



UPCOMING TRAINING EVENTS

March 31- April 3, 2011	National Seminar on the Development and Integration of Mitigation Evidence, Chicago, Illinois
May 19-21, 2011	ABA and National Legal Aid & Defender Association Equal Justice Conference, Las Vegas, Nevada
July 7-10, 2011	NAACP Legal Defense and Educational Fund, Inc. Annual Capital Punishment Training Conference, Warrenton, Virginia
August 18-21, 2011	16th Annual National Federal Habeas Corpus Seminar & 5th Annual Training for Counsel Representing Capital Clients in Section 2255 Proceedings, Charlotte, North Carolina

Death Penalty Abolished in Illinois

On March 9, 2011, Illinois Governor Patrick Quinn signed SB 3539, abolishing capital punishment in Illinois and commuting the sentences of all 15 people on death row to life in prison. The abolition bill reallocates funds used for the implementation of the death penalty toward services for victims' families and law enforcement. Illinois now joins New Jersey and New Mexico, both of which abolished the death penalty during the last three years.

Governor Quinn solicited input from a wide variety of death penalty supporters and opponents before deciding to sign the bill. "I've heard from many, many people of good faith and good conscience on both sides of the issue. And I've tried to be very meticulous and writing down notes and studying those notes and books and e-mails. They've really spoken from the heart. I've been very proud of the people of Illinois," Governor Quinn said. The governor consulted with prosecutors, victims' families, death penalty opponents, and religious leaders.

History of the Death Penalty in Illinois

The last execution in Illinois was in 1999. On January 31, 2000 Governor George Ryan imposed a moratorium on executions in Illinois. In reviewing several death penalty cases since 1977, he determined that 13 prisoners sentenced to death had later been cleared of



Above: Governor Quinn signs the bill to abolish the death penalty on March 9, 2011. (Photo Credit: Governor's Office)

murder charges, compared with 12 who had been executed. Some of the 13 prisoners were exonerated by DNA evidence; the cases against others collapsed after new trials were ordered by appellate courts. Ultimately, in 2003, Governor Ryan commuted all 164 death sentences to life imprisonment.

A Commission on Capital Punishment appointed by Governor Ryan scrutinized the cases of the thirteen defendants who had been released from death row, studied all reported capital decisions in Illinois, consulted with nationally recognized experts in fields related to capital punishment, and commissioned and conducted studies of its own. The Commission also considered recommendations from across the country made by a number of groups also formed to consider potential capital punishment reforms.

The Commission produced a report in 2002 that concluded that reform of the capital punishment system was required in order to enhance the level of scrutiny at all stages of the proceedings in capital cases. If capital punishment were to continue to be imposed in Illinois, a higher level of confidence in outcomes would require a significant increase in public funding at virtually every stage, ranging from investigation through trial and its aftermath.

The Cost of Death

The financial cost of maintaining the death penalty was a significant consideration in lawmakers' decision to approve SB 3539, which was passed on January 11, 2011, and Governor Quinn's subsequent decision to sign it. Capital cases are more expensive because they involve two full trials: one for determining innocence or guilt and another for sentencing. They also require additional lawyers, costly expert witnesses, and are more likely to lead to multiple appeals. Many legislators cited the \$20 million annual cost of death penalty cases as the deciding factor in voting for abolition.

Sixteen states and the District of Columbia do not have the death penalty. Abolition bills have been introduced this year in Connecticut, Kansas, Maryland, Montana, and Washington.

"Our legislature and our governor are to be commended on this historic occasion. Their collective leadership in dealing with this most difficult subject is truly inspirational. On behalf of all those lawyers who have dedicated themselves over the years to representation of Illinois defendants in capital cases, let me just say thank you with all of our hearts."

-John H. Mathias, Jr.

Volunteer death penalty attorney and Chair of the Death Penalty Representation Project Steering Committee

For a list of volunteer law firms recruited in Illinois, see page 4.

Texas Death Row Prisoner in Need of Counsel

The Project is currently seeking counsel for a mentally ill 31-year-old Salvadoran national, "HM", who is on death row in Texas. HM was convicted of killing his two children in what was intended to be a murder-suicide. After shooting his children, HM shot himself, an injury he survived after spending a week in a hospital.

The trial of the case was plagued by irregularities that denied HM a fundamentally fair hearing. HM was found guilty of capital murder after he was prevented from presenting expert testimony about his mental state that could have afforded an evidentiary basis for conviction on a lesser offense. During the trial, the court decided to take a week-long recess based on the request of a jury member. Defense counsel did not have advance warning of this recess and had made plans to bring in witnesses from El Salvador during this time to testify on HM's behalf. The case was ultimately delayed for over a month, and on the day that the court picked to resume testimony, the defense's mental health expert was unavailable. Trial counsel insisted that she could not call any witnesses without the expert's testimony being presented first and

she refused to rest her case. Counsel was thereafter held in contempt and arrested, but she nevertheless refused to participate in the proceedings. After releasing defense counsel from custody and confirming that she would not call any witnesses, the trial court recalled the jury and advised them that "you have heard all the evidence that you're going to hear . . . in this matter."

The court asked whether there was any legal reason it could not sentence HM, to which defense counsel responded, "I can't proceed, Judge." The court then sentenced HM to death.

On appeal, the court of criminal appeals held there was no due process violation "[e]ven if a denial of a motion for continuance results in a defendant presenting no evidence." One judge dissented.

HM was appointed state habeas counsel who has effectively provided no representation. The petition he filed contains only three pages of text, and that text is merely a list of claims without any factual allegations. Substitute counsel is sought to represent HM in his post-conviction proceedings, with the hope that the

Death Row in Texas

- Size of death row: 337
- Number of executions since 1976: 755
- Method of execution: Lethal injection
- Life without parole is an option
- If a defendant is not responsible for the felony, s/he can still receive a death sentence.
- Sentence is determined by a jury.
- Governor must have Board of Pardons & Paroles recommendation for clemency.

current petition can either be expanded or replaced with a new petition. It is hoped the representation could continue in federal habeas proceedings, where the preserved due process claims relating to the trial court's scheduling could be litigated.

Attorneys interested to learn more about HM's case should contact Project Staff Attorney Emily Williams at 202-662-1735 or Emily.Williams@americanbar.org.

Death Penalty News

Ten Execution Dates Set in Ohio

As of March 1, 2011, the Ohio Supreme Court has set execution dates for ten prisoners this year. In 2010, Ohio carried out eight executions, the largest number since capital punishment resumed at the Southern Ohio Correctional Facility in Lucasville in 1999. Ohio was second only to Texas, which held 17 executions last year. If all 10 executions in 2011 occur as scheduled, Ohio will again set a state record for the execution of the most prisoners in a single year.

Ohio officials note that more executions scheduled in 2010 and 2011 have been the result of the conclusion of court challenges to lethal injection procedures, along with exhausted appeals. While Ohio's executions appear to be increasing, the number of

executions nationwide has fallen by about 60 percent since the 1990s.

According to the Death Penalty Information Center, this drop in executions can be partially attributed to heightened awareness of wrongful convictions and new state laws allowing juries to consider life in prison without parole instead of a death sentence.

The rapid assignment of execution dates could hinder efforts to offer fair and adequate representation to individuals facing a death sentence. Brett Hartman, scheduled to be executed on August 16th, 2011, had already come within one week of execution in 2009 before a federal appeals court allowed him to pursue an innocence claim.

Death Penalty News continued on page 3.

Dykema Gossett Wins New Sentencing Trial for David Perkins (AL)

On March 18, 2011, the Alabama Supreme Court ordered a new sentencing trial for death row prisoner David Perkins on the basis of trial counsel's ineffectiveness, including their failure to investigate Mr. Perkins' troubled background and head injuries. After citing the *ABA Guidelines for the Appointment and Performance of Defense Counsel*, the court concluded that if such evidence had been presented at trial, the jury likely would not have sentenced Mr. Perkins to death.

Congratulations to the team at Dykema Gossett for its tremendous efforts on behalf of Mr. Perkins!

Death Penalty News *(continued from page 2)*

Execution Dates in Ohio *continued*

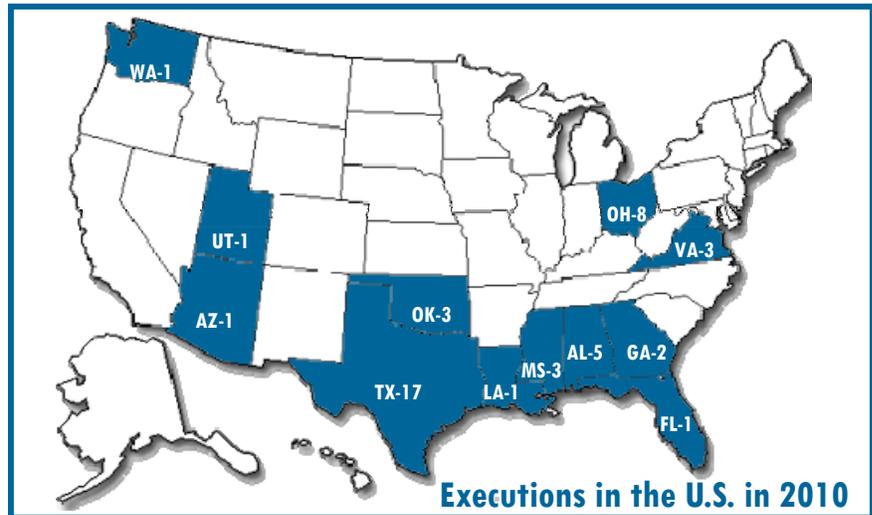
Mr. Hartman has an appeal pending in the Ohio Supreme Court that will resolve whether false testimony was involved in his trial. Ohio prosecutors have pressed the Supreme Court to set execution dates in five additional pending capital punishment cases.

Lethal Injection Challenges Across the Country

The drug “cocktail” used to execute prisoners typically contains three drugs: sodium thiopental (to induce unconsciousness); pancuronium bromide (to cause muscle paralysis and respiratory arrest); and potassium chloride (to stop the heart). Lethal injection is the primary method of execution in all states where the death penalty is authorized, the military, and the federal government.

On January 21, 2011, the sole U.S. manufacturer of sodium thiopental, Hospira Inc., announced that it will no longer produce that anesthetic. The decision came as a result of the Hospira production facility’s relocation to Italy where officials demanded assurances that the drug not be used for executions. In order to work around the shortage of sodium thiopental, some states, such as Ohio and Texas, are changing their protocol and using pentobarbital instead. This drug is typically used to induce surgical comas and is chemically related to a version of pentobarbital used to euthanize animals but has also been employed in physician-assisted suicides. The drug was chosen based on its availability and manufacture in the United States.

Due to the lack of studies for the use of pentobarbital in executions, there are concerns about its efficacy. Natasha Minsker, Death Penalty Policy Director of the Northern California American Civil Liberties Union, noted that “this drug in particular is critical to whether or not the execution is being done in a proper manner, whether the execution is actually



constitutional, so there are very real questions about whether these drugs can be used and should be used.”

Fordham Law School Professor Deborah Denno, an expert on lethal injection, notes that legal battles force prison officials to reveal drug sources and expiration dates. Changes in protocol can lead to delays in the execution process, as prisoners may sue to demand proof that the new drug, or specific uses of it, will not violate the 8th Amendment prohibition of cruel and unusual punishments.

The use of pentobarbital has not yet been examined by the U.S. Supreme Court. The Court addressed the issue of lethal injection in 2008 when it held in *Baze v. Rees* that the three drug cocktail used by Kentucky did not constitute cruel and unusual punishment because it did not create a substantial risk of unnecessary pain or serious harm. *Baze* applies only to that specific drug combination. The shortage of sodium thiopental will have a significant effect on the ability of states to carry out lethal injections until a satisfactory substitute is approved.

On March 10, 2011, Ohio carried out the execution of Johnnie Baston with a single dose of pentobarbital, marking the first time any state carried out a death sentence using solely pentobarbital.

In mid-March the Drug Enforcement Administration seized Georgia’s supply of sodium thiopental over concerns that the Georgia Department of Corrections circumvented federal law when securing the scarce drug. The seizure represents the latest event regarding the use of lethal injection drugs but will likely not be the last.

Death Penalty News continued on page 4.

Visit Us Online!

On February 1, 2011, the ABA launched its new website:
www.americanbar.org

You can find the Project’s site under the “ABA Groups” tab, listed as a Special Committee.

We are in the process of updating and reorganizing content for the Project’s newly re-designed site. The site features a feed with relevant news stories, navigation tools to help you to locate the resources you need, and additional materials for volunteer firms.

PROJECT STAFF

Robin M. Maher, Director
Emily M. Williams, Staff Attorney
Rebecca Katz, Project Associate
Rose Plager-Unger, Undergraduate Intern

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Death Penalty News *(continued)*

Racial Justice Act Withstands Constitutional Challenge in North Carolina

On February 10th, 2011 in North Carolina, Forsyth County Superior Court Judge William Z. Wood rejected a challenge to the Racial Justice Act (RJA), signed into law in August 2009. The law allows defendants who may receive or have received a death sentence to avoid execution due to racial bias in sentencing. In Forsyth County, 58 percent of death-sentenced prisoners were sentenced by juries with fewer than two people of color, compared with 40 percent statewide. Forsyth County had more black defendants with all-white juries on death row than any other county in North Carolina. Additionally, in Forsyth from 1990 to 2009, cases that involved white victims were far more likely to result in death sentences than cases that involved victims of other races.

Racial bias claims can be raised by a defendant in the pretrial conference or in post-conviction proceedings. The measure allows judges to consider whether statistical data show race to be a key factor in putting a defendant on trial for his life or receiving the death penalty. One or more of the following would constitute a violation of the RJA: death sentences were sought or imposed significantly more frequently upon persons of

one race than upon persons of another race; death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race; and/or race was a significant factor in decisions to exercise peremptory challenges during jury selection. Prosecutors have the opportunity to refute the claim that statistical disparities indicate racial bias. If racial bias is proven, a judge can overturn the death sentence or prevent prosecutors from seeking the death penalty. Proof of an RJA violation does not entitle the defendant to a new trial or a new sentencing hearing. Under the RJA, the prisoner who makes a successful claim will have his sentence commuted to life imprisonment without the possibility of parole.

There are currently 159 prisoners on death row in North Carolina, 86 of whom are black and 61 white. Since the RJA was signed into law, 154 death row prisoners in North Carolina have attempted to challenge their sentences with claims of racial bias. District attorneys across the state formed a committee to develop a cohesive strategy for prosecutors to fight the appeals. Prosecutors will argue the specifics of each case and judges will balance the evidence against county and statewide statistics.

Spotlight on Illinois

(continued from page 1)

Project Volunteer Firms in Illinois

Baker & McKenzie LLP	McGuire Woods LLP
DLA Piper LLP	Schiff Hardin LLP
Jenner & Block LLP	Segal McCambridge Singer & Mahone, Ltd.
Kelley Drye & Warren LLP	Sidley Austin LLP
Marshall Gerstein & Borun LLP	Skadden Arps Slate Meagher & Flom LLP
Mayer Brown LLP	Sonnenschein Nath & Rosenthal LLP

CONTACT THE PROJECT!

740 Fifteenth St NW, 8th Floor / Washington, D.C. 20005

Phone: 202.662.1738 / Fax: 202.662.8649 / Email: deathpenaltyproject@americanbar.org