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## DEATH PENALTY SYMPOSIUM

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# VOLUNTEER LAWYERS AND THEIR EXTRAORDINARY ROLE IN THE DELIVERY OF JUSTICE TO DEATH ROW PRISONERS

*Robin M. Maher\**

Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.

U.S. Supreme Court Justice Lewis Powell, Jr.<sup>1</sup>

**F**EW things worth doing are easy. This is especially true for volunteer death penalty lawyers. Representing a death-sentenced prisoner is intellectually challenging work, requiring a significant commitment of time and resources. It is high-stakes, politically-charged litigation that may last for years in a state far from home and family. It is too daunting a concept for many.

That's why it is something of a small miracle when we find the exceptional individuals whose belief in justice moves them past the obstacles that stop others. These are lawyers whose sensibilities are offended at the idea of an execution without judicial review or due process, to whom the concepts of a fair trial and the effective assistance of counsel are more than distant echoes of a constitutional law class. They see what doesn't make sense to them and they do not look away. They extend themselves to invest in the worth of another human being, even one who has been convicted of a terrible crime. These are the lawyers whose stories are told in this special edition of the Toledo Law Review.

## *The Need*

My job is to find volunteer lawyers to represent death row prisoners who lack counsel. I fail far more often than I succeed. But recruiting is not the most difficult part of my job. That is nothing compared with telling a death-sentenced prisoner that I cannot help him. Every week I receive phone calls from frantic mothers and letters from prisoners and their families. They are often supplemented with pages and pages of painstaking, hand-written notes about their trial and potential issues for appeal. Many prisoners protest their innocence, expressing bewilderment at finding themselves on Death Row. Too many tell me how their trial lawyers failed them. They all ask the same thing: please, find a lawyer for my case. I reply that I will do

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1. Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) (citing Report of the Pennsylvania Bar Association Task Force for Legal Services at 3 (1990)).

my best but my heart is heavy with the unspoken truth. I cannot come close to finding enough lawyers for those who need them.

There are hundreds without legal representation on Death Rows around the country. That is because there is no guarantee that a prisoner will be appointed counsel in post-conviction proceedings.<sup>2</sup> Federal funding was discontinued in 1995, and many states fail to provide adequate resources to the post-conviction public defender offices that represent poor people.<sup>3</sup> Consequently, these offices are underfunded, poorly staffed, lacking resources, and overwhelmed with too many cases.

At trial, some states rely on appointed counsel instead of funding and training public defenders. But an absence of meaningful standards for defense counsel and grossly inadequate compensation<sup>4</sup> almost guarantees that many capital defendants receive terrible representation.<sup>5</sup> Volunteer lawyers are astounded to find that drunk, incompetent, or inexperienced trial counsel represented their clients at trial. The continuing taint of racial prejudice, human error, and government misconduct contribute to a capital punishment system that is increasingly viewed as inaccurate and unreliable.<sup>6</sup>

In an attempt to address these profound failures of the criminal justice system, the American Bar Association recently adopted revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>7</sup> The Guidelines set forth a national standard of care for the defense of capital cases.<sup>8</sup> Among other things, the Guidelines call for an independent appointing authority,<sup>9</sup> performance standards for counsel,<sup>10</sup> and a defense team adequately funded and staffed with expert assistance.<sup>11</sup> ABA President Dennis Archer recently called upon all death penalty jurisdictions to adopt and enforce the Guidelines and bring about badly needed reform to capital defender systems.

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2. In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Court rejected the claim of a Death Row prisoner who argued that he was constitutionally entitled to the appointment of counsel to pursue his state post-conviction remedies.

3. For example, the state of Alabama provides no funds for post-conviction representation of Death Row prisoners. See also Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

4. Compensation for Alabama capital trial counsel is a meager \$60/hour in court and \$40/hour out of court. See ALA. CODE § 15-12-21 (2003); compensation for Mississippi capital trial counsel is capped at \$1,000 (or \$2,000 if 2 attorneys are appointed), plus reimbursement of actual expenses. See MISS. CODE ANN. § 99-15-17 (2003); in Florida, compensation for capital trial counsel is capped at \$3,500. See FLA. STAT. ANN. § 925.036 (West 2003).

5. See 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 (1994).

6. A Gallup poll taken in May of 2003 found that 73% of Americans believe an innocent person has been executed in the last five years. A Pew Research poll from July 2003 found that public support for the death penalty had dropped to 64%, compared to 78% in 1996. See Death Penalty Information Center, *Resources, Public Opinion*, available at <http://www.deathpenaltyinfo.org> (last visited Jan. 28, 2004).

7. ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed., ABA 2003) (adopted Feb. 10, 2003), reprinted in 31 HOFSTRA L. REV. 913 (2003).

8. *Id.* at 919.

9. *Id.* at 944.

10. *Id.* at 961.

11. *Id.* at 952.

Only a dramatic transformation of capital defender systems will end the injustice of the wrongfully convicted on Death Row. Since 1973, one hundred and thirteen persons have been released from Death Row with evidence of their innocence.<sup>12</sup> Some came within hours of being executed for crimes they did not commit.<sup>13</sup> United States Supreme Court Justice Sandra Day O'Connor has warned, "Given the statistics, the system may well be executing innocent people."<sup>14</sup> This, I fear, is the inevitable result if we do not commit ourselves to improving the quality and availability of legal representation for poor people.

Recruiting civil lawyers for volunteer capital defense work is an inadequate answer to the problems caused by a criminal justice system that repeatedly fails poor people. But without significant and meaningful reform of capital defender systems, it is the only answer. Simply put, there is no one else to do this work.

### *The Rewards*

The 3500 people on Death Row<sup>15</sup> are often described with words that invite us to deny their status as human beings. The truth is harder to hear. All are poor. Some are innocent. Many are mentally retarded, mentally ill, and uneducated. Most have experienced lives of profound abuse and neglect. These damaged and vulnerable people are unable to deal with the criminal justice system on their own. Their crimes horrify us. But they are no less deserving of the rights we want for ourselves—the right to a fair trial, to due process, and to competent legal advocacy. Justice belongs to all of us, not just those who can afford it.

This principle is recognized by the volunteer lawyers who represent death-sentenced prisoners. They prove that even those without criminal law experience can do this work and do it well. There is an abundance of resources available to assist volunteer lawyers with their cases, from on-line practice areas with sample pleadings and briefs to training programs and counseling from experienced capital defenders. Volunteer lawyers demonstrate the difference that an effective, adequately funded lawyer can make in a capital case. Some have even had the privilege of walking their wrongfully convicted client off Death Row to freedom. Without exception, each describes their experience as among the most rewarding and fulfilling of their career.

Of course, the real value of this work cannot be measured by examining the outcome of the case, the number of hours recorded, or amount of money spent. The significance is seen in the faces of the condemned, when they learn that they have a competent lawyer to advocate for them, many for the very first time. At that moment, hope for justice replaces fear and abandonment, and the dignity of a human being is restored. That is the true meaning and reward of this work.

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12. Death Penalty Information Center, *Innocence*, available at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org) (last visited Mar. 5, 2004).

13. Cindy Richards, *No Escaping the Ryan Challenge*, CHI. SUN TIMES, Jan. 15, 2003, at 45.

14. Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1.

15. Death Penalty Information Center, *Facts*, available at <http://www.deathpenaltyinfo.org> (last visited Jan. 28, 2004).

To learn more about representing someone on Death Row who needs a lawyer or the law firms that represent death-sentenced prisoners, please contact the ABA Death Penalty Representation Project at 202-662-1738 or visit its website at [www.abanet.org/deathpenalty](http://www.abanet.org/deathpenalty).

## ESSAYS

### "DYING FOR REPRESENTATION": PROMOTING JUSTICE THROUGH PRO BONO PARTICIPATION

*Kenneth C. Frazier\**

POLITICAL debate surrounding capital punishment in the United States predominantly concerns one question—should the death penalty be abolished? As a lawyer, I have come to regard the issue of “abolition” as secondary to what is, in my view, the more pertinent inquiry: can our system of justice fairly and consistently apply it *only* to those who, under the law, have been legitimately condemned to die?

In representing James Willie “Bo” Cochran, a former inmate on Alabama’s Death Row, I saw firsthand why there can be no fair and consistent application of the death penalty under the current system. Prosecutorial discretion to charge capital murder is too broad and often goes unchecked. Those who are charged, frequently the socio-economically disadvantaged who lack education, must place their fate in the hands of court-appointed lawyers who frequently lack the necessary experience or resources to provide an adequate defense. In post-conviction proceedings, those death row inmates who have valid constitutional claims face such daunting procedural hurdles that those claims too rarely garner review, much less relief. The “system,” I have learned, is seriously flawed. I make this assertion not from a scholarly perspective, but from that of a former trial lawyer. And, as proof, I do not offer statistics or irrefutable legal principles, but the story of Bo Cochran.<sup>1</sup>

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1. The story of Bo’s journey through the system began in 1977 in Jefferson Circuit Court when his first trial for the murder of Stephen Jerome Ganey ended in a mistrial [hereinafter *Cochran I*]. Bo was then retried in the Jefferson Circuit Court and convicted for Ganey’s murder [hereinafter *Cochran II*]. This conviction, however, was reversed and remanded for a new trial at *Cochran v. State*, 400 So. 2d 435 (Ala. Crim. App. 1981) [hereinafter *Cochran III*] after the United States Supreme Court overturned Alabama’s death penalty statute in *Beck v. Alabama*, 447 U.S. 625 (1980). Bo was again convicted in the Jefferson Circuit Court [hereinafter *Cochran IV*]. The Alabama Court of Criminal Appeals affirmed his conviction at *Cochran v. State*, 500 So. 2d 1161 (Ala. Crim. App. 1984) [hereinafter *Cochran V*]. However, the Alabama Supreme Court remanded the case for resentencing at *Ex parte Cochran*, 500 So. 2d 1179 (Ala. 1985) [hereinafter *Cochran VI*]. The circuit court resentenced Bo at *State v. Cochran*, No. CC77-02211 (Jefferson Cir. Ct. Feb. 25, 1986) [hereinafter *Cochran VII*]. The sentence was affirmed by the Court of Criminal Appeals in *Cochran v. State*, 500 So. 2d 1188 (Ala. Crim. App. 1986) [hereinafter *Cochran VIII*] and by the Alabama Supreme Court in *Ex parte Cochran*, 500 So. 2d 1064 (Ala. 1986) [hereinafter *Cochran IX*], *cert. denied*, 481 U.S. 1033 (1987) [hereinafter *Cochran X*].

Subsequently, Bo’s claim for post-conviction relief was denied at *Cochran v. State*, 548 So. 2d 1062 (Ala. Crim. App. 1989) [hereinafter *Cochran XI*], *cert. denied*, 493 U.S. 900 (1989) [hereinafter *Cochran XII*]. Bo sought federal habeas corpus relief, which was granted at *Cochran v. Herring*, 43

Bo's case serves as more than evidence of the system's troubling inconsistencies. It also demonstrates the extraordinary degree to which lawyers matter in capital litigation. They matter from start to finish, at every stage of the process. My principal objective in sharing my story—really Bo's story—is to encourage fellow lawyers to get involved in reforming the system for administering capital punishment, primarily by stepping forward to take on the defense of a single case. For people like Bo Cochran—those indigent and charged with a capital crime—the only real chance of obtaining justice rests with their lawyers.

### *On the Case*

I first learned of Bo Cochran's cause through a phone call from a friend and colleague, Esther Lardent. I was a litigation partner in a large Philadelphia law firm, consumed with the daily responsibilities of law firm life: providing quality representation to my clients, business development, billable hours, and administrative duties. Esther was heading up the Death Penalty Representation Project of the American Bar Association and was preoccupied with her own challenges: securing representation for scores of indigent death row inmates, fighting for justice, and trying to keep men and women alive in the process. Esther, in her highly persuasive style, asked if my firm would represent an Alabama death row inmate, an inmate whose direct state court appeals had been completely exhausted, whose only remaining avenue for redress was the institution of federal habeas proceedings, and who was facing the imminent issuance of a writ of execution. In all honesty, I was not immediately moved to act on Esther's impassioned plea for help.

Fortunately, two junior associates in our firm, Michael Holston and Seamus Duffy, recognized the opportunity to promote justice and urged the firm to accept the representation. They asked me to serve as the "partner" on the case, and, with more encouragement from Esther, I agreed.<sup>2</sup> Still, feelings of trepidation lingered—I had been trained to be a corporate litigator, not a criminal trial attorney. How, I asked Esther, could a lawyer like me responsibly undertake a representation of such gravity and complexity so far outside my area of expertise? Esther's answer was simple: either we were Bo's lawyers or he was his own lawyer. And so began one of the most challenging and rewarding cases I have ever handled.

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F.3d 1404 (11th Cir.) [hereinafter *Cochran XIII*], modified and rehearing denied by 61 F.3d 20 (11th Cir. 1995) [hereinafter *Cochran XIV*], and cert. denied, 516 U.S. 1073 (1996) [hereinafter *Cochran XV*]. As a result, Bo was granted a new trial in the Jefferson Circuit Court in which he was acquitted of the murder charge [hereinafter *Cochran XVI*].

2. While my recollections are offered in the first person, I am indebted to my colleagues and former partners at Drinker Biddle & Reath for supporting this cause over what turned into almost a decade of active litigation. In addition to Seamus Duffy and Mike Holston, both of whom are now successful partners at Drinker, our team included Brenda Holston (then Williams), who replaced Mike (before later marrying him). Brenda became an integral member of the team after Mike left the firm for a period to work as an Assistant United States Attorney. We were also joined by my former partner Larry Fox, then the senior and wisest member of the Cochran team and now the Chair of the ABA's Death Penalty Representation Project. These proceedings continued for several years after I joined Merck, and I am grateful that the Company supported my continued and active representation of Bo Cochran.

*Sentenced to Death*

My first visit to Death Row at the state penitentiary at Atmore, Alabama, is one that I will never forget. On meeting Bo, he proclaimed his innocence of the murder for which he had been convicted and shared his version of the events. At the meeting's conclusion, the steel doors clanged behind us, separating us from our new client. A prison guard whispered to us that Bo's extraordinary human qualities (his kind and even-tempered disposition and genuine concern for others) made him well-respected by his fellow death row inmates and their captors. He added that he hoped we could help Bo. Without even the vaguest hint of a strategy, we committed to do just that.

Though initially skeptical of Bo's protestations of innocence, I was determined to focus on what I perceived as the more germane issue—had the State proved my client guilty beyond a reasonable doubt?<sup>3</sup> Prior to making the trip, we had reviewed what record there was of the *three* trials conducted by the State of Alabama against Bo (the first ended in a mistrial, and the verdict in the second was reversed on appeal).<sup>4</sup> What was pretty clear from that record was that Bo had committed a robbery—he had "held up" a grocery store at gunpoint late in the evening and escaped on foot with about \$300. The store was in a predominantly white neighborhood south of Birmingham, Alabama. Witnesses from inside the store described the robber as a black man. They further testified that the store manager, the son of a local white minister, pursued the robber out of the store. Police, searching for the robbery suspect, converged on a trailer park just north of the store. About twenty minutes later, a gunshot was heard. Bo was arrested within an hour about a mile north of the trailer park with cash from the store and a gun. The store manager was found soon thereafter, fatally shot in the trailer park.

Now, on the basis of this circumstantial evidence alone, reasonable people might presume that the robber had shot and killed the store manager. Couple this circumstantial evidence with corroborating forensic evidence, and the prosecutor likely wins a murder conviction. In Bo's case, for example, one would expect to see confirmation that the fatal bullet matched the revolver Bo carried. One would also expect to see test results showing that his gun had indeed been fired that night, and, if so, that Bo had been the one to fire it—facts easily confirmed through the use of a paraffin test. Incredibly, as my colleagues and I discovered, substantiation in the form of physical or forensic evidence was totally nonexistent. No testing was done on Bo's gun or his hands to determine whether he shot the gun that night. The prosecution claimed the fatal bullet could not be found. The only bullet allegedly

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3. Long before we had the opportunity to present Bo's claims to the federal court, I became convinced that Bo was indeed innocent of murder. (I suppose it's noteworthy that my two younger colleagues on the case were immediately convinced of Bo's sincerity.) And, in these times of DNA and forensic science advances, we have grown somewhat accustomed to feeling outraged and disgusted by wrongful convictions. It's easy to feel this way when we can be sure, to a scientific certainty, that someone is actually innocent of the crime. But, even where incontrovertible evidence of innocence doesn't exist, my assertion remains the same: the State must meet its burden and prove its case. A person cannot be sent to prison, much less sentenced to die, unless the proof excludes reasonable doubt. It is the job of defense lawyers to push prosecutors to adhere to this standard.

4. See *Cochran I*; *Cochran II*; *Cochran IV*.

found near the scene of the shooting did not match the gun Bo was carrying. Finally, autopsy photos of the victim showed a highly irregular entry wound; it appeared that the fatal bullet had been cut out before the body was delivered to the coroner.

Bo Cochran had not just been convicted of capital murder solely on the basis of highly circumstantial evidence. He was convicted despite evidence suggesting an accidental police shooting and cover-up. And worse, he had been sentenced to die by a jury that was presented with none of the available mitigating evidence, that effectively heard no plea to spare Bo's life.

Through the course of representing Bo, I came to learn that his case was typical of many capital cases. In Alabama, there is no public defender system; the State appoints lawyers to defend a capital case. Bo met his court-appointed lawyers *on the day of his trial*. As is too often the case, they were under-equipped, under-trained, and under-compensated.<sup>5</sup> At the time of Bo's trial, court-appointed lawyers, paid by the State, were entitled to \$40 per hour for in-court time and \$20 per hour for time spent out of court, with a cap of \$7,500 for the entire representation.<sup>6</sup> Jury selection was really nothing more than a process of systematically weeding out African-American jurors from the panel. In short, Bo had been denied virtually all of the fundamental rights we associate with a criminal trial, including effective assistance of counsel and a fairly selected jury of his peers.

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5. Notwithstanding this conclusion, I believe that, in the political debate surrounding the death penalty, the men and women on the "front lines" who defend these cases week in and week out are often unfairly criticized. True, there are numerous cases in which court-appointed counsel are woefully incompetent or irresponsible. But I believe that for every such case, there are many others in which these lawyers fight nobly and effectively to overcome the huge disadvantages they face due to lack of sufficient time and resources. I have asked myself whether I could consistently live up to the constitutional standard of "effective counsel" (or my own standards) were I asked to accept the equivalent of minimum wage, or even less, and spend a year trying capital cases back-to-back in a hostile environment with little or no resources at my disposal, expert or otherwise. Now having met some lawyers who do just that, let me say that I consider them heroes in our profession.

Our first visit to Alabama allowed us to consult with Richard Jaffe, who had served as Cochran's counsel on direct appeal and state post-conviction appeals as a then-rookie lawyer. Although he was paid almost nothing for these efforts, Jaffe had done an excellent job of asserting and preserving several constitutional issues, including the two that would later provide the basis upon which Cochran received habeas relief. Our system of justice relies on lawyers like Jaffe to represent defendants who face the ultimate punishment. They do so based on their deeply held conviction that all defendants are entitled to high-quality, effective representation—irrespective of their ability to pay. Richard Jaffe has gone on to become a premier criminal trial lawyer.

6. Consider that the Alabama Department of Corrections estimates the cost of housing an inmate on death row for one year to be more than \$10,000. Gail Ballantyne, *Is the Price of Justice Worth the Cost of Alabama's Death Row?* (CBS affiliate WHNT television broadcast, Feb. 17, 2003), available at <http://www.whnt19.com/global/story.asp?s=1135754&ClientType=Printable> (last visited Feb. 12, 2004). There are currently 192 men and women on death row with 300 in county jails awaiting trial. Jeffery Rieber, *The Fiscal Distress Caused by Capital Punishment*, at <http://www.phadp.org/fiscal.htm> (last visited Feb. 11, 2004). It is, at best, questionable economics and, at worst, cruel that so little money is allocated to those defending lives and so much to the temporary preservation of those condemned to die. The State recently spent \$166,000 to replace the electric chair with a lethal injection chamber. Ballantyne, *supra*.

He was "railroaded" in the classic sense. The record showed it, and we were determined to prove it to the federal court.<sup>7</sup>

### *A Second Chance*

To win relief on an ineffective assistance of counsel claim, *Strickland v. Washington*<sup>8</sup> required us to prove counsels' performance had fallen below an objectively unreasonable standard, and that Bo had been prejudiced by that performance. Prejudice, in the context of habeas relief, implies more than its everyday meaning. Bo would have to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different. Our review of the record showed serious lapses in performance, none more glaring than his counsels' failure to investigate or offer any proof of mitigating circumstances at the sentencing phase of Bo's trial. Long hours spent poring over the trial record eventually persuaded us that we had a second winning claim—one based on the seminal case of *Batson v. Kentucky*.<sup>9</sup>

Under *Batson*, a defendant belonging to a cognizable racial group may establish a prima facie equal protection violation by showing, first, that the prosecution exercised its peremptory challenges against venirepersons of a cognizable racial group and, second, that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."<sup>10</sup> In establishing a prima facie case, the defendant may rely on any relevant circumstances that demonstrate a discriminatory motive. In Bo's case, the record contained overwhelming evidence to support a prima facie case that the prosecution exercised its peremptory challenges in a racially discriminatory manner. It became obvious that one of the major factors contributing to Bo's conviction centered around the fact that each of his jury trials was distorted when viewed through the lens of race. On each jury that had convicted Bo, minorities were severely underrepresented, a product not of mere chance, but of purposeful planning to use peremptory challenges in a racially

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7. That first trip to Alabama was also eventful because we had the good fortune to meet and consult with Bryan Stevenson, then Director of the Alabama Capital Representation Resource Center and now the Executive Director of the Equal Justice Initiative in Montgomery, Alabama. Bryan was well-acquainted with nearly all the individuals comprising Alabama's considerable death row population, and he knew a great deal about the specifics of their individual cases. He and his Resource Center colleagues represented as many death row inmates in their state post-conviction and federal habeas cases as was humanly possible. When Bryan's direct representation was not possible, as in Cochran's case, he was willing to mentor volunteer counsel. Bryan's considerable insights, knowledge and experience were indispensable to three novice lawyers from Philadelphia. Our frequent consultations with him would prove pivotal in Bo's defense.

In 1995-1996, Congress eliminated the funding of the Alabama Capital Representation Resource Center and similar organizations in other states. Laura Lafay, *Resource Centers Lose Funding; Congress Hoped to Speed Cases of Justice but May Have Slowed It*, VIRGINIAN-PILOT, Oct. 7, 1995, at B1. Thus, many of these centers are no longer in existence. Those that still function do so with minimal resources and owe their existence largely to the dedication of lawyers, like Bryan, who have made securing justice for those on death row their life's work.

8. 466 U.S. 668 (1984).

9. 476 U.S. 79 (1986).

10. *Id.* at 96.

discriminatory manner. The prosecution utilized its challenges to squelch even the possibility that Bo's circumstances would be evaluated by persons with varying experiences, ethnicities, and backgrounds.

The prosecutor exercised twenty-four of twenty-six peremptory strikes in Cochran's first two trials to exclude virtually all black members of the venire. In all, thirty-one of the thirty-five black venirepersons were struck over the three trials. At the trial from which we were seeking relief, the prosecution used 50% of its peremptory challenges (7 of 14) to strike 78% of the black jurors (7 of 9), even though black jurors represented only 21% of the venire panel (9 of 42). The strategic pattern and sequence of the prosecution's strikes clearly demonstrated that exclusion of black jurors was a primary objective of the prosecutor in the selection process. Indeed, the only black juror to participate in deliberations at Bo's third trial had personal ties to the District Attorney, and was, in all respects, an ideal juror for the prosecution.<sup>11</sup>

We would later come to learn through the testimony of former prosecutors in the district attorney's office that the belief in their office was "that prospective black jurors at that time were anti-police, anti-establishment, and should not be left on juries, if at all possible."<sup>12</sup> One former prosecutor testified that race *was* taken into consideration in striking jurors, particularly in cases where there was a white victim and a black defendant. He candidly admitted that black jurors were routinely struck solely on the basis of race. Indeed, at the time of Bo's trial, the courts of Alabama had actually misread the pre-*Batson* standard of proof to mean that prosecutors were free to discriminate in individual cases.<sup>13</sup>

Finally, I had the opportunity to depose, and then to cross examine, the very prosecutor that exercised the peremptory strikes at issue in all three of Bo's trials. I had met the man early in the case on one of our first investigatory trips to Alabama. My impression was that he was a man of sufficient integrity to not lie or shade the facts under oath. For this reason, I made the decision to simply ask him in his deposition about his feelings regarding African-American jurors. His testimony—which would be shocking to many—was that he viewed black jurors as less "reliable" for the prosecution than white jurors, more likely to identify with a black defendant than white jurors, and more likely to acquit a black defendant than white jurors. When I asked him if he had put these feelings out of his mind in selecting the juries in our case, he testified that he "couldn't say" that he did.

Although some maintain the criminal justice system is color-blind, the reality is that race plays a substantial role in the judicial process. Trial lawyers know this, and Bo is living proof of this fact. Jurors' backgrounds, personal experiences, and prejudices tend to frame the way they analyze facts and perceive defendants, ultimately affecting the outcome of every trial. For this reason, "the case with which a prosecutor can offer pretextual, race-neutral explanations for what in reality

11. Specifically, this "good" juror stated during voir dire that he and the district attorney were friendly and that they played golf together.

12. Transcript at 16, *Cochran XIII*, 43 F.3d 1404 (11th Cir. 1995).

13. See *Lynn v. State*, 477 So.2d 1365, 1376-77 (Ala. Crim. App. 1984) ("Alabama courts have consistently held that it is not error for the prosecuting attorney to strike a jury on the basis of race.").

are discriminatory strikes" often serves as the basis for harsh criticism of *Batson*.<sup>14</sup> It is easy to target a minority juror and explain the decision to strike based on some arbitrary distinction that does not enjoy legal protection. Bo was lucky the use of strikes by the prosecutors in his case was so flagrant that there was only one plausible explanation. And, he was lucky, as well, that his prosecutor was unwilling to shade his testimony just to prevent the possibility of a retrial.

### *Hitting the Wall*

Armed with record excerpts and deposition transcripts, we had proof that Bo's trial had not been constitutionally sound and were confident that proof would provide the necessary ammunition to secure his release. The law, we believed, was on our side; however, our journey was far from complete.

As it turned out, the law with which we had to contend, that of federal habeas corpus, would not act as our sentinel against further injustice, but rather, our principal antagonist. And, no doctrine erects a greater barrier to relief than "procedural default." First, I will briefly explain how "procedural default" works, and to a lesser degree, why it exists. Next, and more importantly, I will describe how the doctrine of procedural default could have functioned, and almost did function, to seal Bo's fate in the electric chair.

Procedural default seems simple enough: when a state prisoner seeking relief from his conviction presents evidence of a federal constitutional claim to a state court, the court can refuse to review that claim on procedural grounds. For example, the state court might conclude that it should refrain from reviewing the claim because counsel failed to lodge a contemporaneous objection at trial or because the claim itself was presented out of time under the state's post-conviction statute. However, the implications of such procedural default extend beyond the confines of any one state courthouse.

Ordinarily, where a state court has declared a federal claim procedurally defaulted, federal courts also are bound by that determination, and *no matter how meritorious it appears on its face*, the claim may not be reviewed. Certain requirements do exist. The state procedural rule relied on must be "adequate and independent"—the rule must be independent of federal law, and adequately provide the state court with grounds to bypass review of federal issues.<sup>15</sup> Adequacy is concerned with the clarity, and consistency in application, of the state procedural rule.<sup>16</sup> In other words, "[w]hen a state court refuses to reach the merits of a federal constitutional challenge because that challenge did not satisfy a state procedural rule, a federal court will defer to that judgment so long as the state procedural rule is 'consistently or regularly applied,'"<sup>17</sup> and is "'firmly established and regularly followed.'"<sup>18</sup> If a state's highest court "occasionally forgives procedural default,

14. Geoffrey Cockrell, Note, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 351, 358 (1997) (discussing the danger of minority underrepresentation in juries).

15. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

16. *Adams v. Kyler*, 2002 U.S. Dist. LEXIS 15424, at \*10-11 (E.D. Pa. 2002).

17. *Id.* at \*9 (quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988)).

18. *Id.* (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

but applies it in the 'vast majority' of cases, then the federal habeas court ordinarily should give the state rule preclusive effect."<sup>19</sup>

Finally, even where a procedural default is both independent and adequate, a federal habeas court may still undertake merits-based review if the petitioner demonstrates "cause" for the default and resulting "prejudice," or the petitioner shows that the federal court's refusal to hear the claim would result in a miscarriage of justice.<sup>20</sup> "To show cause, a petitioner must show that a factor 'external to the defense impeded counsel's efforts to comply with the State's procedural rule.'"<sup>21</sup> "To show prejudice, the petitioner must prove that errors at trial 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'"<sup>22</sup>

Though it might appear prisoners seeking federal habeas relief have various tools with which they are able to circumvent procedural default, just the opposite is true. A federal court considering independence, adequacy, cause, or prejudice does so within the statutory framework promulgated by Congress.<sup>23</sup> At the time of *Bo's* conviction, the habeas corpus statute required, at a minimum, that federal courts presume the factual findings of state courts to be correct. Today, the relevant statute, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>24</sup> requires that even greater deference be accorded to state court determinations. It dictates that federal courts may review a state court's determinations on the merits only to ascertain whether the state court had reached a decision that was "contrary to" or an "unreasonable application" of clearly established United States Supreme Court law, or if a decision was based on an "unreasonable determination" of the facts.<sup>25</sup>

Some commentators assert that underlying doctrines like procedural default, and mandates of deference under the AEDPA, are legitimate concerns regarding comity and federalism. A state must be given a chance to correct its own alleged mistakes before the federal habeas court is asked to do so; a federal court must respect a state court's determinations regarding application of its own established procedural rules. Viewing procedural default from a practical perspective as I have, however, raises the question of what possible rationale, other than one rooted in judicial economy, exists for proscribing a federal district court from reviewing the federal claims of a man sentenced to die? I assert there is none; there is no conceivable danger or detriment to ensuring that someone sentenced to die received a fair trial and sentence. Short of employing questionable tactics, lawyers must work to prove that the decision to take a life cannot be undertaken lightly or made hastily, and above all, that it should not rest solely upon a court's application of a time-saving doctrine like procedural default.

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19. *Id.* at \*10 (quoting *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989)).

20. *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977).

21. *Adams*, 2002 U.S. Dist. LEXIS 15424, at \*11 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

22. *Id.* at \*11-12 (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

23. 28 U.S.C. §§ 2241-2256 (2000).

24. 28 U.S.C. § 2254 (2000).

25. 28 U.S.C. § 2254(d) (2000).

As discussed above, our review of the record convinced us that constitutional violations, ineffective assistance of counsel (*Strickland*) and racial discrimination in the selection of jurors (*Batson*), had occurred at Bo's trial. But, in order to make a proper showing, we needed discovery. On hearing argument, the federal district court judge hearing the case granted us discovery on a sole issue, ineffective assistance of counsel. Ultimately, we did prove that trial counsel's failure to present mitigating evidence during the penalty phase warranted relief—the death sentence was overturned.<sup>26</sup> Bo's physical life would be spared, but he would still spend life in prison.

Bo's claim for relief under *Batson*, however, was mired down by the doctrine of procedural default. *Batson* was not decided until April 30, 1986,<sup>27</sup> so it is unsurprising that Cochran failed to raise the claim on direct appeal from his 1982 conviction. In a 1988 amendment to his application for post-conviction relief in state court, Cochran did raise the claim. Based on his failure to somehow raise it previously within an allotted one-year window, however, the state court found the *Batson* issue procedurally barred. Cochran objected and submitted evidence of the prosecution's discriminatory behavior. In a nod to the substantive law, the same court looked at the evidence and noted it could not be certain discrimination had occurred, but it did not need to hold so because it concluded Cochran was procedurally barred from raising the claim based on his failure to raise it on direct appeal. Cochran petitioned for certiorari, was denied, and proceeded to file a petition for writ of habeas corpus in the federal district court. Thus, he found himself before a federal judge who, like all those state court judges before him, concluded Cochran had not followed the state court rules and so his *Batson* claim would not be heard.

Convinced the *Batson* issue was meritorious and clearly worthy of consideration by the court, we decided not to take "no" for an answer. As discussed above, in order for a state's determination regarding procedural default to preclude a federal court from reviewing a federal claim, the procedural bar must be firmly established and a regularly followed state practice. We filed a motion for reconsideration and, the second time around, the judge conceded discovery was warranted. Following an evidentiary hearing where the lead prosecutor on Cochran's case testified that, at the time of Cochran's trial, he believed black jurors were less "reliable" and less likely to return a death penalty verdict than white jurors, the judge ruled that Bo's *Batson* claim entitled him to relief. He found that the evidence tended to show the district attorney's office maintained an informal policy of striking black jurors because of their race, and agreed that race had been the decisive factor in the use of peremptory strikes in Bo's case.

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26. *Cochran VI*, 500 So.2d at 1187 (ordering that an entirely new sentencing hearing be held).

27. Cochran was lucky to have the option of raising *Batson* at all. In January of 1987, the United States Supreme Court held that *Batson* was to "be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 327 (1987). The United States Supreme Court denied certiorari in Cochran's case on April 27, 1987, therefore Cochran's judgment of conviction was not final when *Batson* was announced. *Cochran X*, 481 U.S. at 1033. "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

On appeal, the State persisted in its argument that Bo's *Batson* challenge was procedurally barred from consideration. In affirming the district court, the Eleventh Circuit Court of Appeals stated: "Cases such as Cochran's are unusual because the *Batson* decision came down while the case was on direct review. In such cases, the Alabama courts have not consistently applied a procedural bar to *Batson* claims asserted in state collateral petitions where the defendant had raised a *Swain* objection at trial."<sup>28</sup> The court continued: "We find that the district court was not precluded from addressing Cochran's *Batson* claim in a federal habeas proceeding because Alabama has not consistently applied a procedural bar to *Batson* claims in cases like Cochran's. Moreover, ... the district court did not clearly err in finding that the prosecution in this case impermissibly discriminated against blacks in using its peremptory strikes in violation of *Batson*."<sup>29</sup> Bo's second chance was thus restored.

### *Life Goes On*

Upon first seeing a group of Philadelphia lawyers arrive at his prison cell, Bo said he felt like he had already won. Inexperienced in criminal matters and state procedure, and frightened by the enormity of the repercussions emanating from a capital case, we were not so convinced. But we were there. And, we were energized beyond belief by his confidence in us. More than five years after that first meeting, Bo did win. He won the right to a new trial where he was acquitted of murder by a jury that was not selected primarily on the basis of race. This jury required less than one hour to acquit Bo of a crime for which he had spent 18 years on Death Row. On a chalkboard in the room in which that jury deliberated, the words "not enough evidence" were written next to the murder charge.

Popular discourse concerning the criminal justice system often focuses on individuals "slipping through the cracks." To most, the phrase evokes thoughts of those who "got away"—a suspect never apprehended, or a parolee released back into society who only goes on to commit a new, often more despicable, offense. But, Bo Cochran also qualifies as a man who slipped through the cracks, and not because he is somehow undeserving of the freedom he now enjoys. To the contrary, he is one of the fortunate few set free by a system effectively designed to prevent review or revision of many convictions and sentences, no matter how unjust. Only with the help of lawyers can such gross injustice be avoided.

### *Conclusion*

Who may live and who must die is unquestionably the gravest determination entrusted to our criminal justice system. Approximately 800 people have been executed in the United States since the death penalty was reinstated in 1976. Over this same period of time, more than 100 death row inmates have been retried and acquitted, or released outright, based on evidence that was not submitted in their

28. *Cochran XIII*, 43 F.3d at 1409.

29. *Id.* at 1412.

original trials.<sup>30</sup> This ratio of the executed to the demonstrably innocent hardly confirms the current system's accuracy and reliability or its procedural and substantive fairness. Capital punishment derives its support principally from its plausible (but unproven) claim of deterrence or the notion that it represents the only suitable retribution for heinous crimes. However, those willing to look objectively at how the system dispenses justice to the poor and disadvantaged cannot easily discount the unacceptably high risk of wrongful convictions or the hideous implications of their finality.

Bo's story ends well. A man who spent the better part of two decades on Death Row is now free. He has a family. He works in his church. His refusal to look back in recrimination is an inspiration to many. I firmly believe the privilege of having been Bo's lawyer represents the high point of my legal career. I can only hope this lawyer's tale will inspire other lawyers to volunteer to represent indigent death row inmates. In any event, I wholeheartedly encourage them to do so because, in the words of Bryan Stevenson, "people are literally dying for effective representation."

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30. Though many of these individuals escaped death only because of the recent availability of DNA testing or other incontrovertible evidence of their innocence, Bo is living proof that others, whose cases were not impartially heard or well tried, can escape through the intervention of competent and committed counsel.