

Issues in Administering the Death Penalty

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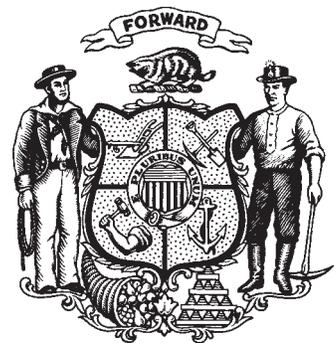


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ISSUES IN ADMINISTERING THE DEATH PENALTY

INTRODUCTION

In 1853, Wisconsin became one of the first states to abolish the death penalty. In November 2006, Wisconsin voters will be asked in a nonbinding referendum whether the death penalty should be enacted in Wisconsin “for cases involving a person who is convicted of first-degree intentional homicide, if the conviction is supported by DNA evidence.”

In the 1972 case *Furman v. Georgia*,¹ the U.S. Supreme Court found the death penalty, as practiced across the nation at that time, unconstitutional. Many states quickly amended their death penalty statutes to comply with *Furman*, and in 1976 the U.S. Supreme Court reviewed and upheld several of the amended statutes.² As defendants convicted under post-*Furman* statutes reached the end of their appeals, the numbers of executions climbed – gradually in the 1980s and more dramatically in the 1990s – to a peak of 98 executions nationwide in 1999. The number of executions and new death sentences has since moderated to about 64 executions a year and about 125 to 150 death sentences a year, down from a high of 317 death sentences a year in the mid-1990s.

This bulletin provides data on use of the death penalty and describes constitutional requirements for imposing the death penalty. It discusses several issues important to administration of the death penalty, including the appeals process for death sentences, exonerations, quality of defense counsel, and costs. An appendix includes a summary of Wisconsin’s history with the death penalty and a list of bills and joint resolutions relating to the death penalty.

JURISDICTIONS THAT HAVE THE DEATH PENALTY

United States

Currently, 38 states and the federal government have death penalty statutes. Five of these states have not executed a person since reenacting their death penalty statutes after *Furman* (Kansas, New Hampshire, New Jersey, New York, and South Dakota).³ Further, New York’s highest state court found the New York death penalty statutes unconstitutional in 2004.⁴ Two states with death penalty statutes, Illinois and New Jersey, currently have moratoriums prohibiting any executions.⁵ Another 12 states considered but did not adopt moratoriums in 2005 (Alabama, California, Delaware, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, and Texas). Twelve states and the District of Columbia do not have death penalty statutes.

Of the Midwestern states, seven have death penalty statutes (Illinois, Indiana, Kansas, Missouri, Nebraska, Ohio, and South Dakota) and five do not (Iowa, Michigan, Minnesota, North Dakota, and Wisconsin).

Internationally

According to Amnesty International, 68 countries and territories have and use the death penalty. An additional 11 countries have the death penalty for what Amnesty International describes as “exceptional crimes such as wartime crimes.” And 30 more countries have the death penalty but have not carried out any executions in the past 10 or more years. Eighty-eight countries and territories have abolished the death penalty for all crimes.⁶

NUMBER OF EXECUTIONS

Since 2001, an average of 64 people have been executed each year in the U.S. According to Amnesty International, at least 2,148 people were executed by 22 countries in 2005, 1,770 of them by China. (The Chinese government does not disclose the number of people it executes.) Iran executed at least 94 people; Saudi Arabia executed at least 86; and the U.S. executed 60.⁷

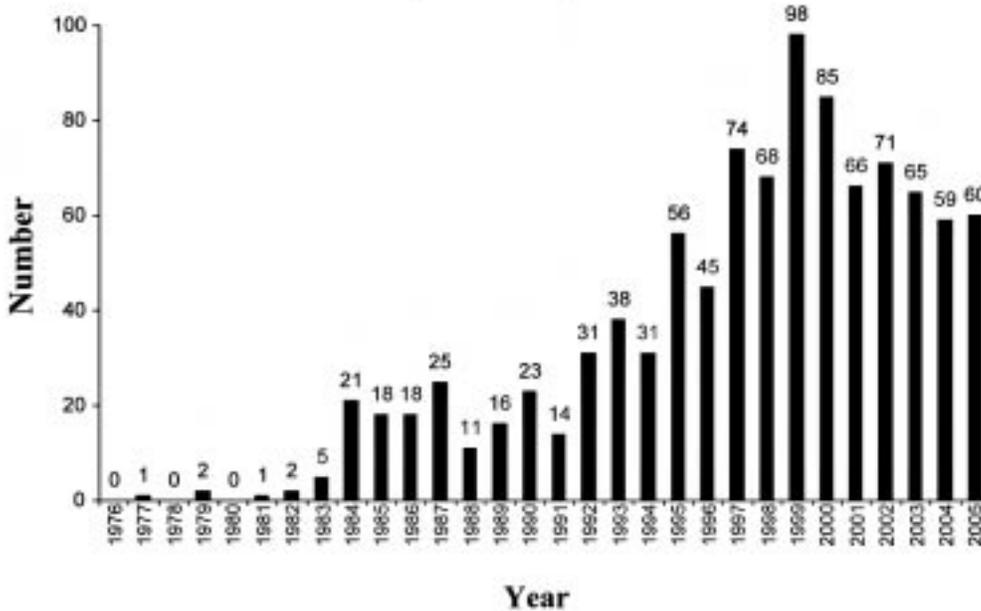
Even before the U.S. Supreme Court determined in 1972 that existent death penalty statutes were unconstitutional, there had been a nationwide moratorium on executions. No person had been executed since 1965. *Furman* granted clemency to prisoners who were on death row at the time. In 1977, Utah conducted the first execution under a state statute that was passed after *Furman*. The number of executions grew gradually in the years following the Supreme Court’s affirmation of the death penalty in 1976, and then more steadily in the 1980s and 1990s. The number

of executions peaked at 98 in 1999 as prisoners, who in some cases had been on death row for many years, ran out of appeals options. After 1999 the number of executions dropped for several years before stabilizing at the current average, reflecting a decrease in the number of death sentences imposed nationwide. The number of death sentences imposed in the U.S. dropped from a peak of 317 a year in both 1995 and 1996 to 125 in 2004.

The number of executions varies drastically among states that have death penalty statutes. Since *Furman*, Texas has been responsible for over one-third of executions nationwide; Texas, Virginia, and Oklahoma together account for more than one-half of executions. During that same time period, five states have executed one person each (Colorado, Connecticut, Idaho, New Mexico, and Wyoming).

There is also wide divergence among the states in carrying out executions. California currently has 652 prisoners on death row, but

U.S. Executions by Year, 1976-2005
(Post-*Furman*)



has executed only 13 people since reenacting its death penalty in 1977. Pennsylvania has a death row population of 232 and has carried out three executions. Tennessee's death row population is 108 and Tennessee has executed two people. In comparison, Virginia has executed 97 persons and currently has 22 prisoners on death row.

Midwestern states that have death penalty statutes have executed the following numbers of people since 1976: Illinois (12), Indiana (17), Kansas (0), Missouri (66), Nebraska (3), Ohio (23), and South Dakota (15).

LEGAL REQUIREMENTS FOR THE DEATH PENALTY

In *Furman*, and subsequent decisions affirming new death penalty statutes, the Supreme Court has established minimum standards for death penalty statutes.

Crimes for Which the Death Penalty May Be Imposed

The death penalty may only be applied for murder. In *Coker v. Georgia*, the Supreme Court found that the death penalty was excessive for rape of an adult woman.⁸ Under certain circumstances a person may be sentenced to death for a murder even if the person was an accomplice and not the "trigger person." An accomplice may be sentenced to death if he or she played a major role in the murder and if he or she acted with reckless indifference to human life.

Narrowing

A death penalty statute must narrow the class of people eligible for death so that only the "worst of the worst" may be sentenced to die. Justice William O. Douglas wrote in *Furman* that the death penalty as applied in

1972 was unconstitutional because it was applied arbitrarily. He also determined that it was applied discriminatorily against racial minorities, the poor, and the uneducated. In *Furman*, Justice Potter Stewart described the death penalty as cruel and unusual in the same way that being struck by lightning is cruel and unusual because, of all defendants convicted of death penalty crimes, those who actually receive the death penalty are a "capriciously selected random handful."⁹

Thus, a death penalty statute must limit the class of people who may be sentenced to death. Some statutes do this by limiting the crimes for which a person may be sentenced to death, and some states provide that the death penalty is only appropriate if one or more specified aggravating circumstances apply to the crime or defendant. Examples of aggravating circumstances include that a crime was heinous, or that the defendant killed more than one person, or that the defendant killed a law enforcement officer.

The more numerous and vague the aggravators cited in a statute, the less effective the statute is in narrowing the class of defendants eligible for the death penalty. For example, in a dissenting opinion in *Walton v. Arizona*,¹⁰ Justice Harry A. Blackmun argued that relying on the aggravator that a "defendant committed the offense in an especially heinous, cruel or depraved manner" does little to narrow the class of murders that qualify for the death penalty and thus does not limit arbitrary application of the death penalty.¹¹ Blackmun concluded:

Indeed, there would appear to be few first-degree murders which the Arizona Supreme Court would *not* define as especially heinous and depraved – and those murders which *do* fall outside this aggravating circumstance are likely to be covered by some other aggravating factor. Thus, the court will find heinousness and

depravity on the basis of “gratuitous violence” if the murderer uses more force than necessary to kill the victim, ...but the murder will be deemed cruel if the killer uses insufficient force and the victim consequently dies a lingering death.... A determination that a particular murder is “senseless” will support a finding of depravity; but a murder to eliminate a witness is also depraved, a murder for pecuniary gain is covered by a separate aggravating circumstance, and evidence showing that the defendant killed out of hatred for the victim or a desire for revenge may be used to buttress the court’s conclusion that the killer “relished” the crime. In *State v. Wallace*, [cite omitted], the court’s determination that the crime was “senseless” (and therefore heinous and depraved) was based in part on the fact that the defendant “steadfastly maintains there was no reason or justification for what he did” – this in a case where the defendant argued that his remorse for the crime constituted a mitigating factor.¹²

Current jurisprudence concerning arbitrariness and the death penalty requires that statutes narrow the class of defendants eligible for the death penalty as described above, but does not require death penalty jurisdictions to adopt any further standards to guide or channel a judge or jury’s consideration of which defendants deserve the death penalty.

Individualized Determinations and Consideration of Mitigating Circumstances

A death penalty statute must allow the sentencer to consider mitigating circumstances in determining whether the death penalty is appropriate. Thus, a state may not mandate a death sentence for a person convicted of a certain class of crimes and may not mandate that if certain aggravating circumstances apply the death penalty must be imposed. States that use

aggravating circumstances to determine eligibility for the death penalty, direct the sentencer to determine whether any mitigating circumstances apply and to weigh the aggravating and mitigating circumstances in arriving at a sentence. States provide different instructions for weighing aggravating and mitigating factors. Some provide that the death penalty may be imposed only if the aggravating factors outweigh the mitigating factors. However, the U.S. Supreme Court upheld a Kansas statute that requires the sentencer to impose a death sentence upon finding that the mitigating circumstances do not outweigh the aggravating factors, thus the death penalty must be imposed if the mitigating and aggravating factors are of equal weight.¹³

The sentencer must be able to consider all relevant mitigating evidence, so even if a statute specifies certain types of mitigating factors that a sentencer should consider, the sentencer cannot be limited to considering the items on the list. However, the law does not require that the sentencer be able to give effect to mitigating evidence in every conceivable manner in which it may be relevant.¹⁴

The statute that Texas adopted after *Furman* required that if a defendant was found guilty of any of the five types of murder for which a death sentence could be imposed, the sentencer would be asked the following three questions: 1) Whether the defendant’s conduct that caused the death was committed deliberately and with the reasonable expectation that death of the victim or another would result; 2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and 3) If raised by the evidence, whether the defendant’s conduct in killing

was unreasonable in response to provocation by the victim. If the answers to all three questions were “yes,” the defendant was sentenced to death. The U.S. Supreme Court found this statute unconstitutional as applied to a defendant who argued that his mental retardation made him less culpable and therefore undeserving of the death penalty. The Court determined that mental retardation was relevant only to question number two, and that the sentencer would likely find that retardation makes the defendant more likely to commit future crimes, so the statute did not allow the sentencer to consider retardation as a mitigating circumstance. Texas has since amended its statutes to direct the sentencer to consider mitigating circumstances.

Tension Between Narrowing and Individualized Sentencing

There is tension between the requirements of narrowing and individualized sentencing. The majority of the Supreme Court, however, is able to reconcile the two requirements, saying they serve different functions. Narrowing limits the class of person eligible for the death penalty and consideration of all mitigating evidence guarantees defendants who are eligible for the death penalty an individualized sentence.

Two justices have written that the requirements of narrowing and individualized sentencing are irreconcilable. However, they disagree on how to deal with the conflict. Justice Antonin Scalia, a current justice, states that the requirements of narrowing and individualization are counter-doctrines. He argues that one cannot have both too much discretion to sentence to death and not enough discretion not to sentence to death. Justice Scalia finds that narrowing is arguably required under the Eighth

Amendment to the U.S. Constitution, but that individualization is not. Scalia declared in 1990 that he would no longer attempt to follow the individualization requirement.¹⁵

Justice Harry A. Blackmun, who retired from the Supreme Court in 1994, had long written that the death penalty was constitutional. In a 1993 dissenting opinion, Justice Blackmun reversed his determination. Like Scalia, he found that narrowing and individualization are irreconcilable requirements, but unlike Scalia, he concluded that the death penalty cannot be applied both fairly and consistently. He cited vague aggravating circumstances, disregarded mitigating circumstances, and blocked judicial review in declaring that the death penalty is always unconstitutional.¹⁶

Categorically Exempt

Several groups are categorically ineligible for the death penalty.

Insane. The government may not execute an insane person. For purposes of the prohibition against executing an insane person, a person is sane if he or she understands that he or she has been sentenced to die and why. A person can be mentally ill and still found sane for execution.

The determination of sanity for purposes of execution is distinct from the determination of competency to stand trial or mental responsibility for the crime. Thus, a person who becomes insane after sentencing may not be executed.

Mental Retardation. In 2002, the Supreme Court found unconstitutional the practice of executing people who are mentally retarded.¹⁷ The Court left it to the states to develop both the criteria and process for determining mental retardation. States that have defined mental retardation for purposes of the death penalty generally

provide that a person is mentally retarded if he or she has significantly sub-average general intellectual functioning and deficits in adaptive behavior, both of which must have manifested before adulthood. Some states establish mental retardation, at least in part, on the basis of IQ level and typically have adopted 70 as the threshold IQ level for mental retardation.

Youth. In 2005, the Supreme Court barred execution of persons who were under age 18 at the time of committing the crime.¹⁸

Who Determines the Sentence

Unless the defendant waives his or her right to a jury trial, the jury must make all determinations of fact that are necessary for imposition of a death sentence.¹⁹ Thus, in a state that requires determinations as to whether aggravating circumstances exist, only a jury may determine that an aggravator exists. However, a death penalty statute may still grant a judge authority to determine whether mitigating circumstances exist, to weigh aggravating and mitigating circumstances, and, as long as a jury has made the necessary findings for a death sentence, to impose or not impose a death sentence.

Juror Eligibility

In a death penalty jury trial, the court must exclude from the jury all potential jurors who are unable to follow the sentencing law. Thus, the court must remove for cause all potential jurors who reveal that they could in no case vote for the death penalty. Also, the court must remove for cause all potential jurors who reveal that they will automatically vote for the death penalty in every case and will fail in good faith to consider the evidence of aggravating and mitigating circumstances.²⁰

Life in Prison Without the Possibility of Release

The Supreme Court has held that under certain circumstances the court must inform the jury if the only alternative to a death sentence for a defendant is life imprisonment without the possibility of release.²¹ The court must provide this information to the jury in the sentencing phase of a trial at the request of the defendant if the prosecution has argued or even inferred that the defendant poses a risk of future dangerousness. A defendant can be subject to a sentence of life imprisonment without the possibility of release either if the only two alternative sentences for a crime are death or life without the possibility of release, or if a sentencing statute, such as “three-strikes” or a repeater enhancement, increases the minimum sentence for a defendant to life without the possibility of release.

Other Common Elements in Death Penalty Statutes

Most death penalty statutes contain several other requirements designed to provide due process. These requirements have not been mandated by the U.S. Supreme Court. But since the requirements were cited by the Supreme Court in its decision approving Georgia’s statute in 1976, many other states have incorporated them. One is a bifurcated trial, in which the jury makes a determination as to whether the defendant committed the crime before hearing additional evidence that is relevant only to sentencing. This bifurcated format allows a defendant to testify at sentencing without incriminating him- or herself in the guilt phase of the trial. Many states also require the highest state court to conduct a review of every death penalty sentence to determine whether the sentence is proportionate to the crime. Finally, many

death penalty statutes provide for automatic appeal of a death sentence.

METHOD OF EXECUTION

Of the 321 people executed in 2001 through 2005, all but three were executed by lethal injection; the other three were executed by electrocution. Lethal injection is used as a method of execution in all death penalty states except Nebraska, which uses electrocution and last executed a person in 1997. Seven states allow the defendant to choose between lethal injection and another method of execution. In addition, even in states where lethal injection is the current-law method of execution, defendants who were sentenced under earlier laws may still have the option of the prior method of execution. Finally, four states that use lethal injection have identified other methods of execution in the event that lethal injection is found unconstitutional.

Over the past century, states have adopted new methods of execution, largely in attempts to make executions more humane, more palatable to the public, and more efficient. Hanging was the general method of execution in the 19th century in Wisconsin and in other states. The most recent execution by hanging took place in Delaware in 1996.

Electrocution was first authorized by New York in 1889. Part of the impetus for authorizing the new method of execution came from New York legislators who had witnessed a bungled hanging. A commission appointed by the legislature reported electrocution was the most humane and practical method of carrying out the death penalty. There is disagreement about the humaneness of electrocution. Many experts hold that it is painless, while others

argue that the individual being executed may remain conscious long enough to feel extreme pain.

In the first half of the 20th century, the gas chamber was developed as another alternative to hanging. Nevada first used this method of execution in 1924. While it does less obvious violence to the body than electrocution, it is not clear how painless it is. If the condemned prisoner breathes deeply, death may be quick and painless; otherwise it may take longer and cause pain. Gas chambers are also expensive to build and operate. The most recent execution by gas took place in Arizona in 1999.

Lethal injection was first authorized by Oklahoma in 1977 and first used by Texas in December 1982. The author of the Oklahoma lethal injection bill, former assembly representative Bill Wiseman, reports that he introduced lethal injection to make executions less painful in an effort to salve his conscience after voting to reenact the death penalty in 1976 even though he says he was morally opposed to it.²² During a lethal injection, three substances are administered intravenously: first an anesthetic to put the person to sleep; next a drug to paralyze the person's muscles and stop his or her breathing; and finally, potassium chloride to stop the person's heart. Lethal injection is certainly more palatable to the public than electrocution, allowing executions to go forward with less public resistance. Some people opposed the introduction of lethal injection because it was too easy a death in comparison to the murder committed by the defendant.

Current Challenges to Lethal Injection

Several states have delayed executions this year in response to court challenges by death row inmates who argue that execution by lethal injection may be extremely and unnecessarily painful. The challengers

argue that the procedures used by executioners do not ensure that sufficient anesthetic is used. Thus the person being executed may still be conscious when the second drug, the paralytic, is administered, but cannot cry out or otherwise notify the executioners of his or her consciousness, because the paralytic has taken effect. When the person's heart is stopped with the third drug, he or she may feel searing pain.

Inmates challenging procedures for lethal injection have asked that medical personnel trained in anesthesiology be present at executions to monitor the consciousness of the person being executed and to administer additional anesthetic if necessary. Challenges to lethal injection procedures cite executions in which the executed person writhes, convulses, or gags during the execution. They also cite post-execution toxicology reports on executed persons to argue that the concentrations of anesthetic indicate that the executed person might have been conscious when the paralytic and heart-stopping drugs were administered. The challenges fault the procedures adopted by states, not the practice of lethal injection. For example, no one attends the person being executed to check if the intravenous catheters used to administer the drugs are properly inserted or blocked. In California, the execution team is in a room adjoining the execution room, and the lines for the intravenous catheters are extended through holes in the wall. In North Carolina, the execution team is in the execution room, but behind a curtain so they cannot see the person being executed. Challengers further argue that there are no standards for how long to wait between administering drugs.

A federal district court in California accepted the possibility that the lethal injection method used by California may cause extreme pain. The court prohibited

California from proceeding with the execution of Michael Morales in February 2006 unless the state either employed an individual trained and experienced in anesthesia to attend the execution and administer additional drugs if needed, or unless the state used a single massive dose of barbiturate (an anesthetic) and no other drugs. California could not find a qualified anesthesiologist to participate in the execution and chose not to use a barbiturate alone. More hearings in the California case were scheduled for September 2006. Judges have granted inmates in several other states stays of execution pending investigation of the states' protocols for lethal injection. A federal judge in North Carolina, however, allowed a lethal injection to proceed in April 2006 because the state agreed to use a monitor that was interpreted by a doctor and nurse to evaluate the prisoner's consciousness during the execution. Lethal injections have continued in other states as well during the controversy.

APPEAL AND HABEAS CORPUS REVIEW

A defendant has the right to judicial review of a trial court's judgment of conviction and death sentence. This section describes the appeal process for a person convicted by a state court, which generally consists of three tiers of review. The average time between a conviction and an execution is 11 years.²³

The first level of review is the direct appeal to the state appeals court, followed by a request for the U.S. Supreme Court to review the case, the latter of which is almost always denied. A defendant who loses his or her direct appeal may seek habeas corpus review. In a habeas petition, a person claims that he or she is being held in government custody in violation of the law, generally in

violation of a constitutional provision. Generally, a defendant first must seek review under state habeas procedures in state court, and only upon losing in state habeas may the defendant obtain a hearing in federal court on his or her federal claims. Thus, the three tiers of review are direct appeal, state habeas, and federal habeas. The discussion on habeas in this bulletin focuses on federal habeas because state provisions vary, and because state habeas is generally patterned after federal habeas.

Direct Appeal

A defendant makes a direct appeal to the state appeals court. In most states, the defendant bypasses any intermediate appeals court and appeals directly to the state's highest court. The purpose of an appeal is to correct any errors made at trial, such as incorrect rulings on admissibility of evidence or incorrect instructions to the jury. Generally, an appeals court will not review an error made at trial unless the defendant raised an objection to the error during trial, thus giving the trial court an opportunity to correct the error. A defendant cannot raise a new defense or introduce new evidence on direct appeal. State laws provide strict time limits for commencing an appeal, though the court may provide extensions. For example, in Wisconsin, a defendant must file notice of intent to appeal within 60 days after receiving a trial transcript. Upon exhausting direct appeal options in the state court system, a defendant may petition the U.S. Supreme Court to hear his or her appeal, though the U.S. Supreme Court rarely hears direct appeals. Once the U.S. Supreme Court acts on a request for review, or once the time for making a request to the U.S. Supreme Court expires, the direct appeal is concluded and the conviction is final.

A defendant may also seek a new trial based on newly discovered evidence.

Again, the time frame for petitioning for a new trial is limited. In Wisconsin, a defendant has one year from the date of conviction to petition for a new trial based on newly discovered evidence.

Habeas Corpus

Federal habeas is a forum in which a federal court may review a prisoner's claim that the state violated his or her federal constitutional rights during the investigation, trial, or sentencing proceeding that resulted in imprisonment or a death sentence. For example, the following types of claims are commonly heard on federal habeas review: that the prosecution failed to divulge exculpatory evidence to the defendant as required under the Due Process Clause; that the defendant was denied effective assistance of counsel; or that a particular death penalty statute permits cruel and unusual punishment, for example because it allows execution of those not morally culpable, or relies on an inhumane method of execution. Those types of claims that take time after trial to develop, such as ineffective assistance of counsel, are typically heard only on habeas and not on direct appeal.

Federal habeas law does not authorize the courts to accept a case to review newly discovered evidence absent a claim of a constitutional violation. For example, if previously unidentified witnesses step forward to show that an accomplice rather than the defendant instigated the murder for which the defendant received a death sentence – evidence that might have been relevant to a jury at sentencing – the federal court will not review the case unless the defendant demonstrates that failure to obtain the evidence for trial was due to a constitutional violation. The purpose of federal habeas is not to relitigate a case. As the Supreme Court has stated, the trial is the

“main event” rather than a “tryout on the road” to federal habeas.²⁴

The claims a defendant raises before the federal court are the same as those raised before the state court, so the review is duplicative. However, federal habeas is the first time that a state prisoner’s federal law claims are reviewed by a federal court. Further, because most state judges are elected to limited year terms, after which they must stand for reelection, federal habeas is also generally the first time the prisoner’s claims are reviewed by a judge who is appointed rather than elected and who has life tenure.

State prisoners have had access to federal habeas corpus review since the Reconstruction era that followed the Civil War. For a prisoner, habeas review is the last opportunity to vindicate his or her federal rights, and in death penalty cases, the last opportunity, short of clemency, to stay alive. Almost every death row inmate, and many prisoners in the regular prison population, file petitions for federal habeas review. Federal habeas review imposes a burden on states to redefend convictions already won, delays the execution of state death sentences and consequently diminishes any deterrent and retributive effects of sentences, and imposes a large workload on federal courts. Federal habeas law has become a battleground between those who believe that the federal courts should be open to state prisoners seeking redress of U.S. constitutional rights and that the federal courts should be the final arbiters of federal law versus those who believe state courts should be trusted to uphold a defendant’s U.S. constitutional rights and that the federal courts should only be open to state prisoners on habeas review under narrow circumstances.

In the past several decades, the U.S. Supreme Court has erected numerous barriers to federal habeas review to winnow the number of habeas cases reviewed on their merits. In 1996, Congress joined the effort to curtail federal habeas review, passing the Antiterrorism and Effective Death Penalty Act (AEDPA). The resulting law governing which cases the federal courts may review and when they may grant relief is highly technical and dominated by procedural rules. Even after these changes to federal habeas law, the federal courts continue to review large numbers of habeas petitions, but many of the decisions deal with whether the petitioner is entitled to federal habeas review rather than dealing with the constitutional questions raised by the petitioner. As one critic of the reforms describes, “judges and justices are spending their time not on the great constitutional question of the day nor yet on the merits of the claims advanced in habeas petitions, but rather on the mechanics of procedural rules ostensibly meant to expedite federal litigation.”²⁵ Even with these reforms to federal habeas law, the delay between sentencing and execution has increased from nine years in the first half of the 1990s to 11 years today.²⁶

Barriers to federal habeas review include the following:

- A prisoner generally must file a petition for review within one year after his or her conviction is final or lose the opportunity for federal habeas review. (Time during state habeas proceedings is not counted toward the deadline.)
- The federal courts do not grant relief on a federal habeas claim unless the state court has had the opportunity to hear the claim.
- The federal courts do not review claims that the defendant procedurally defaulted in state court. If the state court denies a defendant relief because the defendant failed to follow state procedural rules governing appeals or state habeas – for example, failing to object to admission of evidence at trial or

missing the deadline for filing a petition for state habeas – and the state court denial is determined to be based on “independent and adequate” state grounds, the federal court will not review the defendant’s claim. (Whether a denial of relief is based on “independent and adequate” state grounds can be a complex legal question.) So a defendant’s claims may be denied throughout the tiers of review without a review on the merits.

- The federal courts do not review a claim that was raised in a previous federal habeas petition and decided by the federal court (as opposed to being dismissed without prejudice to the defendant, for example, so that the defendant could first raise the claim in state court).
- A prisoner is permitted only one federal habeas petition unless one of two exceptions apply. One exception is for a claim that relies on a new rule of constitutional law, which the U.S. Supreme Court has held is applicable to prisoners seeking post-conviction relief. The second exception is for claims based on new evidence that show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner guilty of the underlying offense.

These procedural barriers are most onerous for defendants who did not receive effective representation at trial or on direct appeal. If a defense attorney fails to adequately investigate a defendant’s alibi, object to errors during trial, assemble a case for mitigation for the penalty phase, or raise issues on direct appeal, the procedural bars prevent the defendant from correcting the attorney’s mistakes in federal habeas unless the defendant can show that the attorney’s failures or mistakes constitute ineffective assistance of counsel.

Attorney error in state habeas is even more detrimental to the defendant. As stated above, a defendant must raise all claims on direct appeal or in state habeas before they may be heard in federal habeas. If the defendant fails to raise a claim in a state habeas petition or misses the deadline for filing the petition, the defendant’s claims are defaulted and cannot be heard in federal habeas. There is no constitutional right to representation in state habeas, so the

defendant cannot win a federal hearing by showing ineffective assistance of counsel during state habeas.

Recognizing that the state procedural default rule cited above may prohibit a prisoner from obtaining habeas review of a meritorious claim, the Court developed two exceptions to the rule. First, if a prisoner shows “cause and prejudice” – cause for noncompliance with the procedural rule and prejudice resulting from the alleged constitutional violation – the court will hear a claim that is otherwise procedurally defaulted. To show cause, a prisoner must demonstrate that the reason for his or her noncompliance was external to the prisoner. Attorney error that is short of ineffective assistance of counsel, such as missing a filing deadline, is not cause, because the courts consider the attorney an agent of the defendant.

The second exception to procedural default is a showing of “actual innocence,” which covers both innocence of the crime and innocence of the death penalty. Innocence of the death penalty means that the defendant did not meet the statutory criteria for the death penalty, for example, none of the aggravating circumstances which the jury found are valid. To show actual innocence, a prisoner must show that but for the alleged constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under state law, a very high threshold of proof.²⁷

Strangely, a prisoner whose habeas claim is procedurally defaulted or barred as successive may win a review by showing evidence of actual innocence but then lose the case on the merits, because a showing of innocence is just the threshold test for getting the court to hear the prisoner’s constitutional claim. For example, a prisoner may bring an ineffective assistance

of counsel claim that is procedurally barred. To overcome the bar, the prisoner claims actual innocence and offers newly discovered DNA evidence to show that another person committed the crime as well as testimony from a newly discovered alibi witness. The court may find the evidence of innocence sufficient to allow review of the federal law claim, but then determine that the counsel's performance was not so poor as to constitute ineffective assistance of counsel, and therefore deny the defendant relief on habeas. In such situations, the courts have stated that a prisoner may appropriately take his or her evidence of innocence to the governor for clemency.²⁸ Additionally, the Supreme Court has alluded to the possibility that federal courts might have the authority to review a claim of actual innocence on habeas absent a claim of any constitutional error (on the basis that it would be unconstitutional to execute an innocent person), but has yet to identify a case in which such review would be appropriate.²⁹

Another significant barrier to federal habeas relief is the Supreme Court's decision that court rulings on procedural law that were not dictated by precedent cannot be retroactively applied to prisoners whose convictions are final (prisoners who have completed direct review and are filing a habeas petition). The Court allows two exceptions. First, the court will apply retroactively a decision that places certain conduct beyond the power of criminal law-making authority. Second, the court retroactively applies so-called "watershed" rules, those which are fundamental to the fairness and accuracy of criminal proceedings. The justification for the nonretroactivity rule is that if every advance in the law were retroactively applied to all prisoners, states would not be able to close off the review process and carry out

sentences and further, the prospect of retroactive application would discourage courts from making new rules of procedural law to protect defendants' rights.

A good example of the nonretroactivity rule in play is a relatively recent U.S. Supreme Court case concerning the Sixth Amendment right to a jury trial. The Arizona death penalty statute, which the U.S. Supreme Court found constitutional in 1990, provided that after a defendant was convicted of an offense for which the death penalty was a permissible sentence, the judge must determine whether aggravating circumstances applied that made the defendant eligible for the death penalty.³⁰ In 2000, the Supreme Court determined in a nondeath penalty case, *Apprendi v. New Jersey*, that any factual decision that makes a defendant eligible for a greater penalty must be determined by the jury, but noted that death penalty cases were different.³¹ In the 2002 case *Ring v. Arizona*, the Supreme Court revisited the Arizona death penalty statute in light of *Apprendi* and determined the Sixth Amendment requires that a jury must make the determination whether aggravating circumstances apply that make a defendant eligible for the death penalty.³² The Supreme Court subsequently determined that *Ring* announced a new procedural rule that does not apply retroactively to cases already final, so no death row inmate may take advantage of the ruling in federal habeas review.³³

If the court does accept a habeas petition for review, it determines whether a constitutional violation occurred and, if it finds a violation, whether the violation was prejudicial to the defendant. (Courts apply various interpretations of prejudice depending on the circumstances of a case, including that a violation is prejudicial if it had a substantial and injurious effect or influence in determining the jury's verdict.)

If the court deems the violation was not prejudicial, it provides no remedy. The court must act with great deference to the state court decision. Under the AEDPA, a federal court may not overturn the state court decision on habeas unless: the state court based its decision on a ruling of law that directly contradicts a U.S. Supreme Court ruling; the state court confronts facts that are materially indistinguishable from a decision of the U.S. Supreme Court and arrives at a different result; or the state court correctly identifies the proper rule of law to apply but applies it unreasonably.³⁴ Under the last condition, “unreasonable” is not the equivalent of “incorrect.” Thus, in a close case, the federal court may apply the proper rule of law to the facts of a case and arrive at the opposite determination from the state court, but must defer to the state court judgment if it is not objectively unreasonable. The AEDPA provision granting deference to state courts’ decisions of federal law unless they are unreasonable marks a departure from the prior relation between courts under which federal courts were the final arbiters of federal law. If a federal court finds a violation and prejudice, the remedy is generally to send the case back to the state courts for correction, not to change the defendant’s conviction or sentence.

Representation for Direct Appeal and Habeas Review

Defendants have a constitutional right to counsel on direct appeal. If a defendant cannot afford counsel for the direct appeal, the state must appoint counsel. Once a conviction is final, a death row inmate does not have a constitutional right to counsel for either state or federal habeas proceedings. However, federal law authorizes the federal courts to appoint and pay for counsel for death row inmates in federal habeas

proceedings. Most states also provide counsel to indigent defendants for state habeas in death penalty cases. Few of these states, however, impose rigorous competency standards for appointed counsel. AEDPA provides an incentive (further streamlining of the federal habeas process) for states to establish mechanisms for appointing and compensating competent counsel for death row inmates in state habeas proceedings. No state has yet qualified for the streamlined procedures. Federal courts have cited inadequate funding for appointed counsel and vague or unduly lenient competency standards as problems in the state appointment systems.³⁵ California has imposed competency standards for counsel appointed to represent death row inmates in state habeas proceedings, but the low supply of willing and qualified attorneys has resulted in a five- to six-year delay in appointing counsel.³⁶

Numbers of Cases Overturned on Review

A team of researchers from Columbia University conducted a study of all state death penalty cases reviewed on direct appeal, state habeas, and federal habeas between 1973 and 1995.³⁷ The researchers found that 68 % of the cases reviewed during that time frame were overturned. The reversals were divided among the three tiers of review as follows:

- 41% of the reversals were on direct appeal;
- 6% of the reversals were in state habeas (10% of the death penalty cases reviewed in state habeas);
- 21% of the reversals were in federal habeas (40% of the cases reviewed in federal habeas).

Thus, 32% of those sentenced to die in that period have either been executed, died in prison other than as a result of execution, been granted clemency, or remain on death row.

The statistics on reversal have probably changed as access to federal habeas has been

restricted. In its most recent report on capital punishment, which includes data through 2004, the U.S. Department of Justice reported that of the 1,790 people sentenced to death from 1991 through 1996, 12% (215) had been executed; the sentences of 20% (364) had been reversed; the sentences of 4% (78) had been commuted; an additional 4% (73) died in prison not as a result of execution; and 59% (1,060) remained on death row (most likely because they had not yet completed all three tiers of review).³⁸

CLEMENCY

All states that have the death penalty grant the governor or a board the authority to release an inmate from death row or commute the inmate's sentence to a lesser sentence. In some states, the governor has sole authority to grant clemency. In eight states that have the death penalty, including Texas and Oklahoma, a board must first recommend clemency before the governor may grant clemency. In three of the states that have the death penalty (Connecticut, Georgia, and Idaho), a board rather than the governor has authority to grant clemency, and in three other death penalty states (Nebraska, Nevada, and Utah), the governor sits on a board that has authority to grant clemency.

Clemency may be granted in death penalty cases for a variety of reasons including lingering doubt about a defendant's guilt, belief that the defendant did not deserve to die for his crime, or humanitarian reasons. Since reinception of the death penalty in 1976, 58 death row inmates have been granted clemency on a case-by-case basis. In addition, Governor George Ryan commuted the sentences of all 167 Illinois death row inmates in 2003, and

the governor of New Mexico similarly commuted the sentences of all four death row inmates in 1986. Some states that conduct executions have not granted clemency to any death row inmates since 1976, and in most others the number of death row inmates who have received clemency stands at one or two.

COST TO STATES

The question of the cost of the death penalty to state government is another issue that has received attention. The major factors in evaluating the costs are the complex trial process versus the savings in prison costs. The answer is not clear; states that have attempted to do cost assessments or comparisons often use different methods and must base their results on projections and assumptions. This difficulty arises from the very nature of death penalty cases because they generally take longer to prepare for, their trials are longer, several appeals could be filed and heard during those cases, and they all end at different points in the process, not always with death as the final outcome. In addition, complete records on the amount of time spent by prosecutors and defense attorneys in death penalty cases are not always available.

One of the first major studies on the costs of death penalty cases was conducted in the early 1990s by Duke University.³⁹ This analysis of North Carolina's judicial system is still referenced by current studies. The report compares the costs of trying murder cases with and without the possibility of a death sentence. To better define the question of the cost of the death penalty, the study was guided by two perspectives: that of the "single case," a death penalty trial versus a nondeath penalty trial, and the "cohort," where one out of 20 death penalty cases

makes it to execution. This allowed for a look at not only how much the death penalty cost per case, but also how often those costs would be applied in the judicial system. The study evaluated the value of the additional resources consumed by death penalty cases, the costs of the trial phases, and the prison costs to the state and county agencies. Private and federal government costs were not considered.

The Duke study came to several conclusions. The first was that a death penalty case which makes it to the execution stage, when compared with a nondeath penalty case that results in a first-degree murder conviction and 20 years in prison, costs North Carolina an extra \$329,000. This was more than the state prison cost savings for the executed inmate, which were estimated at \$166,000. The study also concluded that the extra costs “per death penalty imposed” were over \$250,000, while “per execution” exceeded \$2 million based on the assumption that 10% of defendants in death penalty cases are actually executed.

While the Duke study is an important guide to evaluating the costs of the death penalty, its application to Wisconsin’s situation is limited because it is over 10 years old and deals with a different state’s judicial system. More recent studies have been conducted in Tennessee (2004),⁴⁰ Kansas (2003),⁴¹ Connecticut (2003),⁴² and Indiana (2002).⁴³ These states all currently have active death penalty statutes.

The Tennessee study, released in July 2004, compares the costs of first-degree murder cases with and without the death penalty sought. It includes the costs to the local, state, and federal governments as well as private individuals. The study concluded that death penalty cases cost more overall, including the trial phase. According to the study, a death penalty trial cost \$46,791, a

trial for life without parole cost \$31,494 (although defense attorney costs were not included), and a trial for life with the possibility of parole cost \$31,622. The Tennessee study noted that in death penalty trials, generally more motions are filed, more issues are raised, and juries are sequestered more often. Also considered among the expenses is the fact that death penalty trials have a more complex appeals system, and an appeal is automatic upon sentence. According to the report, an inmate spends an average of 13.2 years on death row in Tennessee. In prison costs, the execution of an inmate saves the state almost \$774,000 when compared to an inmate sentenced to life without parole.

The Kansas, Connecticut, and Indiana studies concluded that the death penalty was more costly to their respective states, although their methods for obtaining those conclusions varied, as did the ultimate costs per death penalty case. (At the time of its report, Connecticut had not executed any inmates convicted under its reestablished death penalty.) Further, the studies were done in an effort to either evaluate or make changes to the current administration of death penalty cases, and did not suggest that the death penalty should be abolished.

In Wisconsin, three fiscal estimates were completed for 2003 Senate Bill 2, which would have imposed the death penalty in cases where a homicide victim was 16 years or younger. The Department of Corrections gave its estimate for two alternative situations. The first alternative, which involved construction of a separate death row unit for housing inmates, put the construction estimate at \$2.9 million. The facility would have included 12 death row cells, with room for expansion to 36, an observation cell, a death chamber, and witness rooms. In addition, the department estimated that \$687,000 and 15.75 full-time

positions would be required annually to run the facility. One-time costs of \$138,000 would be needed for new officers. The second alternative looked at housing death row inmates in existing prison facilities, such as the Wisconsin Secure Detention Facility in Boscobel. In this scenario, the department estimated the cost at \$1.7 million to build a separate facility for executions. Estimates by the courts and the Department of Justice anticipated additional costs but were indeterminate.

EXONERATIONS AND INNOCENCE

The Death Penalty Information Center (DPIC) maintains a list of former death row inmates who have been exonerated.⁴⁴ DPIC is a nonprofit organization that provides analysis and information on the death penalty to the media and public. It opposes the death penalty. In 1993, U.S. Representative Don Edwards asked DPIC to prepare a report on the problem of innocent people on death row. In response, DPIC prepared a report citing 48 cases of defendants released from death row because of subsequently discovered evidence of innocence. The list has since evolved into a list of former death row inmates who have been exonerated.

DPIC's criteria for inclusion on the list are: 1) that the person has been acquitted of all charges related to the crime that placed the person on death row; 2) all charges related to the crime that placed the person on death row have been dismissed by the prosecution; or 3) the person has been granted a complete pardon based on evidence of innocence. The list covers exonerations from 1973 to the present, including several cases of people convicted under pre-*Furman* statutes. At the present time, DPIC included 123 former death row

inmates on the list. The average time between sentencing and exoneration was nine years. The list includes 72 death row inmates against whom charges were dropped, 44 who were acquitted and seven who were pardoned. DPIC does not include on the list former death row inmates who subsequently pled guilty to lesser charges.

The DPIC data indicates that those exonerated through acquittal or having charges dismissed are legally innocent. That means that the original conviction is invalid and the prosecutor either attempted and failed to obtain a new conviction or chose not to seek a new conviction. This puts the exonerated person on the same footing as a defendant who was found not guilty at trial or a suspect who was not prosecuted.

Further, those knowledgeable about the cases on the list, even critics of the list, agree that the list includes former death row inmates who are actually innocent of committing a crime – they just do not agree on the number of actual innocents.⁴⁵ Conclusions of innocence are based on such factors as DNA evidence that conclusively excludes the former inmate or identifies the real killer, other types of new evidence that point to a different killer, or new alibi evidence.

When innocent people are released from death row, some question whether any have actually been executed. Neither the states nor the courts have identified any cases of the execution of an innocent person under post-*Furman* death penalty laws. However, investigators have published compelling stories questioning the guilt of several people who have been executed.⁴⁶ One of the most compelling is the story of Carlos DeLuna, who was executed by the state of Texas in 1989 for the 1983 murder of Wanda Lopez. In June 2006, the *Chicago Tribune* published a special report indicating that Wanda Lopez was actually killed by another

man, Carlos Hernandez, who had a history of committing crimes similar to the murder of Lopez and who died in prison in 1999. The prosecution's key evidence at DeLuna's trial was the testimony of two eyewitnesses who identified DeLuna at a "show-up" (the police placed DeLuna in a car, shone a light on him, and asked the witnesses if he was the killer). The *Tribune* interviewed five people who say that Hernandez admitted to killing Wanda Lopez.⁴⁷

Innocence Projects

One of the factors creating doubt about the guilt of inmates on death row is the spread of the Innocence Project. The cornerstone of the Innocence Project is DNA evidence and its potential to implicate or eliminate suspects in a crime. In general, Innocence Projects are undertaken by law students overseen by practicing attorneys. Most base their investigations on new DNA evidence, but other types of new evidence, such as recantations or eyewitness accounts are also considered.

The national Innocence Project claims that since its inception, 170 people have been exonerated. Of those people, 14 were at one time under a death sentence. The Innocence Project was originally established at a New York law school in the early 1990s and versions at other law schools around the country have sprung up since. One of these is the Wisconsin Innocence Project at the University of Wisconsin Law School, founded in 1998. The Wisconsin Innocence Project becomes involved in selected cases that meet certain criteria, such as claims of actual innocence, the exhaustion of direct appeals, and new physical evidence.

QUALITY OF DEFENSE COUNSEL

The quality of defense counsel is a critical factor determining the outcome of death penalty cases. Supreme Court Justice Ruth Bader Ginsburg has concluded that, "People who are well represented at trial do not get the death penalty.... I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."⁴⁸

The quality of counsel is critical because the U.S. uses an adversarial process for criminal trials, under which attorneys are advocates for the parties and are supposed to put forward evidence and make arguments that show their party's case in the most favorable light. In a death penalty case, as in any other criminal case, the defense attorney must identify any weaknesses in the prosecution's evidence of guilt and investigate and produce evidence against guilt. Further, in a death penalty case, the defense attorney must identify and attack any weaknesses in the prosecution's charges that aggravating circumstances apply to the crime or defendant. And, if the defendant is found guilty, the defense attorney must investigate and present any evidence of mitigation that lessens a defendant's culpability or builds a case for mercy. The U.S. Constitution affords criminal defendants a right to competent counsel. If a defendant is indigent, the state is responsible for providing counsel.

Poor performance by defense counsel creates obvious problems for the defendant. In addition, poor performance by the defense counsel creates at least two problems for the administration of the death penalty. First, juries and trial courts cannot

determine whether a defendant is among the “worst-of-the-worst” who deserve the death penalty if defense counsel does not present available evidence and appeals courts cannot perform adequate proportionality review. Second, if the defense attorney’s performance at trial is subsequently found on appeal to have constituted incompetent assistance of counsel, the conviction or sentence may be overturned.

Ineffective Assistance of Counsel

The quality of counsel for indigent death penalty defendants has not proven uniformly adequate. Investigators and researchers have accumulated numerous examples of poor defense representation in death penalty cases, including failure to properly investigate and evaluate the prosecution’s case, failure to assemble a case for mitigation, lack of knowledge of the law, and impairment due to alcohol or drug use.⁴⁹

Gary Drinkard was sentenced to death after being represented at trial by one lawyer who did collections and commercial work, another who represented creditors in foreclosures and bankruptcy cases, and a recent law school graduate. The prosecution’s case was based on testimony of an informant who in exchange for his testimony was not prosecuted for several burglaries. Drinkard’s attorneys failed to present the testimony of either of two doctors who would have told the jury that Drinkard had a severe back injury that made it physically impossible for him to commit the crime. He had been seen by a neurosurgeon the very day that the crime occurred. The lawyers introduced his medical records into evidence but did not explain what the medical terms meant, the severity of the injury, and how it made it extremely painful for Drinkard to walk.

They also failed to call an elderly man who was by the Drinkard home with a friend the evening of the crime who could have told the jury that Drinkard was at home that evening and barely able to move.⁵⁰

Stephen Bright, a lawyer who has represented death penalty defendants, cites three cases, one of a man with an IQ of 49 and the intellectual capacity of a 7-year-old, the second of a man with an IQ of 65, and the third of a schizophrenic youth, in which the defendants were sentenced to death in Georgia without their attorneys presenting evidence of mental impairment. On retrial, new counsel presented evidence of mental impairment and none of the three received death sentences.⁵¹ The story ended differently for an Alabama defendant who was executed in 1989. Before his execution and after newspapers reported that the defendant was mentally retarded, at least one juror came forward and said she would not have voted for the death penalty if she had known that the defendant was retarded.⁵²

Another example demonstrates how the quality of defense counsel for two codefendants directly impacted the defendants’ fates. The two were both sentenced to death within weeks of one another, both by unconstitutionally composed juries. The lawyers for one challenged the composition of the jury in state court; the lawyers for the other did not because they were unaware of a recent Supreme Court decision prohibiting gender discrimination on juries. A new trial for the first defendant resulted in a sentence of life imprisonment. The federal courts refused to review the issue of jury composition for the second defendant because his attorneys failed to preserve the issue for review; the second codefendant was executed.⁵³

In Washington State, a judge appointed an attorney to represent Joe Kondro in spite

of arguments by the prosecution that the attorney was not qualified to handle a death penalty case. The attorney had alcohol on his breath at pretrial hearings, he ran his car into a ditch and was arrested for drunk driving while representing Kondro, the court approved \$3,500 for experts but the attorney didn't spend any of it, the attorney did not obtain DNA testing of semen in the victim's body, and only provided the court a witness list under threat of a fine from the judge. The list identified only four witnesses, and the attorney had not even contacted all on the list. After 10 months, the judge postponed the trial and the attorney withdrew. The court appointed a replacement attorney who had to withdraw when the state bar association suspended his attorney's license for unethical conduct. The prosecution accepted a murder plea from the defendant and a 55-year sentence to protect against reversal of a conviction on the basis of ineffective assistance of counsel.⁵⁴

Calvin Burdine was sentenced to death in Texas for robbing and killing his former boyfriend. Burdine was represented by court-appointed attorney Joe Frank Cannon, who represented 10 clients who ended up on death row.⁵⁵ Cannon slept through portions of the guilt phase of the trial, during which the prosecutor examined witnesses. That the defense attorney was sleeping during trial did not become an issue until a post-conviction hearing held after Burdine was sentenced to death. The trial judge said he did not notice that Cannon was sleeping. At the post-conviction hearing eight witnesses, including the clerk of court and three jury members, testified that they saw Cannon dozing off, his eyes closed and his head bobbing. Cannon slept up to 10 times during the roughly 13 hours of time before the jury. A federal district court found in a post-conviction appeal that Cannon had provided ineffective assistance of counsel in

violation of the Sixth Amendment to the U.S. Constitution and therefore ordered that the state grant Burdine a new trial. The state appealed the retrial order to the 5th Circuit Court of Appeals, which handles cases from Texas, Louisiana, and Mississippi. Appeals are heard by a three-judge panel. The 5th Circuit reversed the order for a new trial. However, the 5th Circuit agreed to hear Burdine's appeal "en banc" (meaning that all 14 appeals judges that sit in the 5th Circuit heard the appeal), and reinstated the order for a new trial by a 9-to-5 vote. Instead of going to trial Burdine agreed to plead guilty in return for three life sentences. He will be eligible for parole when he is 70.

Burdine's case is interesting because it reveals the divergence of opinion as to what is an acceptable quality of defense counsel in a death penalty case. On one side are those who are incredulous that judges need to analyze what parts of the trial the attorney slept through, how deeply he slept, and whether the defendant's interests were at stake while the attorney slept in order to determine whether sleeping constitutes an unconstitutional deprivation of effective assistance of counsel. On the other side, one of the dissenting judges confidently concluded that Burdine was not entitled to a new trial because the outcome of the trial would not have been any different had the attorney not been sleeping. In arriving at this conclusion, the judge cited several factors including evidence against the defendant presented by the prosecution at trial, affirmative actions taken by the defense counsel to defend his client, and the judge's own conclusion that "there is no evidence in the record that shows the counsel's sleeping occurred at a critical stage of the trial."⁵⁶

Not all effective assistance of counsel claims revolve around such spectacular facts. Probably more typical are cases such

as one decided by the U.S. Supreme Court in 2003.⁵⁷ Kevin Wiggins was convicted of robbing a 77-year-old woman and drowning her in her bathtub. The Court determined that the defense attorneys had provided ineffective assistance of counsel because they failed to conduct a social background investigation of the defendant to prepare for the penalty phase even though funds were made available for the investigation. The defense attorneys had copies of department of social service records showing that as a child Wiggins had been abused and neglected by an alcoholic mother, had been placed in numerous foster homes, and showed signs of emotional difficulties. Had the defense counsel arranged for a social background investigation, as the post-conviction attorney did, they would have learned that Wiggins' mother left him for days without food, she beat him, he was sexually assaulted in several foster care placements, and more. The state argued that the defense attorney's decision not to present mitigating evidence was a tactical decision, not ineffective assistance of counsel, but a majority of the Court disagreed.

The U.S. Supreme Court uses a two-part analysis to determine whether a defendant's Sixth Amendment right to assistance of counsel is violated. The Court first assesses whether the attorney's performance fell below an objective standard of reasonableness as defined by prevailing professional norms. In *Strickland v. Washington*, the Supreme Court stated that there is a strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance.⁵⁸ If the court finds the attorney's performance deficient, it then determines whether there is a reasonable probability that the outcome of the trial would have

been different if the attorney had not made errors. The defendant is entitled to a new trial if the attorney's performance was found deficient and if it impacted the outcome of the case.

State Systems for Appointing Counsel for Indigent Defendants

The U.S. Constitution requires that states provide an attorney to criminal defendants who are unable to afford one, but leaves it to states to determine the methods for selecting and reimbursing appointed counsel. States use three basic methods to provide counsel to indigent defendants. The first is a public defender office that employs attorneys exclusively to represent indigent clients. The second is an assignment system under which a judge or some other coordinator appoints counsel on a case-by-case basis from a list of private attorneys. Sometimes membership on the list is voluntary, and in some cases the list may consist of all attorneys admitted to practice law in a district. Third, and not frequently used for death penalty cases, is a contract system under which the court contracts with a law firm to provide representation to all indigent clients for a fixed price. States and localities commonly use a combination of systems.⁵⁹ Some states that have the death penalty appoint attorneys from a specialized pool to represent defendants in death penalty cases. Others use the same appointment system in death penalty cases as is used to appoint counsel in other criminal cases.

Several attributes of appointment systems affect the quality of appointed counsel. First are qualification requirements for appointed counsel. In some states the only qualification required is an attorney's license, so attorneys who do not have criminal law experience may be appointed to represent a defendant in a death penalty

case. In some instances, judges appoint counsel regardless of whether the attorney is willing to accept the case.⁶⁰

In Texas, each county is responsible for appointing counsel. As of 2004, seven of the state's 254 counties had public defender offices, and almost all the rest of the counties used appointment systems.⁶¹ Prior to 2001, Texas had no requirements for appointment of counsel. In 2001, Texas adopted legislation that requires judges to appoint attorneys in death penalty cases from a list of qualified attorneys. Washington State adopted a similar requirement in 1997, yet the judge in the Kondro case cited above twice appointed attorneys who were not on the list and both had to withdraw from the case due to competency and ethical violations. California has gone further in establishing qualification standards. In 2004, California adopted court rules that establish minimum experience standards for attorneys appointed to represent death penalty defendants. For example, to be appointed as the lead defense counsel, an attorney must have at least 10 years experience in criminal litigation, and must have tried a certain number of serious felony cases through to the stage of argument, verdict, or final judgment. The American Bar Association recommends that states establish skill-based qualification requirements for attorneys appointed in death penalty cases rather than experience standards – Joe Frank Cannon, the sleeping attorney described earlier, had experience in at least 10 death penalty cases.⁶²

The attorney's independence from the appointing authority is a second factor that is relevant to the quality of representation. Under a public defender system, the public defender office identifies the attorney who will represent a client. In an appointment system, the trial judge may select the attorney. Factors other than qualification

can influence a judge's appointment, such as that an attorney is willing to accept the case, that the attorney gives campaign contributions to the judge, that the attorney moves the case quickly and does not ask for funding for investigators or expert witnesses.⁶³

Low pay for appointed defense counsel in some states discourages qualified attorneys from taking death penalty appointments and discourages those who do take death penalty cases from devoting numerous hours to the cases. In the mid-1990s, most states paid appointed attorneys between \$20 and \$40 an hour to represent death penalty defendants, generally an amount in the lower part of that range for out-of-court time and in the higher part of the range for time in court. The reimbursement must cover both attorney pay and overhead costs. In addition, many states impose caps on the amount an attorney may be paid. In the early 1990s, several state supreme courts declared unconstitutional caps that limited attorneys to \$1,000 (Arkansas), \$5,000 (South Carolina), and \$3,200 (Oklahoma) per case.⁶⁴ In upholding an order for a new trial based on ineffective assistance of counsel in a Texas death penalty case in 1992, the 5th Circuit noted that state reimbursed the defense attorney at a rate of \$11.84 per hour and that "the justice system got only what it paid for."⁶⁵ Public defender systems are less prone to the problems of low pay than appointment systems, but can be affected by high caseloads.⁶⁶

Finally, counsel for the indigent may not be provided sufficient resources to hire investigators or expert witnesses. As noted above, investigation of a defendant's background and psychiatric testimony can be critical to defense of a death penalty case, particularly in the penalty phase of the trial. Further, counsel for indigent clients may not

have access or funding for training, nor for basic support functions such as research, administrative staff, and computer technology.

Several states with the death penalty have created centralized public defender systems to provide defense attorneys to death penalty defendants. Missouri has a separate division that handles death penalty trials. The attorneys work in pairs of two representing death penalty defendants. Each attorney has a maximum caseload of six. The majority of the attorneys working for the capital division, created in 1989, have been with the division for at least 10 years.⁶⁷ New York created the Capital Defender Office to provide defense counsel to all indigent defendants charged with death penalty-eligible crimes. The office is charged with establishing qualification

standards for defense counsel, appointing defense counsel (either state public defenders or private counsel), monitoring the performance of appointed counsel, and providing training to defense counsel.

Wisconsin uses a public defender system to provide defense counsel to indigent defendants in criminal cases. The state assumes the cost of providing counsel to defendants who fall below the state's income and asset standard for indigence, which were last amended in 1987. Attorneys employed by the Office of the State Public Defender (SPD) handle 54% of cases. The SPD assigns 38% of its cases to private counsel. (The remaining 7%, which include only misdemeanors, are assigned to private counsel via fixed fee contracts.) The SPD currently reimburses appointed private attorneys at \$40 an hour.⁶⁸

APPENDIX: HISTORY OF THE DEATH PENALTY IN WISCONSIN

The first codified laws of the Territory of Wisconsin in 1839 provided for the death penalty:

Section 1. That every person who shall commit the crime of murder, shall suffer the punishment of death for the same.

Section 2. That every person who shall, by previous engagement or appointment, fight a duel within the jurisdiction of this Territory, and in so doing shall inflict a wound upon any person whereof the person injured shall die, shall be deemed guilty of murder.

The Territorial Statutes stated that the punishment for murder would be hanging.

Capital punishment was discussed at great length in the Constitutional Convention of 1846 (which failed to produce a constitution the voters would ratify). The outcome of that debate was that an article to abolish the death penalty was ultimately defeated on a 68-to-30 vote on November 25, 1846. A bill to abolish capital punishment was introduced in the Territorial Assembly in 1847. It passed the Assembly by a vote of 16-to-8, but was defeated by one vote in the Council (the upper house of the Territorial Legislature).

Although the current Wisconsin Constitution, ratified in 1848, contains no mention of the death penalty, capital punishment continued after Wisconsin became a state because the territorial laws were adopted as the basis of the new state's statutes. Killing a person in a duel, however, was reduced to second-degree murder in the 1849 Wisconsin Statutes. Hanging continued to be the penalty for first-degree murder.

Prior to the creation of the Wisconsin Territory, there had been executions in Wisconsin under Indian tribal law, military law, or previous territorial laws, and records show at least four people were hanged for murder under Wisconsin's own territorial and state laws: Edward Oliver at Lancaster on October 29, 1838; William Caffee at Mineral Point on November 1, 1842; Robert B. Brewer at Lancaster on May 16, 1846; and John McCaffary at Kenosha on August 21, 1851. The first three had shot their victims. McCaffary was convicted of drowning his wife in a hogshead of water. (The last person executed in Wisconsin may have been Jacob Powles, an Oneida Indian who shot another tribe member and was executed on November 13, 1868, under tribal law.)

The murder of Bridget McCaffary and subsequent execution of her husband in front of a crowd of over 1,000 people were the events that initiated the successful campaign to abolish the death penalty in Wisconsin. C. Latham Sholes, the editor of the *Kenosha Telegraph* and later inventor of the typewriter, was already an opponent of capital punishment, but McCaffary's execution spurred him to greater efforts. He was elected to the 1852 Legislature, where he introduced a bill to abolish capital punishment. His bill failed to pass by a vote of 36-to-25. Another bill to abolish the death penalty was introduced in the 1853 Legislature by Edward Lees. 1853 Assembly Bill 67 was adopted by the assembly on March 9 by a vote of 36-to-28 and by the senate on July 8 by a vote of 14-to-9. Governor Leonard Farwell signed the bill as Chapter 103, Laws of 1853, on July 10.

Several lynchings and the murder of a Milwaukee banker in 1855 led to calls for reenactment of the death penalty. Bills to do so were introduced in each of the next five legislative sessions. After this, interest in the issue appears to have waned. The next attempt to restore the death penalty came in 1937 and was a direct response to the kidnap-killing of Charles Lindberg's baby. 1937 Assembly Bill 122 was introduced by Assemblyman Martin B.

Franzkowiak of Milwaukee to establish the death penalty for kidnapping. It was later withdrawn by the author.

In 1949, Assemblyman Ben Tremain introduced Assembly Joint Resolution 43 proposing a referendum on establishment of the death penalty for first-degree murder. It was rejected by a vote of 49-to-33. A multiple murder in Milwaukee led Assemblyman Arthur J. Balzer to introduce 1955 Assembly Bill 188 to establish the death penalty for first-degree murder. The bill was returned to him at his request.

Renewed interest in reestablishing the death penalty in Wisconsin began in 1973. It was precipitated by the killing of a law enforcement officer in Milwaukee six months after the *Furman* decision. As mentioned, *Furman*, although it overturned all then-existing state death penalty statutes, left the way open for the U.S. Congress and state legislatures to enact new legislation. Senator Gordon Roseleip introduced 1973 Senate Bill 186, patterned after an Indiana law providing a death penalty for nine types of murder in the first-degree. Two joint resolutions calling for advisory referenda on the topic were also introduced. These measures all died in committee. Subsequently, legislative proposals to institute the death penalty or to hold an advisory referendum on the topic have been introduced in every session since 1973.

Wisconsin Bills Proposing a Death Penalty or Joint Resolutions Calling for a Referendum, 1937 – 2005

Session	Bill/ Resolution	Author	Disposition/Status
1937	AB-122	Martin B. Franzkowiak	Returned to author
1949	AJR-43	Ben Tremain	Rejected, 49-33
1955	AB-188	Arthur J. Balzer	Returned to author
1973	SB-186	Gordon Roseleip	Died in committee
	SJR-37	Gordon Roseleip and others	Died in committee
	AJR-33	George Klicka and others	Died in committee
1975	AB-640	Stanley Lato and others	Died in committee
	AJR-27	George Klicka and others	Refused to withdraw from committee, 37-59
1977	AB-268	Stanley Lato and others	Died in committee
	AB-315	James Lewis and others	Died in committee
	AJR-5	George Klicka and others	Died in committee
1979	SJR-11	Roger Murphy and others	Died in committee
	AJR-9	George Klicka and others	Died in committee
1981	AJR-28	George Klicka and others	Motion to withdraw tabled, 60-35
1983	AB-213	Richard Matty and others	Died in committee
	AJR-45	Richard Matty and others	Died in committee
1985	SB-65	Alan J. Lasee and others	Died in committee
	AB-18	Richard Matty and others	Died in committee
	AJR-61	Richard Matty and others	Died in committee
1987	SJR-21	Alan J. Lasee and others	Died in committee
	AJR-5	Richard Matty and others	Died in committee
	AB-995	Susan Vergeront and others	Died in committee
1989	SB-125	Marvin Roshell and others	Died in committee
	SB-132	Alan J. Lasee and others	Died in committee
	SJR-33	Marvin Roshell and others	Died in committee
	AB-222	Susan Vergeront and others	Died in committee
	AB-223	Susan Vergeront and others	Died in committee
1991	SB-44	Marvin Roshell and others	Died in committee
	SB-125	Alan J. Lasee and others	Died in committee, motion to withdraw and refer to another committee defeated, 10-23
	SJR-15	Marvin Roshell and others	Died in committee
	AB-588	Susan Vergeront and others	Died in committee
	AB-985	Martin Reynolds and others	Died in committee
1993	SB-23	Alan J. Lasee and others	Indefinitely postponed, 21-12
	SB-30	Michael Ellis and others	Died in committee
	SJR-42	Alan J. Lasee and others	Died in committee
	SJR-43	Joseph Andrea and others	Died in committee
	AB-123	Robert Welch and others	Died in committee
	AB-170	David Zien and others	Died in committee
	AB-358	Dean Kaufert and others	Died in committee
	AB-835	Martin Reynolds and others	Died in committee
AJR-96	Robert Welch and others	Died in committee	
1995	SB-1	Alan J. Lasee and others	Died in committee
	AJR-9	Sheila Harsdorf and others	Died in committee
	AJR-10	Bonnie Ladwig and others	Died in committee
1997	SB-30	Alan J. Lasee and others	Died in committee
	AB-245	Joseph Handrick and others	Died in committee
	AJR-8	Bonnie Ladwig and others	Died in committee
1999	SB-153	Alan J. Lasee and others	Died in committee
	AB-724	Frank Lasee and others	Died in committee
	AJR-16	Bonnie Ladwig and others	Died in committee
2001	SB-328	Robert Welch and others	Died in committee

2003	SB-2 AJR-27	Alan J. Lasee and others Dean Kaufert and others	Died in committee Died in committee
2005	SJR-5	Alan J. Lasee and others	Adopted as Enrolled Joint Resolution 58 5/18/06

ENDNOTES

¹408 U.S. 238, 92 S.Ct. 2726 (1972).
²See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976).
³Kansas last executed a person in 1965 and reenacted the death penalty in 1994; New Hampshire last executed a person in 1939 and reenacted the death penalty in 1991; New Jersey last executed a person in 1963 and reenacted the death penalty in 1982; New York last executed a person in 1963 and reenacted the death penalty in 1995; South Dakota last executed a person in 1947 and reenacted the death penalty in 1979. See “Executions in the U.S. 1608-1987: The Espy File.”
⁴In *People v. Stephen LaValle*, New York’s highest court found the New York death penalty statute unconstitutional. The statute requires the trial judge to instruct the jury that if the jurors do not unanimously agree on a sentence of either life without the possibility of parole or death, the court will sentence the defendant to “a term of imprisonment with a minimum term of between 20 and 25 years and a maximum term of life.” The court concluded that the statute is impermissibly coercive and thus violates the state constitution, because a juror who favors life without the possibility of parole may fear that a deadlock would lead to the defendant getting out on parole and therefore the juror may vote for death in order to prevent parole. The court’s 2004 ruling prevents New York from imposing the death penalty under the current statute. As of this writing, the New York Legislature has not taken up legislation to modify the death penalty statute.
⁵Former Illinois Governor George Ryan imposed a moratorium on executions in 2001 and the current governor has not lifted it, although the death penalty remains in the statutes and defendants continue to receive death sentences. The New Jersey Legislature passed a one-year moratorium on executions to afford the state time to study the application of the death penalty. The New Jersey moratorium expires in January 2007.
⁶Amnesty International, web.amnesty.org.
⁷*Ibid.*
⁸*Coker v. Georgia*, 433 U.S. 584, 979 S.Ct. 2861 (1977). *Coker* was a plurality opinion, meaning that a

majority of the justices agreed on the outcome of the case – that the defendant not be put to death – but did not all agree on the reasoning and scope of the decision. Four justices found that the death penalty was excessive for rape. Justice Byron R. White concluded only that the death penalty is inappropriate for rape of an adult woman. Currently, no state or federal death penalty statutes allows the death penalty as a punishment for rape, so the Supreme Court has not ruled on whether the death penalty may be allowable for rape of a child.
⁹*Furman v. Georgia*, 408 U.S. 238 at 309, 92 S.Ct. 2726 at 2762 (1972).
¹⁰*Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990).
¹¹Justice Blackmun cited Arizona cases in which the heinousness aggravating circumstance had been found because: the defendant killed two children with whom he had no dispute and who posed no danger to him; the victim was 78 years old; the murder was committed to eliminate a witness; the victim had been kind to the killer; the killer used special bullets designed to inflict greater tissue damage; the killer intentionally and repeatedly fired a high-powered destructive weapon at the victim; and the victim was bound to an extent far greater than necessary to achieve the purpose of preventing her escape. *Walton v. Arizona*, 497 U.S. 639 at 695, 114 S.Ct. 3047 at 3079 (1990).
¹²*Walton v. Arizona*, 497 U.S. 639 at 698, 110 S.Ct. 3047 at 3080 (1990).
¹³*Kansas v. Marsh*, 126 S.Ct. 2516 (2006).
¹⁴See *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658 (1993).
¹⁵Concurring opinion in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990).
¹⁶Dissenting opinion in *Callins v. Collins*, 510 U.S. 1141 (1994).
¹⁷*Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002).
¹⁸*Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005).
¹⁹*Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).
²⁰*Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992).
²¹*Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994) and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726 (2002).
²²Vince Beiser, “A Guilty Man,” *Mother Jones*, September/October 2005.

- ²³“Capital Punishment, 2004,” U.S. Department of Justice, Bureau of Justice Statistics, November 2005, NCJ 211349.
- ²⁴*Wainwright v. Sykes*, 433 U.S. 72 at 90, 97 S.Ct. 2497 at 2508 (1977).
- ²⁵Larry W. Yackle, “State Convicts and Federal Courts: Reopening the Habeas Corpus Debate,” 91 *Cornell L. Rev.* 541 (2006).
- ²⁶“Capital Punishment, 2004,” U.S. Department of Justice, Bureau of Justice Statistics, November 2005, NCJ 211349.
- ²⁷To prove actual innocence of the underlying crime, a petitioner must show it is more likely than not that no reasonable juror would have convicted in the light of new evidence, and to show innocence of the death penalty, a petitioner must show by clear and convincing evidence that no reasonable juror would have found the petition eligible for the death penalty in light of new evidence. *Calderon v. Thompson*, 523 U.S. 538, 188 S.Ct. 1489 (1998).
- ²⁸*Herrera v. Collins*, 506 U.S. 390 at 415, 113 S.Ct. 853 at 868 (1993).
- ²⁹*Herrera v. Collins*, 506 U.S. 390 at 417, 113 S.Ct. 853 at 869 (1993); see also *House v. Bell*, 126 S.Ct. 2064 (2006).
- ³⁰*Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990).
- ³¹*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).
- ³²*Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).
- ³³*Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004).
- ³⁴28 USC 2254 (d) (1). *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000).
- ³⁵Andrew Hammel, “Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas,” 39 *Am. Crim. L. Rev.* 1, Winter 2002.
- ³⁶California District Attorneys Association, “Prosecutors’ Perspective on California’s Death Penalty,” March 2003.
- ³⁷James Liebman, Jeffrey Fagan, and Valerie West, “A Broken System: Error Rates in Capital Cases, 1973-1995,” June 12, 2000.
- ³⁸“Capital Punishment, 2004,” U.S. Department of Justice, Bureau of Justice Statistics, November 2005, NCJ 211349.
- ³⁹*The Costs of Processing Murder Cases in North Carolina*. Philip J. Cook and Donna P. Slawson, Duke University. May 1993.
- ⁴⁰*Tennessee’s Death Penalty: Costs and Consequences*. Office of Research, Tennessee Comptroller of the Treasury. July 2004.
- ⁴¹*Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*. Performance Audit Report 04-03. Legislative Division of Post Audit, Kansas. December 2003.
- ⁴²*Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut*. Commission on the Death Penalty, Connecticut. January 8, 2003.
- ⁴³*The Application of Indiana’s Capital Sentencing Law*. Indiana Criminal Law Study Commission. January 10, 2002.
- ⁴⁴The DPIC exoneration list may be found at www.deathpenaltyinfo.org. See also Richard C. Dieter, “Innocence and the Crisis in the American Death Penalty,” Death Penalty Information Center, December 2004.
- ⁴⁵Ward A. Campbell, “Critique of DPIC List,” may be found at www.prodeathpenalty.com. In 2002, Campbell concluded that 34 of the 102 cases then listed on the DPIC list were cases of actual innocence. See also *U.S. v. Quinones*, 196 F. Supp. 2d 416 at 418 (2002, S.D.N.Y.). In *Quinones*, U.S. District Judge Rakoff found the New York death penalty statute unconstitutional because it does not guarantee that innocent people will not be executed. Rakoff concluded that “at least 20 of the 51 death-sentenced defendants who have been released from prison since 1991 were released on grounds indicating factual innocence derived from evidence other than DNA testing.”
- ⁴⁶Among them are the cases of Ruben Cantu and Carlos DeLuna. For Cantu’s story, see Lise Olsen, “The Cantu Case: Death and Doubt,” *The Houston Chronicle*, Nov. 20 and 21, 2005.
- ⁴⁷Maurice Possley and Steve Mills, “I didn’t do it. But I know who did,” June 24, 2006; “A phantom or the killer?,” June 26, 2006; “The secret that wasn’t,” June 27, 2006, *Chicago Tribune*.
- ⁴⁸“Ginsburg Backs Ending Death Penalty,” *AP News*, April 9, 2001.
- ⁴⁹Stephen B. Bright, “Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,” 103 *Yale L.J.* 1835, 1994.
- ⁵⁰Statement of Stephen B. Bright regarding the Innocence Protection Act of 2001 before the Committee on the Judiciary, United States Senate, June 27, 2001. Drinkard was acquitted at a new trial in 2001. Gary Nelson’s case is another example of poor representation at the guilt phase of trial. Bright summarizes the case as follows:
- Gary Nelson was represented at his capital trial in Georgia by a solo practitioner who had never tried a capital case. This court-appointed lawyer, who was struggling with financial problems and a divorce, was paid at a rate of only \$15 to \$20 per hour. His request for cocounsel was denied. The case against Nelson was entirely circumstantial, based on

questionable scientific evidence, including the opinion of a prosecution expert that a hair found on the victim's body could have come from Nelson. Nevertheless, the appointed lawyer was not provided funds for an investigator and, knowing a request would be denied, did not seek funds for an expert. Counsel's closing argument was only 255 words long. The lawyer was later disbarred for other reasons.

In post-conviction proceedings, new attorneys who devoted their own funds to the case, discovered that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison. They also found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared. Nelson was released after serving 11 years on death row.

⁵¹Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," 103 *Yale L.J.* 1835, 1994.

⁵²*Ibid.*

⁵³*Ibid.*

⁵⁴Lise Olsen, "Uncertain Justice," *Seattle Post-Intelligencer*, August 6, 2001. Six attorneys who have handled death penalty cases in Washington since the death penalty was reinstated in 1981 have been suspended or disbarred due to incompetent, unethical, or criminal conduct. In six of Washington's 30 death sentences, the defense attorneys were found to have provided ineffective assistance of counsel. The death sentence for a man convicted of killing 13 people was reversed in part on the basis of ineffective assistance of counsel. The defense attorneys, two inexperienced public defenders, failed to communicate with the defendant's family, who spoke Chinese, and thus did not present the family's pleas for mercy to a jury.

⁵⁵"Judge orders cruel punishment – even before the trial starts," *San Antonio Express-News*, Nov. 29, 2002.

⁵⁶*Burdine v. Johnson*, 262 F. 3d 366 at 357 (2001).

⁵⁷*Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003).

⁵⁸*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

⁵⁹For statistics on indigent defense systems, see Tony Fabels, "Public Defense, Papers from the Executive

Session on Public Defense," Bureau of Justice Assistance, December 2001, Bulletin #2; Steven K. Smith and Carol J. DeFrances, "Indigent Defense," Bureau of Justice Statistics Selected Findings, February 1996 (NCJ 158909); "Gideon's Broken Promise: America's Continuing Quest for Equal Justice," American Bar Association Standing Committee on Legal Aid and Indigent Defendants, December 2004.

⁶⁰In one Alabama case, the judge refused to relieve counsel who filed a motion to be relieved from appointment because they had inadequate experience in defending criminal cases and considered themselves incompetent to defend a death penalty case. In a Georgia case, an attorney newly admitted to the bar was surprised to be appointed to defend a death penalty case after meeting the judge two days earlier when she accompanied her boss to a divorce proceeding. Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," 103 *Yale L.J.* 1835 at 1857, 1994.

⁶¹"Gideon's Broken Promise: America's Continuing Quest for Equal Justice," American Bar Association Standing Committee on Legal Aid and Indigent Defendants, December 2004, p. 27.

⁶²*American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, February 2003.

⁶³"Gideon's Broken Promise: America's Continuing Quest for Equal Justice," American Bar Association Standing Committee on Legal Aid and Indigent Defendants, December 2004, p. 20-21.

⁶⁴Douglas Vick, "Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences," 43 *Buffalo L. Rev.* 329, Fall 1995.

⁶⁵*Martinez-Macias v. Collins*, 979 F. 2d 1067 (5th Cir. 1992).

⁶⁶"Gideon's Broken Promise: America's Continuing Quest for Equal Justice," American Bar Association Standing Committee on Legal Aid and Indigent Defendants, December 2004, p. 17-18.

⁶⁷Kyle W. Morrison, "A life in the balance," *Southeast Missourian*, June 22, 2006.

⁶⁸Section 977.08 (4m) (c), 2003-04 *Wisconsin Statutes*.

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