Message from the Director

Dear Friends and Supporters:

After several years of deeply troubling developments that have threatened due process in capital cases, 2018 has been a year of remarkable progress. Despite significant ongoing challenges, including major changes to the composition of the courts, the Death Penalty Representation Project and its partners in the pro bono and capital defense communities have taken major steps toward the goal of ensuring effective representation for every person facing a death sentence.

Among this year’s successes were several victories at the U.S. Supreme Court, addressing far-reaching issues such as the availability of funding for capital habeas teams and the core requirements of the Sixth Amendment right to counsel. The October 2018 term of the Court promises to continue this active trend, with three capital cases already heard in the first two months. We have also made significant progress in the policy arena, including new state-based implementation of the ABA’s capital defense standards. On the national front, a committee of federal judges and other nationally renowned experts recently released its highly anticipated report about the administration of the Criminal Justice Act, recommending independence for the federal defender program—a critical change long called for by the Project and many others.

While we celebrate these victories for fairness and due process, we are also mindful of the challenges that remain. Certain states continue aggressive efforts to carry out death sentences, even where there is indisputable evidence of serious constitutional errors. A deeply divided Supreme Court continues to struggle with the question of whether certain methods of execution violate the Eighth Amendment, with some justices accusing their colleagues of forcing capital prisoners to make an impossible choice about how to die. This unsettled area of the law recently led to renewed use of the electric chair and has created deep ethical conflicts for defense counsel. And we know that, underlying it all, there are still thousands of people on death row who lack meaningful access to the courts because they are unable to afford a lawyer and have no constitutional guarantee of counsel.

We hope the stories contained in the pages that follow, about all these issues and much more, will inspire you to get involved with our work. If you are a lawyer and have been thinking about volunteering, please allow us the chance to show you how you can use the civil litigation skills you already have to make a difference. Lawyers and non-lawyers alike can also get involved by following us on social media, signing up for our newsletter, and helping us educate about the need for reform. And anyone can be a critical part of our work by making a financial contribution. Our continued success is dependent on the generosity of our donors, and every dollar you give goes directly to ensuring that each person facing the death penalty has a committed advocate by his side.

Please consider joining us and becoming an essential part of the fight to protect fairness and due process for the most vulnerable among us.

With thanks,

Emily Olson-Gault
Director, ABA Death Penalty Representation Project

2018 Year-End Report Includes:
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➢ Project News (p. 11)
➢ 2018 Awards Event Recap (p. 15)
You can make a difference!

Volunteer

The Project directly addresses the lack of qualified, adequately resourced defense counsel for death row prisoners by recruiting volunteer attorneys to provide pro bono death penalty representation. We have both large and small projects available and will work with you to find an opportunity that is a good fit for you and your practice. No past criminal or death penalty experience is required, and we will provide training materials and assign you a strategic advisor who has expertise in capital defense and can assist you throughout your case. For more information, please visit our website at www.americanbar.org/deathpenalty and click “Get Involved.”

Learn

Learn about the problems with death penalty representation and the ways that the Project and its partners are fostering change by signing up for the Project’s newsletters and following us on social media. You can sign up for our quarterly electronic newsletter at http://eepurl.com/bv09ij or by sending a message to deathpenaltyproject@americanbar.org. You can also follow us on Twitter at twitter.com/deathpenaltyrep.

Donate

The Project works in every active death penalty jurisdiction in the United States to recruit counsel, provide strategic assistance and litigation support, train lawyers, and engage in policy reform. This work is entirely dependent on the generosity of our donors, and it is needed now more than ever before. Your contribution ensures that we can continue our fight to guarantee due process and access to counsel for every person facing a death sentence. The Project is part of the ABA Fund for Justice & Education, a 501(c)(3) nonprofit organization, and your donation is tax deductible to the fullest extent allowed by law. To donate online, please visit https://donate.americanbar.org/deathpenaltyrep or you can mail a check* directly to:

ABA Fund for Justice & Education
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*When mailing a check to the ABA Fund for Justice & Education, please indicate the Death Penalty Representation Project as the recipient of your gift to ensure your contribution goes directly to support the Project’s work!

Thank you for your support!
In June 2018, the Committee to Review the Criminal Justice Act Program publicly released its Final Report addressing a wide range of topics related to the administration of the Criminal Justice Act (“CJA”). The CJA was enacted in 1964 to govern the appointment of indigent defense counsel in federal courts, and the last comprehensive review of its functioning took place in 1993. In 2015, U.S. Supreme Court Chief Justice John Roberts appointed a committee, chaired by Judge Kathleen Cardone of the U.S. District Court for the Western District of Texas, to conduct a new, in-depth review of the administration of the CJA.

During its two-year study period, the Committee heard testimony at a series of hearings from a wide range of individuals who work within the criminal justice system. The Committee’s 340-page Report synthesizes the large volume of information collected about the functioning of the CJA program and makes recommendations for improvements to ensure that the CJA fulfills its role in protecting the right to counsel and the effective functioning of the criminal justice system.

Although the CJA applies only to federally funded defense services, the Act’s administration plays a vital role in all capital cases. The CJA is directly implicated from start to finish in the relatively limited set of capital cases prosecuted under federal law. But capital defendants whose cases were tried in state court can seek habeas corpus relief from the federal courts, and when they do so, they are eligible for appointment of counsel under the CJA. Thus, the CJA has the potential to directly impact every capital case in the United States.

In recognition of this important role in death penalty cases, the Committee’s Report dedicates a full chapter to capital defense. With respect to counsel appointed to represent capital prisoners in federal habeas proceedings, the Report discusses a number of areas of concern. Among these is the adequacy of funding for defense teams. The Report notes that while the hourly rate for attorney time has been raised periodically over the years, funding for experts, mitigation specialists, investigators, and other supporting services is presumptively capped at $7,500—a limit that has not been increased since 1996. The Report concludes that the presumptive limit is “far too low” in light of the fact that habeas corpus “requires the investigation, or re-investigation, of matters which might have been but were not litigated at trial, on appeal, or even in the initial state habeas petition. This work,” the Committee concluded, “cannot be done without significant assistance from expert witnesses and other specialized service providers.”

The Report also discusses problems with the appointment of qualified counsel in both federal capital trials and in habeas proceedings. Judges are responsible for appointments and funding requests, but the Report observes that “[m]any federal judges are not familiar with the nature of criminal defense and are even less knowledgeable about what it takes to provide a strong defense in a
death penalty case . . . .” As a result of this lack of experience, combined in some jurisdictions with an insufficient pool of qualified attorneys, “judges often struggle with selecting and appointing the learned counsel required in direct death cases and capital habeas cases.” The lack of judicial experience can also result in improper denials of funding from judges who are “unaware of the need for extensive investigative, mitigation, and other expert assistance in both capital prosecutions and habeas petitions.”

The Report recognizes the “disastrous” consequences that result from failure to appoint qualified counsel, finding “a negative, or inverse, relationship between the attorneys’ hours on a case and their client’s risk of being sentenced to death [at trial] . . . .” This relationship holds true in habeas cases as well. The Report highlights testimony from one witness who reported that in “at least ten Texas capital habeas cases, lawyers have missed the statute of limitations — including one Houston lawyer who missed the deadline in three cases . . . [and] continued to receive federal capital habeas appointments . . . .”

The Report discusses numerous other issues with capital representation under the CJA, including insufficient training and the practice of cutting vouchers submitted for reimbursement of expenses. At a Committee hearing held in 2016, Project Director Emily Olson-Gault testified about many of these problems and the Project’s work to address them. The Report quotes Ms. Olson-Gault’s testimony about the difficulty of finding pro bono counsel to fill the gap left by the lack of qualified attorneys and funding. In her remarks to the Committee, she made clear that pro bono representation cannot serve as a substitute for a well-functioning system of indigent defense.

Focusing on potential solutions to these widespread issues, the Report praises the model of Capital Habeas Units (“CHUs”), which “provide zealous and effective representation” and “do not need to seek judicial approval for needed expert and other services.” The Report found that “CHUs are uniquely qualified to accept and effectively represent death penalty habeas clients while keeping costs lower than those expended on private attorneys providing commensurate representation.” The Report cautions, however, that the mere creation of a CHU is insufficient without the necessary staffing and funding.

Along with the Report, the Committee issued a number of “interim” recommendations, including the creation of additional CHUs, elimination of presumptive budget caps, and increased judicial training on the requirements for the defense effort in capital cases.

The Committee’s primary recommendation, however, is an overarching structural change that would grant independence to the federal defender program through creation of an independent Federal Defender Commission. This new commission would remain located within the judicial branch of the federal government, but would move outside the control of the Judicial Conference. The creation of the commission would, in the view of the Committee, remove the need for many of the interim recommendations, although some would remain “useful guidance even to a fully independent entity.”

The impact of the Committee’s interim recommendations can already be seen in the area of capital defense with the opening of new CHUs in Texas and Florida—two of the most active death penalty states in the country. Several other recommendations, as well as the major structural change recommended by the Committee, remain under consideration.

The full report, along with videos and transcripts of the hearings and a library of related resources, is available on the Committee’s website at https://cjastudy.fd.org.
In October 2018, the Washington Supreme Court found that the state’s death penalty is unconstitutional, making Washington the 20th state without capital punishment. The case, State v. Gregory, raised issues of racial bias in the capital punishment system, but the court noted that its decision was also based on the “arbitrary manner in which the death penalty is generally administered.” Chief Justice Fairhurst, writing for the court, explained that “the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant.” The court also held that the death penalty serves no legitimate penological goal. No justices dissented from the decision, with Justice Johnson filing a concurrence joined by two others to provide even more reasons why he would find the death penalty unconstitutional. As a result of this decision, all eight men currently on Washington’s death row will have their sentences commuted to life in prison.

Following the court’s decision, Governor Jay Inslee said that he would veto any bill that attempted to reinstate the death penalty by amending the statute and will propose legislation that would formally remove the death penalty from state law.

Several other states have grappled with the question of death penalty abolition this year. In New Hampshire, the governor vetoed an abolition bill that made it to his desk, and in Utah and Louisiana, bills failed to gain the necessary support to move forward. 30 states, plus the federal government and the U.S. Military, currently have the death penalty, although only eight states carried out executions in 2018.

The state of Tennessee carried out two executions by electric chair in 2018, the first state to do so since Virginia in 2013. Nine states currently authorize the electric chair as a method of execution, although lethal injection is the default method of execution in all those states. Lethal injection has been the subject of intense debate and frequent legal challenges for many years, as commercial drug manufacturers have refused to allow their drugs to be used in executions, and states have turned to loosely regulated private compounding pharmacies or experimental drug combinations to carry out their executions. There have also been numerous reports of “botched” executions by lethal injection, including several where the prisoner appeared to be conscious and suffering long after the drugs should have taken effect. The U.S. Supreme Court rejected a lethal injection challenge in 2015, holding that prisoners wishing to bring a challenge to a method of execution must first identify an “available alternative method.” Under that rule, the Tennessee prisoners elected to be executed by electric chair rather than risk “torturous” death by lethal injection, but also asked the Supreme Court to intervene, arguing that the electric chair was not an acceptable alternative. The Court declined to stop the executions, with Justice Sotomayor dissenting both times. The second time, she wrote that “electrocution can be a dreadful way to die” but that the prisoners had elected it anyway “against the backdrop of credible scientific evidence that lethal injection . . . may well be even worse.” She chastised the Court for forcing prisoners to make such a choice, saying that the situation is a “byproduct” of the Court’s 2015 decision requiring prisoners to elect an alternate method and concluding that “[s]uch madness should not continue.”
Court Upholds Capital Defendant’s Right to Assert Innocence at Trial

On May 14, 2018, the U.S. Supreme Court issued its opinion in *McCoy v. Louisiana*, a capital case concerning a defendant’s right to assert his innocence, even when trial counsel recommends conceding guilt. With Justice Ginsburg writing for the majority, the Court held that death-row prisoner Robert McCoy’s Sixth Amendment rights were violated by his attorney’s statements to the jury that Mr. McCoy was guilty of murdering the victims, over his client’s repeated explicit instructions not to do so. The trial attorney argued that the admission of guilt was in the client’s best interest, reasoning that it was better to focus instead on seeking mercy during the punishment phase of trial. The Court rejected this justification, finding that where a defendant has explicitly communicated to his attorney that he does not wish to concede guilt—and the attorney disregards these explicit wishes—the defendant has been deprived of his constitutional right to counsel. Justice Ginsburg wrote, “With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.” Unlike in most cases challenging the performance of counsel, the Supreme Court found that Mr. McCoy was not required to show that his counsel’s error likely affected the outcome of the trial. Instead, the Court held that counsel’s admission of guilt constituted structural error entitling Mr. McCoy to a new trial without the need to show prejudice. In dissent, Justice Alito, joined by Justices Thomas and Gorsuch, first noted that counsel for Mr. McCoy had not admitted his client was guilty of first-degree murder as charged, but rather only conceded that he had factually killed the victims; and second, that the scenario presented by the case was so rare as not to warrant Supreme Court review. The ABA filed an amicus brief in support of Mr. McCoy, arguing—as the majority would later hold—that under these narrow circumstances, the client has the authority to determine whether to concede guilt, and that the actions of Mr. McCoy’s trial counsel violated his Sixth Amendment rights.

Court Unanimously Rejects Fifth Circuit’s Circular Requirements for Providing Investigative Funds to Defense Teams

On March 21, 2018, in a rare unanimous decision in a capital case, the Supreme Court issued its opinion in *Ayestas v. Davis*, with Justice Alito writing for the majority. *Ayestas* concerned a federal district court’s denial of a defense motion for investigative funding under a federal statute, 18 U.S.C. § 3599(f). Counsel for Mr. Ayestas requested the funds to develop evidence that would demonstrate prior counsel’s ineffectiveness at trial. Trial attorneys conducted almost no investigation into Mr. Ayestas’s background and spent only two minutes making the case for why he should not be sentenced to death. During state habeas review, attorneys also failed to conduct a proper mitigation investigation, and in so doing waived viable claims of trial counsel ineffectiveness. Such waived claims are typically barred from further consideration by the courts, but the Supreme Court’s 2012 decision in *Martinez v. Ryan* created a path to overcoming these procedural bars. In order to take advantage of *Martinez*, however, Mr. Ayestas would have to show that his state habeas counsel were also ineffective for failing to raise claims of trial counsel’s ineffectiveness. In order to make this showing, Mr. Ayestas would need to introduce the evidence that trial counsel should have developed to present to the jury. Development of such evidence requires the assistance of experts and investigators to conduct a proper mitigation investigation. Mr. Ayestas’s habeas counsel requested funding for these services, but that request was denied by the Texas district court, using the Fifth Circuit’s circular requirement
Microfinance: A Pathway to Financial Inclusion in Developing Countries

Microfinance is a significant approach in the global financial landscape, particularly for those who lack access to traditional banking services. It is a small-scale lending practice that aims to provide financial services to the underserved population, often found in rural areas. This service is typically provided by non-bank financial institutions (NBFI) such as microfinance institutions (MFIs). MFIs offer a range of services including loans, savings accounts, and insurance products to help individuals and small businesses to improve their financial well-being and achieve their economic goals.

Microfinance has the potential to contribute to poverty reduction, economic growth, and gender equality. It is particularly crucial in developing countries where traditional banking institutions may not reach the rural areas and where formal financial services are often inaccessible. By offering microloans to individuals, especially women, MFIs provide them with access to capital, enabling them to start or expand small businesses. This, in turn, can lead to increased income generation, reduced poverty, and improved living standards.

The success of microfinance initiatives is contingent upon several factors, including the quality of the loan product, efficient management, and the appropriate use of funds by borrowers. Furthermore, regulatory frameworks and policies that support microfinance can significantly enhance its impact. While microfinance has shown remarkable success in many countries, challenges such as the high default rates, lack of collateral, and the need for improved financial management practices remain to be addressed.

In conclusion, microfinance is a crucial tool in achieving financial inclusion. It offers significant opportunities for poverty alleviation and economic development, particularly in rural and underserved areas. To maximize its impact, further research and policy interventions are needed to ensure that microfinance services are accessible, affordable, and sustainable for all members of the population.

References:


**Bucklew v. Precythe, No. 17-8151**

In *Bucklew v. Precythe*, the Supreme Court took up the latest in a line of capital cases challenging a state’s method of execution. Unlike other recent cases that questioned whether certain methods of execution are inherently unconstitutional, Missouri death row prisoner Russell Bucklew challenged the state’s lethal injection protocol as it applies to his unique medical circumstances. Mr. Bucklew suffers from a rare, debilitating medical condition known as cavernous hemangioma that could cause him to experience extreme suffering during the lethal injection process. The Court agreed to review a number of questions raised by the case, including whether Mr. Bucklew must propose an alternative method of execution in order to bring the challenge; if so, whether he met his burden to establish the existence of the alternative method; whether the Court should assume that the state personnel conducting the execution would be competent to carry it out; and what evidence is needed to establish that one method of execution carries less risk of suffering than another.

During oral argument on November 6, 2018, the Court focused primarily on the questions of whether Mr. Bucklew had shown that he would experience extreme suffering during any lethal injection procedure and whether the proposal of an alternative method that has not yet been used by any state could constitute a viable alternative method. Justice Sotomayor sharply questioned counsel about Mr. Bucklew’s current medical status and whether any decision in the case would be solely advisory given the possibility that the condition might change. Justice Roberts, meanwhile, questioned whether Mr. Bucklew’s proposed alternative method of execution—nitrogen hypoxia—was actually an “available” method, given that no state has yet used it. Justice Kavanaugh, meanwhile, expressed considerable skepticism in response to the State’s assertion that even if a method of execution were to create brutal and gruesome pain for the prisoner, it would nonetheless be constitutional if there was no other alternative. As with prior cases challenging methods of execution, the opinion will likely reflect the significant divisions in the justices’ views on the Eighth Amendment and capital punishment.

**Madison v. Alabama, No. 17-7505**

Vernon Madison is on death row in Alabama for the 1985 murder of a police officer: a crime which, due to a series of strokes and the development of vascular dementia, he is wholly unable to remember committing. On October 2, 2018, the U.S. Supreme Court heard arguments about whether Mr. Madison is competent to be executed. Past Supreme Court decisions have held that it violates the Eighth Amendment to execute someone who is “insane,” or someone who is so mentally ill as to be unable to rationally comprehend the reasons for his execution.

Mr. Madison is routinely unable to remember where he is or why he is facing the death penalty. When told that he is on death row for committing this crime, Mr. Madison can temporarily understand why the State intends to execute him, but he quickly forgets this information. He is constantly “disoriented as to time and place,” “cannot remember the alphabet past the letter G,” and sometimes soils himself because he cannot find the toilet next to the bed in his cell.

During oral arguments, Mr. Madison’s counsel—Equal Justice Initiative founder and director Bryan Stevenson—conceded that it is not enough that a prisoner simply be unable to remember the commission of a crime but argued that the Eighth Amendment prohibits execution of someone whose mental and physical deterioration has left him so fragile and vulnerable that, in addition to not remembering the crime, he is unable to orient himself to time and place. Mr. Madison, his attorneys argue,
may not be technically “insane” or incapable of understanding why the State intends to execute him; but he is nonetheless the type of individual that the Eighth Amendment shields from execution. During oral argument, Mr. Stevenson told the Court, “The 8th Amendment isn’t just a window. It’s a mirror. And what the court has said is that our norms, our values are implicated when we do things to really fragile, really vulnerable people. And what we’ve argued is that dementia in this case renders Mr. Madison frail, bewildered, vulnerable in a way that cannot be reconciled with executing him because of his incompetency.”

In response, the State argued that vascular dementia and strokes could be sufficient to render someone incompetent to execute, but because Mr. Madison was able to rationally understand why the State intended to execute him, he did not fall within the narrow category of individuals that are exempt from execution under the Eighth Amendment.

**Carpenter v. Murphy, No. 17-1107**

On November 27, 2018, the Supreme Court took up an unusual question in a capital case: whether the state of Oklahoma lacked jurisdiction to prosecute capital defendant Patrick Murphy. Mr. Murphy, who is a member of the Muscogee (Creek) Indian Nation, was convicted of the murder of George Jacobs, also a member of the Creek Nation, in Oklahoma state court. In federal habeas proceedings, Mr. Murphy’s lawyers argued that the state lacked jurisdiction to prosecute the crime because it occurred on land belonging to the Creek Nation. They introduced evidence that the land in question belonged to the Creek Nation, based on boundaries set in 1866 which were never formally disestablished by Congress. As a result, they argued, any murders that took place in that territory involving one or more members of the Creek Nation would be subject to exclusive federal jurisdiction. A host of other civil and criminal laws and regulations would also potentially be affected by the jurisdictional question, as the disputed territory spans nearly half the state of Oklahoma and is home to roughly 1.8 million people.

During oral argument, the justices appeared skeptical of the State’s argument that disestablishment of the Creek Nation had taken place due to the termination of tribal sovereignty over several years. Justice Kagan, along with Justices Breyer and Sotomayor, seemed especially critical of the State’s claim that de facto dissolution of tribal sovereignty was sufficient to constitute formal disestablishment. Several justices, however, appeared concerned with the potential destabilizing impact ruling in favor of the Creek Nation would have on the people within the disputed territory. Justice Breyer remarked that the millions of people living within the boundaries, “have built their lives . . . on municipal regulations, property law, dog-related law, thousands of details. And now, if we say really this land, if that’s the holding, belongs to the tribe, what happens to all those people? What happens to all those laws?”

Attorneys for the Creek Nation challenged the notion that the decision would have a widespread impact, arguing that destabilizing effects could be mitigated through routine agreements between the state, the Creek Nation, and the federal government. Shortly after hearing arguments, the Supreme Court requested additional briefing from the parties to address whether Oklahoma could theoretically retain jurisdiction over criminal prosecutions that took place in the territory at issue, even if the Court were to rule that the Creek Nation had never been formally disestablished.
Notable Petition: Moore v. Texas

Last year, the Supreme Court issued its decision in Moore v. Texas, invalidating the process by which Texas state courts assessed intellectual disability in capital cases. Writing for the Court, Justice Ginsburg found that the so-called “Briseno factors” impermissibly relied on lay stereotypes about individuals with intellectual disabilities, wrongly emphasized adaptive strengths rather than deficits, and too heavily focused on improved performance while in prison—all contrary to accepted scientific standards for assessing intellectual disability. As a result, there was an impermissible risk that individuals who are in fact intellectually disabled according to scientific diagnostic measures would nonetheless be subject to execution under the Briseno framework, and therefore, the test was unconstitutional. The Court’s 2017 decision reversed the decision of the Texas Court of Criminal Appeals (CCA) denying relief to Texas death row prisoner Bobby Moore and remanded for further proceedings consistent with the opinion.

Armed with this decision, pro bono attorneys for Mr. Moore, led by Skadden partner Cliff Sloan, returned to the CCA to secure a life sentence for their client. In light of the Supreme Court’s decision, the District Attorney conceded that Mr. Moore was intellectually disabled and therefore ineligible for execution. In June 2018, however, the CCA again ruled that Mr. Moore was not intellectually disabled and denied the requested relief from his death sentence. While acknowledging the Supreme Court’s decision prohibiting use of the Briseno factors, the CCA continued to look to many of the same lay stereotypes that formed the basis for the Briseno factors and relied on a State expert’s evaluation conducted in 2015. That evaluation, which concluded that Mr. Moore is not intellectually disabled, was conducted prior to the Moore decision, and was therefore also based on the Briseno factors.

As a result of the CCA’s refusal to accept the consensus of all parties that he is intellectually disabled, Mr. Moore was forced to again turn to the Supreme Court for relief. In his new petition seeking review, Mr. Moore also requested summary reversal of the CCA’s ruling in light of the Court’s 2017 decision. The ABA submitted an amicus brief in support of this request, arguing that the CCA’s most recent ruling again impermissibly invokes the specter of the Briseno factors in determining that Mr. Moore is not intellectually disabled. The ABA brief also discussed the important rule of law principles implicated by the CCA’s apparent disregard for Supreme Court precedent.

Other legal scholars and groups have joined the call for the Court to grant the petition and summarily reverse the CCA’s latest decision, including Kenneth Starr, who served as Solicitor General under President George H.W. Bush. Mr. Starr also authored an op-ed in The Washington Post urging the Court to reverse the decision. He wrote, “For our system to work, the Supreme Court must make sure that its rulings are respected and faithfully applied. In this case, I hope the Supreme Court will act to correct the Texas court’s fundamental error, especially since Moore faces the most extreme punishment our government can impose.”
Hofstra Law Review Marks 15th Anniversary of the ABA Guidelines

This summer, the Hofstra Law Review published a Symposium entitled “Effective Capital Defense Representation, The ABA Guidelines, and the Twilight of the Death Penalty,” marking the 15th anniversary of the publication of the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases. The Guidelines, first published in 1989 and updated in 2003, set forth a national standard of care for the capital defense effort and have been used throughout the United States to assess the performance of capital defense counsel. Nationally recognized death penalty defense experts, including Project staff members, wrote articles about how the Guidelines have been used and implemented in the 15 years since their publication and discussed the challenges that capital defense teams face today.

Reclaiming Van Hook: Using The ABA’s Guidelines And Resources To Establish Prevailing Professional Norms

One article in the symposium, authored by Project Director Emily Olson-Gault and entitled “Reclaiming Van Hook: Using The ABA’s Guidelines And Resources To Establish Prevailing Professional Norms,” examines how the Guidelines have been used by the courts, challenges facing capital defenders trying to use the Guidelines, and resources provided by the ABA that can help.

In 1986 in Strickland v. Washington, the U.S. Supreme Court established a two-part test for assessing effective representation: 1) whether counsel’s performance fell below prevailing professional norms; and 2) whether counsel’s deficient performance prejudiced the client. The Supreme Court, along with hundreds of state and federal lower courts, has repeatedly turned to the Guidelines as a benchmark against which to measure the first prong of the Strickland test. In 2009, however, the Court issued a per curiam decision in Bobby v. Van Hook that injected significant uncertainty into an expansive body of case law that looked to the Guidelines. In Van Hook, the U.S. Court of Appeals for the Sixth Circuit found that Robert Van Hook’s counsel were ineffective at the penalty phase of his 1985 capital trial. Counsel did not start preparing the crucial “mitigation” case for why their client should not receive the death penalty until the guilt phase of trial had already concluded. This resulted in a “cursory” mitigation investigation that was “never finished.” The Sixth Circuit compared counsel’s performance to the standards set forth in the 2003 ABA Guidelines, which call for an “extensive and generally unparalleled investigation into personal and family history, as well as school, medical and psychological records.” Finding that counsel had clearly fallen short of these norms, and concluding that this deficient performance prejudiced Mr. Van Hook, the court ruled that Mr. Van Hook was entitled to a new sentencing hearing. The State of Ohio sought review of this decision in the U.S. Supreme Court, which—without hearing oral argument—reversed the decision of the Sixth Circuit.

The Court held that use of the 2003 Guidelines as evidence of prevailing professional norms at the time of Mr. Van Hook’s 1985 trial, without stopping to consider whether those norms existed in 1985, was error.

Since this decision was issued, lower courts have diverged wildly in their use of the Guidelines, particularly as they relate to counsel performance that occurred before the Guidelines were published. Some have continued to use the Guidelines as before, simply taking the extra step—as directed by the Court in Van Hook—to examine whether the norms in the Guidelines existed at the time of trial;
some have limited use of the Guidelines only to evaluate performance that occurred after the date of publication; and some have—without basis—dismissed the relevance of the Guidelines entirely.

The Death Penalty Representation Project has created a number of resources to assist practitioners with the challenges created by the Van Hook decision, including a massive online database of historical capital defense standards, training materials, and articles that can be used to support the existence of norms at the time of the challenged performance, along with an interactive version of the Guidelines that allows for easy tracking of the underlying authority for the norms set forth in the Guidelines. “Reclaiming Van Hook” details information about these resources and sets forth the strong argument for the continued relevance of the Guidelines, even as applied to counsel performance that occurred prior to their publication.

The Ethical Argument for Funding in Clemency: The ‘Mercy’ Function and The ABA Guidelines

Also included in the Symposium is an article by Project Staff Attorney Laura Schaefer, “The Ethical Argument for Funding in Clemency: The ‘Mercy’ Function and The ABA Guidelines,” concerning the difficulty many capital practitioners face in securing adequate funding for clemency and the ethical dilemma this can cause for practitioners. In particular, the article looks at the 2003 ABA Guideline 10.15.2, which outlines the duties of counsel in clemency proceedings.

In thinking about the funding needed to adequately perform clemency representation, Guideline 10.15.2(B) is especially relevant, as it requires that clemency counsel conduct a thorough and independent investigation consistent with Guideline 10.7. The scope of this investigation is expansive, and in the clemency context potentially even more so, because in addition to all the matters that must be investigated leading up to post-conviction proceedings, the post-conviction proceedings themselves must be reviewed and incorporated when investigating a case in clemency.

Additionally, clemency representation requires counsel to familiarize themselves with the state’s unique clemency process and decision maker and, as set forth in Guideline 10.15.2(D), seek judicial redress if the process is not substantively and procedurally just. For attorneys who are performing clemency representation for the first time or are undertaking clemency representation outside the jurisdiction in which they typically practice, these demands—together with the requirement to conduct a thorough investigation—require extensive preparation and work on the part of the attorney, which in turn requires significant financial resources.

Ms. Schaefer’s article looks at some of the reasons that courts and other entities may be reluctant to allot significant funding for clemency, specifically examining the tension between clemency’s traditional function as an extra-judicial “act of grace” and its significant role in the outcomes of many capital cases today. Additionally, the article examines Harbison v. Bell, where the Supreme Court decided that Congress intended to make federal funds available for clemency representation. Despite this guidance, however, lower courts have remained reluctant to fund attorneys’ work in this area commensurate with what the ABA Guidelines require of clemency counsel, thus creating a potential ethical conflict for attorneys.

The article closes with an examination of three different models under which clemency is currently funded—1) the federal funds model; 2) the state funds model; and 3) the institutional defender model—and concludes that the institutional defender model is the best for avoiding potential ethical conflicts created by a lack of funding. Where attorneys are subject to funding decisions by either the federal courts or state entities, the article argues, attorneys should point to the ABA Guidelines, as well as the Supreme Court’s decision in Harbison, to support the need for funding sufficient for representation consistent with the attorney’s professional obligations.

In April of this year, the Project’s Capital Clemency Resource Initiative (CCRI) officially launched its clemency resource website to the public and announced the publication of its new book, Representing Death-Sentenced Prisoners in Clemency: A Guide for Practitioners.

The book represents a start-to-finish guide to thinking about and preparing for clemency representation in capital cases, whether as a private attorney, a pro bono volunteer, or a seasoned capital defender. While clemency is an inherently unpredictable and discretionary process—which can make engaging in clemency representation daunting and even frustrating for attorneys—it is also an incredibly important part of a death penalty case. If approached thoughtfully and with the same amount of planning and strategizing that goes into preparing capital cases for review in other parts of the legal process, it can significantly increase the chances of saving a client’s life. Indeed, in 2018, there have been three individual grants of clemency amid 23 executions—a clemency grant rate of about 13%. In the 1990s and 2000s, by contrast, the rate of individual clemency grants was down to about 4%. This change may signal that decision makers are once again beginning to exercise their power to intercede in executions.

Representing Death-Sentenced Prisoners in Clemency covers topics such as preliminary planning in a capital clemency case; contemplating victim and juror outreach; discussing clemency with your client; identifying potential messengers for your clemency campaign; and thinking about how to involve media in advocating for your client.

The CCRI also launched its resource website at the same time as the book was released. The website’s public pages include state-by-state clemency process information, which will continue to be expanded in 2019, as well as public clemency statements, decisions, petitions, and other resources. Over the summer in 2018, the CCRI also published more than a dozen mental health fact sheets that were assembled with the generous assistance of the Bazelon Center for Mental Health Law. These fact sheets are available to the public and represent a snapshot into current medical and scientific understanding of many of the mental illnesses and disabilities that may be present among individuals on death row. All of the information that is available on the site has been tagged for subject matter and is fully searchable using keywords or by navigating through the toolbars at the top of the page. The CCRI is adding new resources to the website on a regular basis, and the homepage to the site displays a ticker with the resources most recently added.

For practitioner users, who can gain access to the resource-restricted areas of the site by requesting login permission on the homepage, the website also includes conference materials relating to capital clemency representation; clemency applications and supplementary materials that are not otherwise publicly available but have been shared by practitioners for publication on the site; strategic materials for thinking through discrete aspects of the clemency process (such as bringing court challenges, securing funding, and conducting juror and victim outreach); and a downloadable PDF of Representing Death-Sentenced Prisoners in Clemency.

To see the resources and learn more about the CCRI, visit www.capitalclemency.org.
Project Urges Adoption of Capital Defense Standards in Nebraska

On September 7, 2018, the Judiciary Committee for the Nebraska Unicameral Legislature heard testimony regarding LR406, an interim study to examine statutory adoption of the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases in Nebraska. Project Director Emily Olson-Gault submitted written testimony and also appeared before the Committee to answer questions from the Committee members. Other witnesses included UMKC Law School Professor Sean O’Brien, Nebraska Commission on Public Advocacy chief counsel Jeff Pickens, and the bill’s sponsor, Senator Adam Morfeld.

Nebraska’s Republican-held legislature overrode a gubernatorial veto to abolish the death penalty in 2015, only to have it reinstated after a 2016 voter referendum that has since been the subject of numerous legal challenges. The Committee acknowledged that Nebraska voters have chosen the death penalty but said that it must be administered fairly. The Committee appeared particularly concerned that Nebraska currently has no capital defense standards in place. Senator Morfeld noted that the Commission on Public Advocacy developed standards in 2002 but that they have never been used. Senator Patty Pansing Brooks expressed clear support for implementation of capital defense guidelines, saying, “Should there be standards? Absolutely. Should we be using the best practices possible? Yes. Should we have the lawyers who are the most prepared? Yes.”

The senators questioned Ms. Olson-Gault at length about the key requirements of the ABA Guidelines and why having an adequately resourced defense team with the proper training and experience is critical to achieving reliable outcomes in capital cases. She discussed the more than 150 people who have been exonerated after being sentenced to death, many only after decades of expensive post-conviction litigation. Such costly errors could be minimized by providing the proper resources from the start of a capital case.

Ms. Olson-Gault’s written testimony described in detail how the Guidelines were created, including the involvement of a broad spectrum of actors from within the criminal justice system and their 2003 approval, without dissent, by the ABA House of Delegates. Since that time, she wrote, the Guidelines have been used in nearly 400 published court opinions, from courts at every level, to assess the performance of defense counsel in capital cases. The Guidelines have also been adopted by regulation or statute, by state and local bar associations, or by court rule in 18 states, including Texas, Kansas, Montana, and—most recently—Idaho.

The Nebraska Legislature is expected to take up the question again when it enters regular session in early 2019.
The Project presented its Exceptional Service and Guiding Hand of Counsel awards to volunteer firms Crowell & Moring LLP and Orrick, Herrington & Sutcliffe LLP, and volunteer attorney Gwendolyn Payton, at its annual Volunteer Recognition & Awards Event on September 20, 2018. Former death row prisoner Joseph Giarratano provided keynote remarks, speaking about his lifelong quest to improve access to counsel and the lifesaving work of pro bono attorneys. Pictures and video of the event, as well as additional information about the award winners, can be found at http://ambar.org/2018awards.

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