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VI. *Gideon v. Wainwright* in Death Penalty Cases

Ronald Tabak†

I should first mention that we are going to have the death penalty in New York State because Congress has passed a new federal drug law that will apply in New York State.²⁷⁹

I want to talk about three aspects of capital litigation that implicate *Gideon*. The first aspect is the quality of the defense offered at trial. State legislatures and local counties generally do not adequately fund defense lawyers to represent death row inmates.²⁸⁰ Defense counsel generally get no investigative assistance at all. The people who do these cases are frequently either public defenders with incredible caseloads or are local lawyers, some of whom are not even criminal practitioners, who get appointed to take on these cases.

These lawyers are subjected to enormous pressures from the community, and they, unfortunately, frequently succumb to this pressure. For example, we recently had a case in the Eleventh Circuit, which involved a local defense lawyer who did not challenge the jury selection system even though a prima facie case of unconstitutional racial discrimination against blacks serving on juries could have been established.²⁸¹ When he was asked why he had not challenged the jury selection system, he replied that the leading defense lawyers in town had gotten together and decided that the public would get upset at their clients if they were to challenge racial discrimination in the selection of local juries. Therefore, they all decided that such a challenge would do more harm than good and they never made such a challenge. The re-

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279. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 120 Stat. 4181 (1988).

280. See Tabak, *supra* note 149, at 801-04 and 810. See also *Toward A More Just and Effective System of Review In State Death Penalty Cases*, A.B.A. TASK FORCE ON DEATH PENALTY HABEAS CORPUS 70-77 (October 1989).

281. *Gates v. Zant*, 863 F.2d 1492 (11th Cir.), *cert. denied*, 110 S. Ct. 353 (1989) (holding that counsel was not ineffective and that a discrimination claim was procedurally barred due to counsel's failure to object).

sult was that our black client who was charged with raping and killing a white woman wound up with an all-white jury, even though blacks constituted almost thirty percent of the population, and even though a single juror's vote against the death penalty would have resulted in a life sentence.²⁸²

Death penalty cases are more complex cases not only because of the special eighth amendment constitutional rules in these cases, but also because of the need to investigate and present mitigating evidence in the penalty phase of a capital proceeding. Unfortunately, many defense lawyers do not prepare for the penalty phase of capital cases. In one notable case, where the lawyer was found ineffective, the lawyer was asked why, after he put on an unsuccessful insanity defense at the guilt phase, he did not put on anything at the sentencing phase. He said he did not choose to "prepare for losing" the guilt phase.²⁸³

There are also many defense lawyers who exhibit some rather questionable judgment. For example, defense lawyers frequently make arguments in the guilt phase which are totally inconsistent with their subsequent arguments in the penalty phase — thereby fatally undermining their credibility before the jury in what is often the most crucial part of the trial. Thus, counsel who vehemently argues during the guilt phase that the defendant did not commit the crime is unlikely to be persuasive when he proceeds to argue soon thereafter, during the penalty phase, that the defendant is deeply sorry for having committed the crime.²⁸⁴

It is vital to learn how to counsel the defendant in a death penalty case to take a proffered plea bargain. Attorneys with wide experience in representing death-row inmates believe that over half of the people on death-row today were offered and turned down plea bargains whereby they could have gotten life sentences.²⁸⁵ Defense lawyers must learn how to offer proper ad-

282. *Id.* at 1497-98. See also *Gates v. Zant*, 880 F.2d 293, 293-97 (11th Cir. 1989) (Clark, J. dissenting).

283. *Blake v. Kemp*, 758 F.2d 523, 533-34 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985) (due to defense counsel's ineffectiveness, the jury never heard available character evidence in the sentencing phase).

284. See W. WHITE, *supra* note 148, at 55-56.

285. Telephone interview with Joseph Nursey, Team Defense Project, Atlanta, Ga., (Nov. 14, 1987). Indeed, Ted Bundy was executed only because he had declined an offer

vice on plea bargains to clients whose thoughts on that issue may be distorted by serious mental problems, lack of judgment or an unwillingness to detract from "their macho image."²⁸⁶

The need for better quality lawyers in these cases has been recognized even by the Louisiana Supreme Court, which has decried the "recurring problem" of defense counsel who "vigorously" contest the State's case at the guilt phase but then do little to challenge it at the penalty phase.²⁸⁷ But so far, the United States Supreme Court has done its best in its rulings on ineffectiveness of counsel to limit the possibility of meaningful relief.²⁸⁸

A second major part of the problem is the lack of a constitutionally guaranteed right to counsel in state postconviction and federal habeas corpus proceedings. That the provision of capable counsel in such proceedings can be crucial is evident from the fact that many serious constitutional violations have only been discovered because of lawyering done, on a pro bono basis, in such proceedings.

For example, a lawyer at my firm entered one case only after it had reached the Tenth Circuit. After investigating, he uncovered the following: The judge who imposed the death sentence at the retrial had been one of the two lawyers in the prosecutor's office when the case was first tried. Although this lawyer turned judge had stated at the outset of the retrial that he had had nothing to do with the original prosecution (despite having been asked to work on it), our paralegals found local press reports from the time of the original trial which reported that on several separate occasions he had commented to the press about the case and about the prosecution's strategy. Once that happened, that death sentence was thrown out.²⁸⁹

In another case, we found during a post conviction investi-

of a life sentence. See W. WHITE, *supra* note 148, at 35-36.

286. See W. WHITE, *supra* note 148, at 36-37.

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

288. See, e.g., Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainwright 477 U.S. 168 (1986); Strickland v. Washington, 466 U.S. 668 (1984).

289. State v. Hatch, Nos. CR-79-302, 303, 304, 305 (Jan. 26, 1987) (Canadian Cnty. Okla.). Unfortunately, Mr. Hatch was resentence to death by a different judge, who subsequently resigned from the bench after the initiation of a judicial inquiry concerning him.

gation that one of the jurors in the case was in a mental hospital. It turned out that he had been mentally ill at the time he served on the jury. He gave us an affidavit stating that he had been biased against the defendant because he thought he had read a story that said that the defense lawyer was having an affair with a woman of whom he was enamored. This showing did not persuade the Arkansas Supreme Court that anything was wrong with that case, but we are still working on it in federal court.²⁹⁰

You may remember the *McCleskey*²⁹¹ case, the case about racial discrimination in capital sentencing. After the Supreme Court upheld McCleskey's death sentence, the NAACP Legal Defense Fund went back and did further investigation in a successor post conviction proceeding. It discovered that the State had planted an informer in the cell next to McCleskey and had actively solicited information from the informer long after McCleskey had obtained counsel. This raised a substantial constitutional challenge, which succeeded in the federal district court, only to be reversed by the Eleventh Circuit — largely on the grounds that the Legal Defense Fund should somehow have uncovered sooner evidence of official misconduct which the State was successfully endeavoring to hide.²⁹²

These are the kind of issues that can be developed when you have habeas corpus proceedings in federal court. So, these are very important proceedings. You cannot count on the state courts to provide justice in these cases, and it is true, as Justice Fortas commented,²⁹³ that the state courts resent the federal courts upsetting convictions and death sentences in habeas corpus proceedings. They resent them because the federal courts deal with serious constitutional problems which have occurred in the state courts and which the state courts have not corrected.

It is absolutely vital, therefore, that we oppose the recommendations made by the committee chaired by Justice Powell which would curtail the right to federal habeas corpus.²⁹⁴ I can

290. See Tabak, *supra* note 149, at 812 (discussing *Pruett v. State*, 287 Ark. 124, 128, 697 S.W.2d 872, 875 (1985)).

291. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

292. See *McCleskey v. Zant*, 890 F.2d 342 (11th Cir. 1989).

293. See *supra* notes 233-36 and accompanying text.

294. The recommendations of that committee (the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States) ap-

guarantee you that without habeas corpus, one-third to one-half of the persons who are executed will be executed as a result of an unconstitutional conviction or death sentence. That is the range of death penalty cases that have been ordered retried by the federal courts.²⁹⁵

Yet, those victories which are now being won in federal habeas corpus actions, and in state postconviction proceedings, are being won despite the fact that there is no constitutionally recognized right to counsel.²⁹⁶ Thus, it is purely happenstance whether you happen to get Skadden, Arps, my former firm Hughes, Hubbard & Reed or some other capable firm to come in and do the investigation which establishes what has happened. Where a firm like that is not willing and able to volunteer, major constitutional problems such as those which my firm has uncovered will likely remain undetected, and people will get executed unjustly.

The case I described above — with the judge who had repeatedly commented on the case on behalf of the prosecutor's office — had made it all the way to the Tenth Circuit with the trial lawyer still mishandling the case. It was only because he was late in filing his brief in the Tenth Circuit that the court caused him to be relieved. My firm was asked by the NAACP Legal Defense Fund to come in, and we then did our investigation.²⁹⁷ This catch-as-catch-can system is not how I had under-

pointed by Chief Justice Rehnquist, were introduced by Senator Thurmond late in 1989 as S. 1760, 101 Cong., 1st Sess. (1989). In March 1990, the Judicial Conference of the United States recommended several significant changes to the Ad Hoc Committee's recommendations. Reportedly, the Judicial Conference would have recommended additional statutory changes, to roll back certain procedural restrictions on the consideration of death row inmates' meritorious constitutional claims, if Chief Justice Rehnquist—the author of several Supreme Court decisions imposing such restrictions—cast votes creating ties. See Greenhouse, *Vote Is A Rebuff For Chief Justice*, N.Y. Times, Mar. 15, 1990, at A16, Col. 4.

295. See Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. OF THE ASS'N. OF THE BAR OF THE CITY OF N.Y. 859, 873-74 (1987); see also Letter from George H. Kendall, Associate Counsel, NAACP Legal Defense and Education Fund, Inc., to Al Pearson, Reporter to the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Apr. 3, 1989).

296. See *Murray v. Giarratano*, 109 S. Ct. 2765 (1989). There is now a statutory right to counsel in federal habeas corpus, under the Anti-Drug Abuse Act of 1988. See *supra* note 279. But even effective counsel at that point may not be able to resuscitate claims waived or poorly litigated in state postconviction proceedings.

297. See *supra* note 289 and accompanying text.

stood *Gideon* to work.

Finally in this regard, there is now some progress being made with the federal government and some state governments helping to fund resource centers to give backup support for people handling death penalty cases in state post conviction and federal habeas corpus proceedings. But there are real dangers that those resource centers will be subject to improper pressures. In Florida the head of the office of the Capital Collateral Representative is appointed by Governor Martinez, who ran for office on a platform focusing on support for the death penalty and who now signs the death warrants. In Louisiana a federal judge opposed funding the resource center until the person who had been working effectively on ensuring proper representation for Louisiana's death row inmates was withdrawn as the lawyer who would head the resource center.²⁹⁸ It is vital that these resource centers be independent in the way that The Legal Aid Society has an independent operation, and that they not be beholden to the judiciary, the governors, or the prosecutors in these states.

My final point is, that even if we have superb counsel in state postconviction and federal habeas corpus proceedings in every case, counsel may be meaningless in many cases because of the developing law of procedural default.²⁹⁹ I found this rather amazing when I started to get into this area. People said the most important thing you have to know about is procedural default. I said, "What are you talking about?" Back when I was in law school, which was not that long ago, the rule was that if you did not "understandingly and knowingly" waive your claim in state court for strategic reasons, you were allowed to raise it in federal court.³⁰⁰ Well, little did I know that in the meantime, without any act of Congress intervening, the "cause and prejudice" test came in and even negligent lawyering was not considered to be "cause" for the failure to raise a claim in state court.³⁰¹ What is actually happening now in this country is that

298. Conversation with Millard Farmer, Team Defense Project, Atlanta, Ga., in Warrenton, Virginia (July 1988).

299. See, e.g., *Dugger v. Adams*, 109 S. Ct. 1211 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

300. See *Fay v. Noia*, 372 U.S. 391, 438-39 (1963).

301. See *Dugger v. Adams*, 109 S. Ct. 1211 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986).

people are literally being executed because their lawyer did not object at trial to what is an unconstitutional practice at the trial or sentencing hearing.

How can I say that with such great ardor and evident knowledgeability? One reason I can is because there have been at least two recent cases in Georgia of codefendants, where counsel for one defendant did not object and, in a separately held proceeding, counsel for another defendant did object.³⁰² The defendants whose lawyers objected in a way that did not run afoul of the Georgia procedural bar rule eventually were granted new trials by the federal courts.³⁰³ The codefendants, whose lawyers did not raise a timely objection, were unable to get the federal courts to rule on their claims.³⁰⁴ In one case, that of John Eldon Smith, this occurred even though his codefendant (and common law wife) had already won on the identical claim in that same federal court and had already gotten a life sentence at retrial.³⁰⁵ Since the federal courts refused to consider Smith's claim, which they knew they would have to grant, he was executed.³⁰⁶

These are about the greatest travesties that I have seen of all the many travesties in the way in which the death penalty is being carried out. These procedural default rulings apply in all sorts of contexts in criminal cases, but the most ridiculous results are in the death penalty area.³⁰⁷

302. See *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986); *Stanley v. Kemp*, 737 F.2d 921 (11th Cir. 1984); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

303. *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

304. *Stanley v. Kemp*, 737 F.2d 921 (11th Cir. 1984); see *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

305. See *Smith v. Kemp*, 715 F.2d 1459, 1462 (11th Cir. 1983).

306. *Id.* at 1472. Compare *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983) (holding that the state jury selection procedure permitting women to simply opt out by sending notice to the jury commissioners deprived the defendant of his right to an impartial jury) with the case of Machetti's co-defendant, *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983) (holding that the defendant waived his right to object to jury composition by failing to assert the issue at trial); compare *Stanley v. Kemp*, 737 F.2d 921 (11th Cir. 1984) (claim of habeas corpus barred and stay of execution denied) with the case of Stanley's co-defendant *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986) (relief was granted in the same claim).

307. A subsequent, fatal example occurred in a 5-4 decision in a case in which I represented the petitioner, Aubrey Dennis Adams. A new sentencing trial had been

Thus, it is particularly obscene for Justice Powell to be asserting that a major problem with federal habeas corpus is that counsel for death row inmates are abusing the courts by raising frivolous claims in repetitive proceedings,³⁰⁸ when in reality what we have is the courts' fatal abuse of death row inmates, by failing to review meritorious claims which were negligently waived by trial lawyers who were not given adequate funding or support by the courts.³⁰⁹

unanimously ordered for Adams by the Eleventh Circuit, which held that the judge had unconstitutionally misinformed the jury by repeatedly stressing that it had *no* responsibility for the sentencing. *Adams v. Wainwright*, 804 F.2d 1526, 1528 (11th Cir. 1986), *modified and reh'g denied*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, *Dugger v. Adams*, 485 U.S. 933 (1988). However, the Supreme Court, without suggesting that the Eleventh Circuit's holding on Mr. Adams' claim had been incorrect, nevertheless reversed, because Adams' trial attorney had not objected and because Adams had not offered an excuse for that failure which would amount to "good cause." *Dugger v. Adams*, 109 S. Ct. 1211, 1216-18 (1989). Thus, the Supreme Court sent "a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so." *Id.* at 1218 (Blackmun, J., dissenting).

308. See, e.g., Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038-41 (1989).

309. A further problem has been injected by the Supreme Court's adoption, by judicial legislation, of a new retroactivity standard in *Teague v. Lane*, 109 S. Ct. 1060 (1989). Under *Teague* other federal courts will generally be barred from granting relief on claims which *have been* asserted at trial and every stage of litigation thereafter, if the basis for granting relief is a new decision handed down after the defendant's direct appeal has been completed. *Id.* at 1074. Indeed, under the Supreme Court's decisions in *Butler v. McKellar*, 58 U.S.L.W. 4294 (U.S. Mar. 5, 1990), and *Saffle v. Parks*, 58 U.S.L.W. 4322 (U.S. Mar. 5, 1990), the federal courts will frequently be precluded from upholding a habeas petitioner's meritorious constitutional claim if granting the claim would entail applying an existing Supreme Court precedent in a different context. Decisions such as *Teague*, *Butler*, and *Parks* are the latest manifestations of the Supreme Court's injudicious campaign to eviscerate the statutorily-mandated system of federal habeas corpus.