FIGHTING FOR LIFE AND JUSTICE IN ALABAMA: OBSERVATIONS FROM THE FRONT LINES

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I am the Co-Chair of the Intellectual Property Section at Pillsbury Winthrop LLP. My office is in Palo Alto, California and I work with a group of more than 200 Pillsbury lawyers around the world. I represent clients involved in disputes related to patents, trade secrets, copyrights, and trademarks. My clients are start-ups, mature public companies, educational institutions, and individuals. These cases usually are disputes over the ownership or use of ideas that are the core of their business. Quite often, these cases are “corporate death penalty” cases. If the client loses the intellectual property that is the basis for its existence or is found to be violating someone else’s rights, it could go out of business. I am the client’s counselor and trial lawyer in helping them to survive and grow.

In addition to “corporate death penalty” cases, I am very busy on real death penalty work. I represent two men in Alabama whose trials and convictions are, we believe, constitutionally defective, and on whose behalf we have filed petitions for relief under a “Rule 32” petition, Alabama’s equivalent of a habeas proceeding.1 I am grateful for the opportunity to share these experiences with you. It allows me to highlight the extraordinary rewards of such an experience.

How I Got Started

I have always believed that there is no endeavor more important or noble for a lawyer than to fight for a person’s life. This belief, like many lawyers my age (49), was inspired by the well-known book To Kill A Mockingbird.2 The depiction of the lawyer Atticus Finch struggling against injustice and prejudice was extremely moving, particularly in the context of the civil rights movement and the struggles in the South that dominated the news of my youth. Indeed, the news was replete with images of towns like Birmingham and Selma, Alabama; Philadelphia and Oxford, Mississippi; and countless other places in the South where people demonstrated extraordinary courage and, in some cases, paid for this courage with their lives. I admired and envied the bravery of those who fought for justice. The landscape of the region and the times were engraved indelibly in my mind and heart.

I therefore went to law school intending to go into public service or possibly to teach. Instead, I ended up in a large firm and discovered that I liked working with interesting businesses and the people who run them. Protecting their rights and livelihoods against claims made by others is intellectually challenging and professionally satisfying. Despite this unexpected professional discovery, the

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1. ALA. R. CRIM. P. 32.

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lessons of my youth and desire for change remained. Consequently, I became active in pro bono work. In doing so, I focused my efforts on cases involving children whose interests are often, if not usually, without a voice in the legal system. Soon, I was involved in several significant cases, two of which were considered by the Supreme Court. My pro bono case load consisted of nearly 1000 hours a year, in addition to a full billable load. In spite of the demands on my time, I found the more I did pro bono work, the better and happier lawyer I was. While this work was satisfying, I still always thought about taking on a death penalty case, but believed it was too burdensome and impractical.

That opportunity came in late 1998 while I was immersed in a difficult and complex international patent case. The case was heading for a resolution after several years of intense litigation, and I faced the prospect of having extra time on my hands when it concluded. I realized that I needed a new challenge in a new area. I felt myself getting dull from the consuming technical case that was going to be wrapping up in the months ahead. Concurrent with that, a good friend and former partner of mine, Jon Streeter, had just achieved a great victory on a habeas case he had worked on for nearly 15 years. I greatly admired Jon's steadfast resolve in his many years of toil and setbacks for a convicted murderer. I began to consider whether I could take on a case like his.

Coincident with these events, my son was working on a school project involving the death penalty, and his class, which was considering the book and movie Dead Man Walking, asked me to help them understand the legal context of capital punishment. My research for the class further piqued my interest in the subject, solidifying my commitment to working on a death penalty case. Therefore, I started scouting for opportunities to get involved in a capital case.

Stephen Bright provided the opportunity I was searching for. I read an article that appeared in the National Law Journal that featured Stephen Bright, the head of the Southern Center for Human Rights in Atlanta. The article profiled Steve on the occasion of his receiving the American Bar Association's Thurgood Marshall Award, which is the legal analog to the Nobel Peace Prize. The article detailed Steve's remarkable career. It showcased his selfless dedication to representing condemned men and women on death rows, people who were innocent or clearly incompetent to stand trial, and people who often had pathetically incompetent counsel. I was so overwhelmed with Steve's courage, skill, and wisdom that I wrote him a fan letter. In the letter, I congratulated him on receiving the Award and told him how much I admired him and his life's work. I concluded the letter by offering my assistance. Although I had no idea how a lawyer in California could be of help in his cases in the South, I said that, if I could possibly provide any pro bono assistance, I'd be happy to help.

6. Id.
A few days after I sent the letter I was in my office meeting with my client in the patent case I mentioned earlier, discussing a settlement proposal that was in the final stages. While my client reviewed a draft agreement, I looked at my e-mails and saw that one had just arrived from Steve Bright. I opened it and read Steve's message. It began by thanking me for my kind words. Then, to my surprise, he wrote, of course your help is needed on cases in the South. In a few minutes, the email continued, you are going to get a call from a person named Lis Semel, who is the Director of the ABA Death Penalty Representation Project in Washington, D.C. Her role, the email explained, is to obtain representation for men and women on death rows. Ironically, the letter concluded, she happens to be in San Francisco today, and I hope you have a few minutes to talk with her.

Within minutes after receiving the e-mail, my phone rang. It was indeed Lis. She was outside my office building and wanted to stop in and talk. I explained the situation to my client, who, knowing me well, said that he knew I would end up taking a case. I then arranged to visit with Lis. I learned from her that the ABA, recognizing the crisis of indigent men and women convicted of capital murder and sentenced to death, had formed the Death Penalty Representation Project in Washington, D.C. To combat the crisis, the ABA recruits lawyers and law firms to represent these individuals in post-conviction challenges as permitted by the Constitution. Lis, one of California's premier criminal defense lawyers, recruited by then ABA President Larry Fox to come to Washington to be the first Director of the Death Penalty Representation Project because of her expertise on death penalty matters, was sitting in my office to convince me to get involved. Lis was in California, making the rounds of firms to get them interested in taking on cases in Alabama, Mississippi, Texas, Georgia and other places where the need was greatest.

During our meeting, Lis outlined the details of the commitment. She explained to me, for example, that taking an Alabama case was quite different from a California death penalty case. Unlike a typical California case after all direct appeals are exhausted, where an enormous record would have been generated, a typical Alabama case would have a record that might fit into a box, maybe two. She further explained that many of the Alabama cases had had virtually no work done on them during trial and direct appeal. In fact, the lawyer doing the post-conviction phase was often presented with a blank slate in terms of investigation and strategy. The key to most of the cases, she concluded, was proving ineffective assistance of counsel under the Sixth Amendment. 7

After considerable discussion with Lis about the scope of the task, my firm generously allowed me to take on a case. Once the decision was made, we began the process of deciding what case to take. Ultimately, we decided on Jimmy Davis.

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Because the case, *Jimmy Davis, Jr. v. State of Alabama*, is still pending, I am unable to offer detailed information about our selection of the case.

Here is what I can tell you. One of the first things I did was to go to my dear and trusted friend and mentor, Jack Lahr of Foley & Lardner in Washington. I asked him if he would co-counsel the case. Jack had worked on the previously mentioned patent case with me, and I knew I was going to miss working with him. He was a professional and personal mentor to me, and I had much more to learn from him. Thankfully, Jack agreed. He enlisted a young associate, Joy Langford, to his Foley team. I also enlisted a young associate at my firm, Nicole Townsend, who became our key "go to" person on the Pillsbury team. We also received major support from the Bradley Arant firm in Birmingham; specifically, we are indebted to Paul Ware, Rich Sharff, John Harrell, and Hope Stewart for their invaluable contributions.

We began our work on Jimmy's case in early 1999 and had our Rule 32 hearing in August 2002 in Calhoun County Circuit Court in Anniston, Alabama. The hearing consisted of a week of testimony by both expert and fact witnesses. The hearing was the culmination of several years of hard work in learning everything about the trial, the events leading up to and after the shooting, and the psycho-social history of Jimmy's family going back over one hundred years. The case is under submission. I therefore must decline comment on our strategy and work product. What I can comment on, however, is the significance of the experience.

It was overwhelming to be with our client, Jimmy, for the week of the hearing and most of the preceding week. He was transferred from Holman State Prison in Atmore, Alabama to the county jail in Anniston for the week of the hearing. At the Anniston jail, we worked with him to prepare for the hearing. We had, of course, met with Jimmy many times at Holman during the years leading up to the hearing, but this was our first chance to see and talk with him everyday. Representing Jimmy in that courtroom every day was one of the most intense and penetrating personal experiences of my life. The stakes were and still are unspeakably high. Similarly, the drama and emotion were profoundly powerful. We had to confront the lawyer who was Jimmy's appointed defense counsel during his trial, a lawyer who we accused of being wholly and constitutionally ineffective in his defense of Jimmy. That lawyer also happened to be, nine years after the trial, the district attorney in the adjoining county. Enhancing the intensity of the courtroom experience was the fact that the brother of the man who Jimmy was convicted of shooting sat through most of the hearing. Encountering him released a flood of powerful emotions. He firmly believed that my client had murdered his brother, a service station attendant, in cold blood and should be punished by execution. Conversely, I firmly believed that Jimmy had inadequate counsel at trial, that Jimmy was innocent, and that Jimmy,

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8. The citations to the Jimmy Davis, Jr. case are as follows: the original conviction and trial was in the Calhoun County Circuit Court in 1993. The affirmation of his conviction and sentence by the Alabama Court of Criminal Appeals is reported at *Davis v. State*, 718 So. 2d 1148 ( Ala. Crim. App. 1997). The Alabama Supreme Court's affirmation of the lower courts is reported at *Ex parte Davis*, 718 So. 1166 (Ala. 1998). The United States Supreme Court denied certiorari at *Davis v. Alabama*, 529 U.S. 1179 (1999). The post-conviction relief proceedings are pending in Calhoun County Circuit Court under Case No. CC-93-534.60.

9. No. CC-93-534.60 (Calhoun County Cir. Ct.).
in any event, had many mitigating factors that should have precluded imposition of the death penalty.

A few side notes about the positive aspects of the hearing are warranted. First, we were all very impressed by the professionalism and courtesy that all the Court staff showed us. The Court, the clerks, and the staff were extremely helpful, welcoming, and accommodating to us. This was so much appreciated, particularly when we were trying a hard case for an extended time a long way from home and office. Second, the Courthouse in Calhoun County, well over one hundred years old and beautifully restored, was an aesthetic marvel. In fact, it is one of the nicest places where I have tried a case. It is a restored building that looks like a courthouse should look, and the courtroom itself is elegant and majestic. The judges and lawyers of Calhoun County are lucky to have such a venue in which to practice.

Next Case

After Jimmy’s case was argued, we knew that the next phases of his case would be “legal.” That is, the factual part of the case that had dominated our efforts for several years would give way to the legal arguments that would govern the appellate process to follow. While much work on Jimmy’s case lay ahead, Nicole and I wanted to take on another case in Alabama in the meantime. Jack, who was approaching retirement at Foley, obtained his firm’s agreement to support his involvement in a new case. We went back to the ABA Death Penalty Representation Project to find a new matter. By this time, Lisa had taken a job heading up the death penalty clinic at Boalt Hall, and Robin Maher, a very experienced litigation lawyer, had become the Director of the Death Penalty Representation Project. We worked with Robin, Bryan Stevenson, and Randy Susskind at Equal Justice Initiative in Montgomery to select a new case, Melvin Davis, Jr. v. State of Alabama.

10. Assuming that whatever side loses the Rule 32 phase would seek appellate review.

Many wonder if our specialty is representing Davis, Jrs. in Alabama. Again, Nicole and I were very grateful for Pillsbury’s commitment, support, and generosity, particularly from our Chair, Mary Cranston, and our Managing Partner, Marina Park. And again, the Bradley Arant firm, with Rich Shariff and Hope Stewart leading the way, joined our team to provide counsel and help that is much
We filed a Rule 32 petition in October 2002.\textsuperscript{13} The State moved to dismiss it, arguing that an intervening change in the time limit for filing the petition, from two years to one, made the petition untimely.\textsuperscript{14} We felt that the application of the new, and largely silently promulgated, rule was unconstitutional. But the trial court granted the motion.\textsuperscript{15} We appealed to the Alabama Court of Criminal Appeals, which heard the case on June 17, 2003, and issued a ruling on September 29, 2003, affirming the trial court.\textsuperscript{16} We filed a petition for certiorari with the Alabama Supreme Court seeking review of the decision of the Alabama Court of Criminal Appeals' affirmation of the dismissal. On February 6, 2004, the Alabama Supreme Court not only granted certiorari, but issued a writ reversing the dismissal of the case and remanding it back to Circuit Court to proceed to hearing.\textsuperscript{17} We are very gratified by the Alabama Supreme Court's decision and look forward to the opportunity to proceed with Melvin's case.

Meanwhile, my work has led me to teach a class at Stanford on the death penalty. This adds to my course load of teaching an undergraduate class on children and the law and advising numerous students as a faculty advisor. What is so rewarding for me is that a number of my students have gone on to work on death penalty cases at organizations such as the Southern Center for Human Rights with Steve Bright in Atlanta, Texas Defenders Inc. in Austin with John Niland, and the ABA Death Penalty Representation Project with Robin and Lis. Helping to channel the passion of young people dedicated to this important cause is a profound joy and blessing.

\textit{Closing Thoughts}

I am very grateful for the opportunity to work on capital cases. I feel that I have made important contributions to the administration of justice and the enforcement of the Constitution. I am a much better lawyer from this experience. This is the result of working with extraordinary people, like Steve Bright, Bryan Stevenson, Randy Susskind, Lis Semel, Robin Maher, and my colleagues and partners Jack Lahr, Nicole Townsend, Joy Langford, Rich Sharff and Hope Stewart, and our many expert witnesses and consultants. I am also a much better father to my children, who are beneficiaries of the knowledge I have gained about life and people. I have gained understanding about people in circumstances that are very different from mine. This, in turn, has given me a better sense of perspective and direction. I strongly encourage everyone to try to take on one of these cases.

From a professional perspective, I strongly encourage the same. I believe a person accused of a capital crime should have the same vigorous representation in Alabama as in California. A black person accused of killing a white person should have the same chance and effectiveness of counsel as a white person accused of killing a black person. I do not presume to know how I would feel if a family

\textsuperscript{13} Davis V, No. CC-98-13160.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} Davis VI, No. CR-02-0729.
\textsuperscript{17} Davis VII, 2004 WL 226106.
member were the victim of a heinous murder or what would be an appropriate punishment. But when many people accused of capital crimes are provided trial counsel who are wholly, if not pathetically, inadequate to represent them, with no resources for investigation, all of us are at risk. The Constitution is simply not being applied. Therefore, for the sake of the Constitution, do take on one of these cases. Call Robin Maher, Steve Bright, or Bryan Stevenson if you are interested. And don’t hesitate to call me or my colleagues for help and counsel—you’ll be the first call we will return.