hours of interrogation, he signed a confession.[6]

When at last produced in court, House was permitted his first phone call. He called his mother, who retained Dorothy Atkins, a local attorney practicing in partnership with her husband, Ben Atkins; Ben became lead counsel at trial. Until that moment, Dorothy had never represented a capital defendant and neither attorney had read the new Georgia statute enacted after *Furman v. Georgia*.[7] In the words of a panel of the Court of Appeals for the Eleventh Circuit, their "state of preparation qualified them only as spectators."[8]

That indictment, although extreme, was wholly justified. It would take more than the pages allotted in the present forum to relate in full the sins of omission and commission that comprised the second crime in this case: the one committed against Jack House by his attorneys and countenanced by the State of Georgia. But even a quick review of the highlights — or "lowlights" — of House's so-called defense will demonstrate that his lawyers in effect signed their client's death warrant themselves. Consider the following:

> — Although the confession amounted to the single most direct piece of evidence against House, and his lawyers heard him claim that it had been procured by beatings, and they had seen the bruises and welts on his body, they took no pictures nor did they call a doctor to substantiate his physical condition. In attacking the confession before the jury, they relied solely on their own testimony.[9]
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> — The Atkinses failed to visit the crime scene or interview the state's witnesses, made no attempt to obtain discovery from the prosecutor, and did not file any pre-trial motions. Dorothy subsequently explained that they had been "too busy" to seek discovery. As a result, they were admittedly "completely surprised" when the state introduced evidence at trial that a blood sample taken from House's clothing matched the blood type of one of the victims.[10]
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> — They barely spoke to either the defendant or his family even though House's mother told Ben that she had been telephoned by a man named Michael Pitts, who said he knew who had committed the murders and that it was not House. Furthermore, they formulated no defense strategy. Indeed, Dorothy informed the family that she was "stymied" as to what she should do to ready a defense. On the very eve of trial, she dumped the case on her husband Ben — who had done no preparation at all — because she felt she could not

6. *Id.* at 609-10.
7. 408 U.S. 238 (1972). *See House*, 725 F.2d at 611-13.
8. *House*, 725 F.2d at 611-13.
9. *Id.* at 611-12, 618.
10. *Id.* at 612, 614-18.

handle it.[11]

— During the guilt trial, the Atkinses let their client testify in narrative form, without direction. Dorothy asked that the court postpone the state's cross-examination of House until the next day so that she could attend a church guild meeting, thus giving the state the night to prepare. Furthermore, Ben, now the lead counsel, absented himself from court during the testimony of a key prosecution witness (whom he nevertheless cross-examined!) as well as during approximately half of the state's summation.[12]

— Perhaps most typical,[13] and thus most important, Ben and Dorothy did not present any mitigating evidence nor did they prepare an argument at the sentencing phase. Indeed, the Atkinses were even unaware that there *was* a separate trial on penalty until they found themselves in the midst of it after the conviction. The reason? They simply had not read the new statute. Ben gave the following sentencing summation, reproduced here in its entirety:

> May it please the Court, ladies and gentlemen of the jury, any lawyer who finds himself in this position cannot help but feel somewhere along the way there must be something that he could have done to have brought about a different decision, he always does. I must admit I have never been in this position before.
>
> I think there has been enough dramatics already, and all I would like to leave with you for your own sake is, "Vengence [sic] is mine, saith the Lord." Thank you.[14]

Notably, Ben made no mention of mercy.

— Finally, counsel filed a boilerplate motion for a new trial. It did not mention that a few days following the trial, three credible neighbors had surfaced, each of whom claimed to have seen the victims alive hours after the time of death proved by the state.[15] Although House had an iron-clad alibi for the later time,[16] this fact was also omitted from the motion. When the Atkinses failed to appear to argue the motion, the court initiated an action to hold them in contempt.[17]

While *House* surely is one of the worst documented cases of inadequate

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11. *Id.* at 611-12, 614.

12. *Id.* at 612-13.

13. *See* Berger, *Born-Again Death* (Book Review), 87 COLUM. L. REV. 1301, 1306 (1987) (reviewing W. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 54-55, 64-65 (1987)).

14. *House*, 725 F.2d at 613 & n.4.

15. *Id.* at 613.

16. Conversation with John C. Boger, Jr., the LDF attorney who represented House in the habeas proceedings (Dec. 1989).

17. *House*, 725 F.2d at 613.

assistance of defense counsel, it hardly could be called atypical except insofar as counsel were retained rather than appointed, and the client ultimately gained relief.[18] Defense lawyers in capital trials default most often (and plainly, with the most fatal results) in areas directly relating to penalty.[19] Thus, if one represents death-sentenced clients on appeal or in post-conviction proceedings, one frequently reads transcripts devoid or virtually devoid of mitigating evidence only to discover later that investigation, sometimes quite cursory, would have yielded powerful mitigating facts.

Georgia, for example, executed Billy Mitchell in 1987.[20] He, too, was by then one of LDF's clients. Since Mitchell's counsel, like the Atkinses, called not a single mitigating witness at the penalty phase, the sentencing judge never heard the evidence that later filled 170 pages of the habeas corpus record in the form of affidavits. Respectable people including not only members of Mitchell's family but also his teachers, coaches, and friends, as well as a bank vice president, a city councilman, and a former prosecutor swore that, if asked, they would have testified that Mitchell was a person of good character.[21]

Growing up in a poverty-stricken and crime-ridden ghetto of Jacksonville, Florida, Mitchell cared for his eleven siblings while his mother worked. He took a job in eighth grade in order to help support his family, served as captain of the football team, was a good student, a boy scout, and member of the student council, and generally impressed all who knew him. He got into trouble shortly after his parents divorced when he was sixteen and — unknown to his sentencing judge — suffered repeated homosexual rape during a six-month incarceration for attempted robbery. As a result, he lost thirty pounds and became severely depressed. When released, he committed the convenience-store robbery and killing that later led to his execution.[22]

It is hard to believe that Mitchell would not have had a fairly good chance at life, if counsel had only shown the judge his human face: the decent and highly regarded young man whom circumstance had so dreadfully changed. But what kind of lawyer represented Mitchell? One who pleaded his client guilty without even interviewing the policeman (a cousin of the victim) who Mitchell claimed had extracted a confession from him at gunpoint. One who did no investigation or preparation for the penalty hearing. And how did the lawyer explain himself later? He neglected to speak to the officer

18. Notably, however, relief was granted under a pre-*Strickland* test, which was more generous to defendants in that it did not require proof of prejudice. To win on an ineffectiveness claim under *Strickland*, the defendant must show both that his lawyer's performance fell below "prevailing professional norms" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 690, 694 (1984); *see* Berger, *supra* note 2, at 76-77, 88-96.

19. *See supra* text accompanying note 13.

20. *See* Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

21. *Mitchell*, 483 U.S. at 1027 (Marshall, J., dissenting).

22. *Id.* at 1027-29.

in question because "I personally don't like the man."[23] He decided to forgo any inquiry into mitigating facts because he thought that he held a legal "ace in the hole" that would wholly preclude imposition of death. This "ace in the hole" consisted of counsel's untried theory that absent prior written, as opposed to oral, notice, the state would be forbidden to adduce any evidence of aggravating factors. Predictably, the theory self-destructed, leaving counsel and client defenseless.[24]

Such shocking histories inevitably pose the question of why lawyers so dreadfully and consistently fail individuals on trial for their lives. The following is a brief exploration of the reasons.[25] Some attorneys (undoubtedly those in *House* and *Mitchell*) are simply incompetent. Approximately 90% of capital defendants are poor, and the poor all too frequently are represented by the incompetent or inexperienced.[26] Amazingly, *one-quarter* of Kentucky's death row inmates had trial attorneys who have since been disbarred or resigned rather than face disbarment![27]

But there is more to it than that. Simply put, the death-penalty context operates—especially in the deep South—to magnify the problems already endemic to indigent defense, thereby fostering "no-fault" or "low-fault" ineffectiveness on a broad scale.

For one thing, prevailing hourly rates and maxima may result in assigned counsel's receiving as little as $1,000 per case.[28] Payment for expert or investigative services is also meager beyond belief.[29] In Virginia, for instance, as of 1985, appointed capital attorneys were paid an average of only $687 per case.[30] That sum, aptly described as "peanuts" by the president of the Virginia bar, at times has amounted to a dollar an hour.[31] This calculation excludes, moreover, the often large opportunity cost of potential client fees forgone — perhaps permanently, since properly conducted capital defense work not only overburdens attorneys, forcing them to turn business away, but also at times adversely affects their community standing.[32]

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23. *Id.* at 1027.

24. *Id.* at 1029.

25. *See generally* Berger, *supra* note 13, at 1306-08; Tabak, *supra* note 4, at 801-10.

26. *See* Minority Report of Stephen B. Bright, in TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: RECOMMENDATIONS AND REPORT OF THE ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS app., at A-38 (1989) [hereinafter TASK FORCE REPORT].

27. Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A.L. REV. 59, 74 & n.92 (1989).

28. TASK FORCE REPORT, *supra* note 26 at 70-71 & n.91.

29. TASK FORCE REPORT, *supra* note 26, at 76-77; *see also* Gradess, *The Road From Scottsboro*, CRIMINAL JUSTICE, Summer 1987, at 46 (citing caps for investigative fees as low as $100).

30. Tabak, *supra* note 4, at 801 (citing Springsteen, *Virginia Death Penalty Follows Course Different from Country, World*, News Leader, June 27, 1985).

31. *Id.* at 801-02 (citing Walker, *State's Low Fees Said to Create 'Disaster' in Legal Help to Poor*, Times-Dispatch, May 29, 1985).

32. State Senator Gary Parker of Georgia testified at the ABA Task Force hearings: "When judges get lawyers to take these cases, especially when there is a black defendant and a

Unpopularity, or fear of it, has the additional dire effect of dampening some attorneys' zeal. Thus, anxious counsel may refrain from challenging discrimination in grand or petit jury selection or even from inquiring in voir dire into prospective jurors' attitudes regarding the death penalty or race, in order to avoid eliciting hostility toward themselves or, more legitimately, extra hostility toward the defendant.[33] They may also, unjustifiably, suggest to the jury in argument that they are serving their clients reluctantly and only by virtue of court compulsion.[34] Worst of all, when counsel, by contrast, persistently displays independence, skill and ardor, local judges may decline to appoint them. In a recent (happily, reversed) ruling, a trial court refused to name two experienced capital lawyers for a retrial, when they had represented the defendant, Tony Amadeo, for a total of fourteen years and one of them had just won a Supreme Court victory for the client.[35]

Yet if, as the cliché goes, "death is different," thereby warranting the law's special treatment of capital cases, this difference translates into more than a call for enhanced reliability in the underlying proceedings[36] — a call that the Supreme Court seems prepared to resist.[37] It, too, translates into a need for counsel possessing knowledge of a complex and constantly developing body of procedural and substantive doctrines as well as a willingness to bring that knowledge into play in a setting of extreme emotional strain.[38]

Furthermore, capital defense involves what some attorneys view as an alien, unlawyerly task. Constructing what Professor Welsh White has called a "dramatic psychohistory" of the client and presenting it at the penalty phase smacks more of social work than of law.[39] Many attorneys who feel comfortable with traditional trial work and, in the words of one who made no preparations whatsoever for the sentencing phase, believe that a lawyer should "try to win . . . rather than prepare for losing it," are devastated when the client is convicted and afterward just throw in the towel.[40] In one of my cases, the original lawyer, who had done an adequate job at the guilt trial, tried to con-

white victim, [rather than look for those who are best qualified] they look for those who can stand the embarrassment." TASK FORCE REPORT, *supra* note 26, at 109 n.180.

33. *See* Tabak & Lane, *supra* note 27, at 72-73; Tabak, *supra* note 4, at 803 (discussing cases).

34. *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983) (death sentence was reversed where, among other derelictions, defense counsel stressed his appointive status); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (defense counsel's emphasis on the reprehensible nature of the crime and his reluctance in representing the defendant warranted reversal of death sentence).

35. *See* Amadeo v. State, 259 Ga. 469, 384 S.E.2d 181 (1989).

36. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

37. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 347-48 (1987) (Blackmun, J., dissenting) (commenting that the majority had applied a *lesser* standard of scrutiny under the equal protection clause because the case was a capital one).

38. *See* Tabak, *supra* note 4, at 808-10.

39. *See* W. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 54, 56 (1987); Berger, *supra* note 13, at 1307-08.

40. Berger, *supra* note 13, at 1308; *see* Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985).

vince the court to proceed to the penalty phase immediately after the verdict came in late at night — so that he could attend a football game the following day![41] Perhaps he was not so much callous toward the client as exhausted, depressed, and unattuned to the critical importance of the sentencing stage. Finally, the socioeconomic and, frequently, racial gulf between the attorney and the defendant, his family, and friends, adds to the inherent problems of communication and investigation when dealing with an often disturbed or retarded individual who may have committed heinous crimes.[42]

I hope by this point the reader is persuaded that the conditions of capital defense work virtually guarantee ineffectiveness, especially in regard to the penalty phase, in an alarming number of cases. What, then, are the consequences of that scandal? Not only does the defendant suffer a conviction or sentence that a competent lawyer might have avoided, he also faces an increasingly arduous obstacle course in his efforts to overturn the judgment.

Doctrinally, *Strickland*'s strong presumption of reasonable performance, coupled with its tough prejudice test,[43] make most sixth amendment challenges hopeless. Practically, replacement counsel, if there is one, often encounters severe difficulty in getting trial counsel to cooperate in proving her own derelictions. It once took me almost two years to locate my predecessor, who had dropped out of sight, and many more months of canceled appointments to get him to see me. In the subsequent post-conviction hearing (where I, representing the defendant-petitioner, bore the burden of calling the lawyer as my witness), he protected himself by simply answering "yes" to the state attorney's suggestions, on a very friendly cross-examination, that he had had excellent strategic reasons for failing to investigate or adduce mitigating facts, such as the mental retardation of our client.[44] This scenario is very common, although there are occasional exceptions: Ben Atkins was finally disbarred on account of his honest admission of fault in Jack House's habeas proceeding.[45]

Most disturbingly, in recent years the problem of ineffective assistance has been compounded by retrenchments in the law of habeas. A full description of the tightening noose that Supreme Court decisions have placed around the necks of habeas petitioners is beyond the scope of this Article.[46] At least

41. The case is that of Robyn L. Parks of Saffle v. Parks, 110 S. Ct. 1257 (1990), for whom the author served as counsel. None of the reported opinions in Mr. Parks' litigation mentions the incident.

42. *See* Berger, *supra* note 13, at 1307.

43. *See* Strickland v. Washington, 466 U.S. 668, 689-96 (1984); *see also supra* note 18.

44. The case is Allen v. Kemp, Civil Action No. 86-V-565 (Butts Co., Ga.), *cert. denied*, Allen v. Zant, 110 S. Ct. 3293 (1990).

45. Conversation with John C. Boger, Jr., *supra* note 16.

46. The recently published two-volume treatise by my colleague, Professor James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988 & Supp. 1989), provides a superb introduction to, and overview of, habeas doctrine — past and present. *See also* Liebman, *More Than 'Slightly Retro': The Supreme Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE (1990-91) (forthcoming); Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able To Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-91).

two points deserve mention, however, and should be reflected upon with the insight that death-sentenced prisoners constitute the principal serious consumers of habeas.

First, since the 1970s, the Court has paid extreme deference to state rules on procedural default.[47] Capital attorneys frequently fail to make timely requests and objections, thereby precluding in many instances state court review of particular claims. With rare exceptions, the petitioner in the habeas forum cannot show "cause" for the state default because he is unable to establish the gross ineffectiveness required to prevail on a sixth amendment claim.[48] Second, in the 1988 Term in *Teague v. Lane*,[49] the Court revamped the law on retroactivity of favorable new holdings in the area of criminal procedure such that, again with the rarest exceptions, no new rule can be announced on collateral review because it would not be retrospective.[50] These developments make crystal clear that, in order to save lives, defense counsel must routinely "get it right" the first time — at trial or, at the latest, on direct appeal.

Thus far, this account has given only the bad news. There is, however, some good news, although limited and partial. Against a backdrop of terribly negative Supreme Court opinions — not only fashioning stringent doctrine on counsel ineffectiveness, procedural default, and retroactivity, but also rejecting a constitutional right to counsel in capital post-conviction proceedings[51] — a bit of progress is being made on the statutory front.[52]

An eleventh-hour amendment to the federal death penalty bill that became the Anti-Drug Abuse Act of 1988[53] gave the indigent death-sentenced prisoner a right to the assignment of one or more lawyers to represent him in habeas proceedings.[54] Previously, appointment had been discretionary unless

47. *See, e.g.*, Dugger v. Adams, 489 U.S. 401 (1989) (defendant defaulted on claim of unconstitutional penalty-phase instructions by failing to raise the issue on direct appeal in state court); Smith v. Murray, 477 U.S. 527 (1986) (failure to raise issue of unconstitutional admission of psychiatrist's testimony in state court resulted in default of claim); Engle v. Isaac, 456 U.S. 107 (1982) (defendant defaulted on claim of unconstitutional burden-shifting instruction when he failed to raise the issue in state trial court); Wainwright v. Sykes, 433 U.S. 72 (1975) (defendant defaulted on claim of unconstitutionally admitted incriminating statement by failing to raise it in state trial court).

48. *See* Murray v. Carrier, 477 U.S. 478, 485-92 (1986); Smith v. Murray, 477 U.S. 527, 533-37 (1986).

49. 489 U.S. 288 (1989) (plurality opinion).

50. The *Teague* doctrine was adopted by a majority of the Court and was expressly extended to capital cases four months later in Penry v. Lynaugh, 109 S. Ct. 2934 (1989). In the 1989 Term, it was applied to preclude review on the merits in three death-penalty habeas cases, Butler v. McKellar, 110 S. Ct. 112 (1990) (guilt-phase claim), Saffle v. Parks, 110 S. Ct. 1257 (1990) (penalty-phase claim), and Sawyer v. Smith, 110 S. Ct. 2822 (1990) (penalty-phase claim).

51. Murray v. Giarrantano, 109 S. Ct. 2765 (1989).

52. *See generally* Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990).

53. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (to be codified in various sections of the U.S. Code).

54. 102 Stat. 4393-94, § 7001 (to be codified at 21 U.S.C. § 848(q)(4)(B)).

and until a hearing was ordered.[55] The amendment also set minimal standards for years of experience and admission to practice in the relevant court,[56] provided for "reasonably necessary" investigative, expert, or other services,[57] and — critically — dispensed with fee caps and regular rates to permit the courts to order reasonable compensation.[58] In the wake of the Act, the United States Judicial Conference issued guidelines calling for a pay scale of $75 to $125 an hour[59] and money was appropriated for the death-penalty resource centers in thirteen states.[60]

In addition, an ad hoc committee of the United States Judicial Conference, chaired by former Supreme Court Justice Lewis F. Powell, Jr.,[61] sought to address the urgent need for assigned council in state post-conviction attacks in capital cases.[62] Their proposal does not come without heavy costs, however. Although it requires the state to provide "competent counsel" for the prisoners in these proceedings,[63] it also imposes a new statute of limitations on habeas petitions and places very severe constraints on the filing of successive federal challenges.[64]

The recommendations of the Powell Committee are embodied in a bill sponsored by Senator Strom Thurmond[65] and a slightly altered, competing bill sponsored by Senator Joseph Biden.[66] The American Bar Association (ABA), whose Task Force on Death Penalty Habeas Corpus has also been examining these problems, has made more detailed recommendations. Among other things, the ABA, unlike the Powell Committee, would make it mandatory for states to furnish qualified defense lawyers at all stages of capital proceedings.[67]

Notwithstanding this flurry of legislative activity, it is unlikely that Congress will enact or the President will sign any statute that comes close to ensuring effective assistance of counsel for capital litigants in every state. While

55. See Rule 8(c) of the Rules Governing Section 2254 Cases in the District Courts.

56. 102 Stat. 4394, § 7001 (to be codified at 21 U.S.C. § 848(q)(6)).

57. 102 Stat. 4393-94, § 7001 (to be codified at 21 U.S.C. § 848(q)(4)(B)).

58. 102 Stat. 4394, § 7001 (to be codified at 21 U.S.C. § 848 (q)(10)).

59. Conversation with Theodore J. Lidz, Chief, Defender Services Division, Administrative Office of the U.S. Courts (Dec. 1989).

60. *See* Murray v. Giarratano, 109 S. Ct. 2765, 2781-82 (1989) (Stevens, J., dissenting).

61. *See* AD HOC COMM. ON FEDERAL HABEAS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES, 45 CRIM. L. REP. (BNA) 3239, 3239-45 (Sept. 27, 1989) [hereinafter POWELL COMMITTEE REPORT]. For a full discussion of this report, see Berger, *supra* note 52, at 1674-84.

62. The need has reached crisis proportions since demand far outstrips the supply of what until now have generally been *pro bono* lawyers. *See generally* Tabak, *supra* note 4, at 829-34.

63. *See* Proposed 28 U.S.C. § 2256, *in* POWELL COMMITTEE REPORT, *supra* note 61, at 3241-42.

64. *See* Proposed 28 U.S.C. §§ 2257-2258, *in* POWELL COMMITTEE REPORT, *supra* note 61, at 3242-43.

65. S. 1760, 101st Cong., 1st. Sess., 135 CONG. REC. S13480-13481 (1989).

66. S. 1757, 101st Cong., 1st Sess., 135 CONG. REC. S13474-75 (1989).

67. *See* TASK FORCE REPORT, *supra* note 26, at 45-123. The ABA approved the Task Force Report, as amended by the Criminal Justice Section, on February 13, 1990. ABA Resolution 115E. For a full discussion of this report, see Berger, *supra* note 52, at 1684-1704.

the Powell Committee's incentive approach permits jurisdictions to opt into a streamlined mode of habeas practice by guaranteeing fundamental rights such as competent counsel, which should be accorded in any event,[68] it also allows them to opt out. To the extent that states decline the statutory offer, nothing will change. The same result may also come about if they opt in, because the Committee did not articulate minimum standards for counsel or the courts' appointing authority. Further, the proposal would countenance attacks only on the system established to vouchsafe access to counsel, not on the performance of individual attorneys.[69]

In addition, in contrast to the recommendations of the ABA, neither the Anti-Drug Abuse Act (whose mandatory provisions on counsel the Bush Administration is trying to repeal[70]) nor the Powell Committee Report addresses lawyering at trial or on direct appeal. Finally, even if Congress were to extend mandatory coverage of the Act to the states, adequate funding would doubtless still be problematic. Put in a nutshell, it is possible that much of this country simply lacks the political will to stop the type of travesty embodied in cases such as *House*[71] and *Mitchell*.[72]

Yet, stop it we must. To quote Steve Bright, the death-penalty expert who served as Tony Amadeo's lawyer in the Supreme Court: "There are many small communities that do not have surgeons. But that does not mean that we allow chiropractors to do brain surgery in those communities."[73] We do, however, let "chiropractors" with law degrees perform the equivalent of brain surgery in capital cases and, predictably, the "patient" often dies. This is intolerable. Whatever the views of particular lawyers might be on the merits of capital punishment, members of the bar should at least support the proposition — accepted since *Powell v. Alabama*[74] — that a defendant may not be condemned and sent to his death without "the guiding hand of counsel at every step in the proceedings against him."[75] In the last decade of the twentieth century, the promise of *Powell* remains to be kept.[76]

68. *See* Committee on Civil Rights of the Ass'n of the Bar of the City of New York, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. 848, 851 (1989).

69. Proposed 28 U.S.C. §§ 2256, in POWELL COMMITTEE REPORT, *supra* note 61, at 3241-42. While the ABA also rejects ineffective assistance in collateral challenges as a separate ground for relief, it deprives the state of certain benefits (*e.g.*, the doctrine of procedural default) with respect to any proceeding at which the defendant lacked counsel picked in compliance with its proposal. *Id.*

70. *See* TASK FORCE REPORT, *supra* note 26, at 80-81 n.114.

71. *See supra* text at notes 5-17.

72. *See supra* text at notes 20-24.

73. Minority Report of Stephen B. Bright, *supra* note 26, at A-46.

74. 287 U.S. 45 (1932).

75. *Id.* at 69.

76. In October 1990, Congress passed and the President signed a crime bill from which all controversial provisions, including those on the death penalty, had been removed. *See* Berke, *Congress Wraps Up Work Belatedly, and a Little Battered*, N.Y. Times, Oct. 29, 1990, at A1, col. 1.