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DEATH-PENALTY APPEALS AND POST-CONVICTION PROCEEDINGS

PREFACE

Representing a death-row inmate—either on the direct appeal to a state’s highest appellate court or on habeas corpus or “collateral” review in the state or federal courts—is the most daunting task a lawyer will undertake. In many respects, it is more daunting than representing a capital defendant at trial.

At the trial stage, a defense lawyer usually has significant control over the case—in terms of what facts to develop and what legal issues to preserve for appeal. Conversely, a lawyer representing a death-row inmate on direct or collateral appeal often lacks control over both the facts and the legal claims in the case, which more often than not were set in stone by another lawyer representing the inmate during a prior stage of the proceedings.¹ If factual or legal issues were not properly raised

1. During the past three decades, the Supreme Court, Congress, and state legislatures have erected myriad procedural barriers to raising factual and legal matters on direct and collateral appeals in capital cases. See e.g. *Coleman v. Thompson*, 501 U.S. 722 (1991) (applying procedural default doctrine to foreclose review of a state death-row inmate’s constitutional claim in federal habeas corpus proceeding based on his state counsel’s deficient performance in failing to file a timely appeal in the state habeas corpus proceedings); 28 U.S.C. § 2254 (2002) (codification of amendments to federal habeas corpus statutory scheme in the Antiterrorism and Effective Death Penalty Act of 1996) (available at <http://uscode.house.gov>); Tex. Code Crim. P. art. 11.071 (West 2003)

at the first available opportunity, such issues usually cannot be raised later in the case, absent a compelling (and usually impossible) showing of the death-row inmate's "actual innocence" or legal ineligibility for the death penalty.² As a result of these procedural barriers, the "Great Writ" of federal habeas corpus—once the ultimate safety net for capital defendants convicted or sentenced to death in an unconstitutional manner—increasingly has lost its teeth. Thus, as Justice Blackmun wrote in his dissent from the denial of certiorari in *McFarland v. Scott*,³ "[m]ore often than not . . . it is in the proceedings antecedent to federal habeas corpus . . . that a capital defendant's case is won or lost" by his counsel in those prior proceedings.⁴

The procedural straitjacket in which countless appellate and habeas lawyers—particularly those on federal habeas corpus review—find themselves in capital cases raises two questions addressed by the articles in this special section. First, what can a lawyer representing a death-row inmate do in the initial stages of capital appellate and collateral proceedings to avoid procedural hurdles from foreclosing relief at some subsequent stage of the case? And, second, what type of systemic reforms should occur to prevent the injustices that befall the many death-row inmates whose attorneys failed to preserve legal and factual issues in prior proceedings in their cases?

Charles Blackmar offers the unusual perspective of a widely respected legal scholar and jurist who at different times in his career has represented capital defendants on appeal; represented the prosecution in direct and collateral appeals in capital cases; and sat as an appellate judge in dozens of direct and collateral appeals in capital cases. His article offers helpful advice to lawyers, particularly uninitiated ones, who represent death-row inmates seeking to reverse their convictions or sentences.

(codification of 1995 amendments to Texas's habeas corpus statutory scheme, which limited the availability of post-conviction relief in Texas capital cases).

2. See e.g. 28 U.S.C. §§ 2244(b)(2), 2254(e)(2) (2002) (available at <http://uscode.house.gov>).

3. 512 U.S. 1256 (1994).

4. *Id.* at 1256.

Two academics with substantial experience actually representing death-row inmates—legal scholars Eric Freedman and Andrew Hammel—propose reforms in the current system while providing helpful advice to the practitioner. Eric Freedman, who served as Reporter for the ABA’s 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,⁵ discusses the ABA’s proposals, most notably the position that the Sixth Amendment right to the effective assistance of counsel should extend beyond a death-row inmate’s direct appeal and apply to state and federal habeas corpus proceedings. He also discusses the need to provide post-conviction counsel with the same “tools for the defense” traditionally made available to trial counsel⁶—tools like investigators, experts in mental health, and mitigation specialists.

Andrew Hammel takes a somewhat different approach, and eschews the broader argument that the Supreme Court should overrule existing precedent⁷ and hold that the Constitution guarantees death-row inmates the right to effective representation on collateral review. His proposed reform is narrower, although it appears to achieve the same end. He first surveys the current legal landscape in the states that actively employ capital punishment, noting the various approaches states have taken in seeking to promote effective representation on state collateral review. He concludes that, at least for the time being, the best approach is to provide a “unitary” system, whereby a death row inmate’s direct and collateral appeals in the state court system occur simultaneously—prior to the inmate’s conviction becoming final—and extend the right of effective assistance of counsel to both tracks of such a unitary system.

LaJuana Davis, an Alabama lawyer who represents death-row defendants, addresses the Supreme Court’s landmark decision in *Atkins v. Virginia*,⁸ in which it overruled prior precedent and held that the execution of mentally retarded

5. See 31 Hofstra L. Rev. 913 (2003) (reprinting Guidelines and Commentary).

6. See *Ake v. Okla.*, 470 U.S. 68 (1985).

7. *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that there is no constitutional right to counsel on collateral review in capital cases).

8. 536 U.S. 304 (2002).

defendants is a violation of the Eighth Amendment. She underscores the need for capital-defense counsel, including counsel representing a death-row inmate for the first time on collateral review, to engage in an exhaustive investigation to determine whether their clients are mentally retarded. She also discusses the mental-health profession's various standards and tests addressing mental retardation, and urges lawyers and judges to master that science instead of relying solely on the results of I.Q. tests when assessing whether a client is mentally retarded.

All of these articles highlight the extremely important, difficult, and sadly, too often thankless, job that capital-defense counsel perform at all stages of appellate and post-conviction proceedings. We hope that those who currently represent death-row inmates will gather helpful information or insights from the articles included here. And we hope too that other lawyers may be inspired by what they read to accept the representation of death-row inmates on direct or collateral appeal.

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