DEATH PENALTY IN LOUISIANA

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We never intended to take a death penalty case, it just happened. The first call came in 1986 when a Minnesota lawyer who had emigrated to Louisiana to work on death penalty cases called to look for volunteers. We were civil litigators, inexperienced in criminal law and reluctant to begin a criminal defense career with a death penalty case. The second call from the transplanted Minnesotan came a year later. She said that another lawyer who had volunteered had not followed through, and the client's execution was ten days away. We agreed to help.

The three of us—a commercial litigator, a real estate litigator, and a bankruptcy litigator—knew nothing about habeas proceedings or Louisiana procedure. Calling on the expertise of the Louisiana Death Penalty Resource Center, we swiftly prepared pleadings seeking a stay of execution to allow us time to prepare a petition for a writ of habeas corpus. The Louisiana state court judge granted the motion.

Then what were we supposed to do? We had no idea what the law was, what documents had to be filed, what rules governed, or even what our client was like. We quickly learned.

Our client was Dobie Gillis Williams, a 24-year-old African American man from a small town in north central Louisiana. We later learned that this area was

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1. The story of Dobie Gillis Williams began with a murder conviction in an unreported decision in the 35th Judicial District Court in Grant Parish, Louisiana [hereinafter Williams I]. A direct appeal to the conviction to the Louisiana State Supreme Court was unsuccessful. Louisiana v. Williams, 490 So. 2d 255 (La. 1986) [hereinafter Williams II]. A petition for certiorari to the United States Supreme Court was denied as well. Williams v. Louisiana, 483 U.S. 1033 (1987) [hereinafter Williams III]. The Supreme Court also denied petitioner's request for a rehearing in Williams v. Louisiana, 483 U.S. 1056 (1987) [hereinafter Williams IV]. A post-conviction hearing for ineffective assistance of counsel during the penalty phase of the trial was sought and granted in State ex rel. Williams v. Butler, 520 So. 2d 759 (La. 1988) [hereinafter Williams V]. The Louisiana Supreme Court remanded the case to the trial court to conduct an evidentiary hearing based on potentially ineffective assistance of counsel during the penalty phase of the prior proceeding. The trial court affirmed the conviction in an unreported decision [hereinafter Williams VI]. The trial court's affirmation was directly appealed to the Louisiana Supreme Court in Williams v. Butler, 543 So. 2d 2 (La. 1989) [hereinafter Williams VII] and was denied. The petitioner applied for a Supervisory and/or Remedial Writ with the 35th Judicial District Court in Grant Parish and was denied. In re Williams [hereinafter Williams VIII]. On appeal, the writ was also denied by the Louisiana Supreme Court. State ex rel. Williams v. Butler, 618 So. 2d 402 (La. 1993) [hereinafter Williams IX]. Short-term success was achieved in Williams v. Cain, 942 F. Supp. 1088 (W.D. La. 1996) [hereinafter Williams X], where the Federal District Court vacated the death penalty and remanded the case for resentencing. The District Court's decision was appealed and reversed by the 5th Circuit Court of Appeals in Williams v. Cain, 125 F.3d 269 (5th Cir. 1997) [hereinafter Williams XI]. A stay of execution was granted by the United States Supreme Court pending its decision whether to grant certiorari. Williams v. Cain, 524 U.S. 934 (1998) [hereinafter Williams XII]. However, certiorari was eventually denied in Williams v. Cain, 525 U.S. 859 (1998) [hereinafter Williams XIII], and so was the final request for a rehearing. Williams v. Cain, 525 U.S. 979
considered a “no man’s land” in the 1800s, a lawless place between Louisiana and Texas. Williams was convicted of murdering a Caucasian woman, allegedly in the course of committing a burglary and a rape. The victim was in the bathroom when her attacker stabbed her repeatedly. She staggered out of the bathroom into her husband’s arms, saying “a black man killed me.” The victim died shortly thereafter.

The sheriff rounded up all local African Americans with criminal histories and began questioning them. Our client fell within this category. Having been previously convicted of burglary, he happened to be on a furlough from prison and in town that hot Fourth of July weekend in 1984.

The police rousted him from bed in the middle of the night and took him to the police station. Detectives interrogated him for many hours through the night and finally, according to their later testimony, extracted a confession from him near dawn. According to the detectives, Williams’ initial attempts at a confession were inaccurate—it could not have happened the way Williams said it did. Further information was supplied by the police until the confession came out as desired. The chief detective conducting the interrogation said he recorded the confession, but when he later went to play it back, he found that nothing had been recorded. The chief detective claimed he must have forgotten to push the record button. The police also claimed to have videotaped parts of the interrogation and confession. By coincidence (according to the police), the videotape machine malfunctioned. As a result, the only evidence of what happened during the interrogation and the details of the confession came out of the mouths of the police.

Williams told us that during the interrogation, the police removed his clothes so that they could check his body for telltale scrapes. He was nearly naked for most of the interrogation in the windowless basement office and was surrounded by half a dozen officers, most of whom had guns. The officers repeatedly told him that if he confessed, he would not get the death penalty. He explained his whereabouts that evening, but denied that he confessed.

No physical evidence tied Williams to the scene. There were no fingerprints, even on the murder weapon, which was determined to be a kitchen knife that the victim’s husband said he left in the bathroom after he made gumbo in the kitchen. Black hairs in the bathroom pointed to an African American man with a rare kind of hair similar to that of our client. After a brief trial, Williams was convicted of murder in the course of a rape or attempted rape. The latter are aggravating factors a jury may consider in deciding to impose a death sentence.

The penalty phase commenced immediately and was over quickly. The prosecution called the warden of the prison from which our client had been on furlough. Caught unaware, our client’s attorney had not prepared for the penalty phase. He called no witnesses and made only a brief closing statement.

The direct appeal to the Louisiana Supreme Court, mandatory in death penalty cases, was unsuccessful, as was the petition for certiorari to the United States Supreme Court. The “round up” by the local sheriff seemed to be without probable cause and therefore a Fourth Amendment violation. The law, however, does not

(1998) [hereinafter Williams XIV].
2. Williams II, 420 So. 2d at 255.
3. Williams III, 483 U.S. at 1033.
accord prison inmates the same Fourth Amendment rights as others and, although he was on furlough, our client was still considered to be a prisoner with diminished Fourth Amendment rights.

These were essentially the facts we knew when we began reading the files sent to us from Louisiana. We soon learned that we had barely scratched the surface in terms of both the facts and the law.

One of the obvious post-conviction claims to raise was ineffective assistance of counsel during the death penalty phase. We learned that our client’s defense counsel had never tried a capital case before and did not understand what was required to defend in the penalty phase. It turns out that he prepared only for the guilt/innocence phase and not the penalty phase. To investigate the viability of the ineffective assistance of counsel claim, we needed to determine what evidence could have been presented in the penalty phase had counsel done a thorough investigation. We were stunned by what we found.

We visited our client’s family in their home. To get there, we literally crossed the railroad tracks into the poor section of town, an area with unpaved roads and few vehicles. The family home was a small building sitting on cinder blocks. We met our client’s brother, who was on medication for severe emotional problems. Another brother was institutionalized after he broke into a church, claiming that auditory hallucinations—a conversation with God—told him to do so. His father’s brother and others on his father’s side had severe emotional problems. Our client himself was examined and found to be a paranoid schizophrenic with an IQ at the borderline retard level. As a child, he was abused physically and emotionally by relatives. His parents separated early in his life and never reconciled. Our client’s upbringing was epitomized in an anecdote related by his mother. When our client was very young, his parents had a fight. His mother picked up a shotgun and aimed it at her husband, who in response picked up our then two-year-old client, using him as a human shield.

During his teenage years, our client sniffed gasoline, which we learned was a cheap means of getting high. Medical experts told us that gasoline was also used as a form of self-medication to dull the senses—a means of dealing with mental and emotional illness. We learned that all of this evidence, combined with impassioned pleas from family members, could have been presented as “mitigating” evidence by a reasonably competent defense counsel and could have given the jury reason to spare our client’s life.

In the course of the numerous post-conviction hearings, we came to meet the trial judge, who introduced us to Louisiana history. He was from Winnfield Parish in north central Louisiana, the hometown of Huey Long. The judge’s father had been a friend of Huey Long, and in the course of our many meetings with the judge, we learned about the impact of the Long family on Louisiana history and politics. The judge told us about Long’s effectiveness as an orator. Long used to rail against the fat cats in their $300 suits, but nobody noticed he was also wearing a $300 suit. We learned about the tension, both politically and culturally, between New Orleans and the rest of Louisiana. This populist view catapulted Huey Long into power in the early 1900s. The political and social divide still exists, at least in the minds of some outside of New Orleans.
The prosecutor was the district attorney in this parish and an adjoining one. He knew our client because he had represented him as a criminal defense attorney in an unrelated matter before his election as district attorney. He personally believed in our client’s guilt and was under political pressure to enforce the death penalty. In fact, he used this case as campaign material in his first election to office. The case received quite a bit of attention in the local papers. In fact, the pretrial publicity had been so extensive that the trial judge had changed the trial venue. Before one post-conviction hearing, we were shocked to pick up the local paper and see the headline, “Local Killer to Get Another Hearing.”

Throughout our representation, we were assisted by experts from the Death Penalty Resource Center in New Orleans. We were continually amazed at the devotion and dedication of those talented attorneys who spent all their time working on death penalty cases. They are under constant pressure with caseloads most lawyers would consider impossible to meet, and their daily schedule is determined by execution dates. We learned that capital cases in the South are often handled by court-appointed counsel who are paid woefully inadequate rates to handle some of the most complicated and challenging cases. Court funds limit the amount of money defense counsel can obtain to investigate and prepare the case. As a result, the Death Penalty Resource Centers had more business than they could handle simply working on appeals and post-conviction writs.

We were instructed that in a claim of ineffective assistance of counsel, it is sometimes necessary to present evidence of an expert criminal defense lawyer on what should have been done in the trial. The Resource Center helped us locate that expert. Mike Small, a well-known criminal defense attorney in Alexandria, Louisiana, had handled dozens of capital cases and none of his clients had ever been executed. He was the perfect expert witness because few attorneys had handled more capital cases. He agreed to help us pro bono. Coincidentally, he had just completed a similar post-conviction proceeding where he had been in our role. The transcript of that hearing proved invaluable as a guide.

Mike Small was not a passive expert. He visited our client’s family with us, reviewed the medical, school, and social service records we accumulated, and read the entire trial transcript. His resulting opinion was definite. In his judgment, our client had received ineffective assistance of counsel at the penalty phase, and he had no doubt that if the jury had learned of his borderline retardation, abusive upbringing, emotional problems, and otherwise non-violent background, the jury would have spared his life. At a three-day hearing before the original trial judge, we presented all of the evidence that we found. In addition, we raised numerous other issues. Our expert testified extensively and, we thought, effectively.

One day during the hearing, we noticed a gentleman sitting in the audience. Our expert recognized him as the prosecutor from another parish who had a reputation for putting more people on Death Row than any other prosecutor in the state. This prosecutor was called to testify as an expert for the prosecution. We had no opportunity to prepare for his testimony. In civil litigation of the sort we customarily handle, experts and their opinions must be disclosed in advance. Regardless of the amount of money involved, extensive discovery is available in the form of interrogatories, request for admissions, production of documents, and
depositions. None of that is available as a matter of course in post-conviction proceedings, which are a hybrid of criminal and civil procedure.

When the opposing expert took the stand, it was literally trial by ambush. Although his opinion was predictable, we had no information on him beyond what our expert witness happened to know. He testified that all of the mitigating evidence upon which we relied would not have made a difference to the jury and that while all defense attorneys try to humanize their client, few succeed to the extent of avoiding the death penalty. This last comment, however, provided some ammunition for cross examination. By conceding that every defense counsel tries to humanize his client, the expert had unwittingly agreed that our trial counsel had failed to meet professional norms and that this humanization tactic sometimes succeeded.

We felt that the hearing could not have gone much better. Our expert performed well, we had a mountain of mitigating evidence that was commonly introduced in penalty phases, and we had an affidavit from trial counsel that he had never handled a capital case before and did not know what he was supposed to do in the penalty phase. We felt confident that the judge would see it our way and vacate the death sentence.

We were wrong. The judge sided with the prosecution and found that all of the evidence we had unearthed would not have changed the result.

Therefore, even though counsel’s performance could be considered deficient, the judge found that such deficiency was not prejudicial—the mitigating evidence would not have made a difference to the jury.

We appealed the decision to the Louisiana Supreme Court which, by a vote of 4-to-3, declined to hear the appeal. Meanwhile, an interesting development occurred. Apparently one of the detectives who had been involved in obtaining the confession had told an assistant district attorney and others that the tape of the confession existed. He also admitted that he had made promises of leniency to our client during the interrogation and stated that he does what he needs to in order to obtain a conviction. To his credit, the district attorney obtained a search warrant and, together with the sheriff, searched the detective’s office and other locations where this tape might be found. They found nothing. Nevertheless, the district attorney properly disclosed this potential exculpatory evidence.

These revelations led to another hearing before the judge. We cross examined both the detective and the former assistant district attorney, who was then a sitting judge. Again, the court ruled against us and found that the detective had been “popping off” or bragging.

Meanwhile, we filed another habeas petition with additional claims, including claims of racial discrimination in the selection of the grand jury foreperson and defective jury instructions regarding the aggravating factors in a capital case. The court allowed us some discovery on the issue of racial discrimination in the selection of grand jury forepersons. In Louisiana, the forepersons were selected by judges. As a result, we had the unique opportunity to take the depositions of the two judges

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5. *Id.*
who had been sitting in this parish at the time. We examined how the judges selected grand jury forepersons. By using statistics from the courthouse, we were able to show that since the Civil War, no black person had ever been appointed foreperson of the grand jury, despite the substantial black population in the parish and judicial district. From a statistical standpoint, we calculated that the odds of a black not being appointed under these circumstances was one in many millions. This, we felt, made a prima facie showing of discrimination, which was actionable under federal case law. In fact, a federal magistrate had recently found such discrimination in a Louisiana state court case. Once our petition was filed and moved along in the court system, we heard that many other inmates in prison, including those on Death Row, were filing similar petitions.

Again, we had a multi-day hearing before the trial court. The former judges testified regarding their selection of grand jury forepersons. An unusual evidentiary problem developed at one point. We were trying to prove the population and racial breakdown of residents in the local parish, but our reference to census figures and use of copies of census tracts were challenged by the prosecutor on “best evidence” grounds. The judge sustained the objection. We offered to obtain the original census book, which proved harder to accomplish than we thought. After several unsuccessful attempts at local libraries and local agencies, we finally contacted United States Senator Paul Wellstone’s office, obtained the appropriate census book from the Library of Congress, and sent the book to Louisiana by Federal Express.

After the hearing, the court ruled against us, finding no discrimination. The Louisiana Supreme Court denied review. Another execution date was set. The Death Clerk from the Fifth Circuit began calling us and asking when we were planning to file in federal court. By now, it was 1996, and the Anti-Terrorism and Effective Death Penalty Act had just been passed, which severely narrowed federal review. We scrambled to file our federal habeas petition and preserved an argument that it was filed or commenced a day or two before the effective date of the Act.

The federal petition was filed in the United States District Court for the Western District of Louisiana, in Alexandria, Louisiana. We knew it was not going to be easy when our unopposed motion for admission pro hac vice was denied! These motions are normally routinely granted. Nevertheless, they were denied by the federal district judge, apparently on the ground that he was concerned about paying funds under a federal defender’s statute for more than one petitioner’s counsel.

We decided that we could not improve on our state post-conviction record and did not seek a new evidentiary hearing. After extensive briefing, the district court judge, a Republican appointee, took the matter under advisement. Many months later, we were elated to receive a thorough opinion from him concluding that our client effectively had no lawyer at all in the death penalty phase and that the death penalty must be vacated. After about nine years of effort, we had finally achieved the relief we were seeking. Our client was shocked with disbelief.

7. Williams VII (unreported).
8. Williams IX, 618 So. 2d at 402.
Sister Helen Prejean, a Roman Catholic nun in the Sisters of St. Joseph of Medaille, was surprised as well. She focuses her special ministry to Death Row inmates. Sister Helen was our client’s spiritual advisor. She came to virtually every court hearing we had and was indefatigable in her opposition to the death penalty. She explained to us that she ministered both to the family of the defendant as well as the family of the victim, although in this case the victim’s family refused to have much contact with her.11

The prosecution, of course, appealed to the Fifth Circuit.12 We drew a panel that consisted of two Clinton appointees and one Reagan appointee. At the oral argument in the Great Courtroom in the Federal Courts Building in New Orleans, the setting was different but the circumstances were similar to what we had seen in the past. On one side of the courtroom were members of the victim’s family, sitting behind the prosecution. On our side of the courtroom were representatives of the defendant’s family and his defense team. Unfortunately, except for Sister Helen, who tried to move back and forth between both factions, the faction sitting behind the prosecution was all white and the faction sitting behind our defense table was all black.

At the oral argument, we were grilled on the ineffective assistance claim, which was one of three claims that we raised. One judge questioned the alleged abuse, appearing to downplay it. When asked for an example of the abuse, we told him about a family member whipping our client with a wet rope. The judge suggested that perhaps this was simply a form of discipline. The other judges asked a few questions, but did not seem to telegraph any views.

Several months later, the court issued its decision. The decision unanimously reversed the federal district court and reinstated the death penalty.13 We were stunned because the federal district judge had written a solid opinion and had a reputation for being a conservative jurist. Moreover, one of the judges on the Fifth Circuit panel was formerly a state court judge from a nearby parish in Louisiana. We had nowhere to go but up, so we filed a petition for writ of certiorari with the U.S. Supreme Court.14 Meanwhile, the state trial court issued another execution date. We applied to the U.S. Supreme Court for a stay of execution.

On June 18, 1998, our client was scheduled to die at 6:00 p.m. Our petition for certiorari and our motion to stay the execution had been filed, and we were assured by the Death Clerk at the U.S. Supreme Court that a decision on the motion to stay would be made that day. None of us could do any work. We sat in Minnesota by

11. During our long sojourn in state courts in the early to mid-1990s, Sister Helen wrote a book, Dead Man Walking, which was a composite of her experiences with various death penalty prisoners and cases. HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1st ed. 1993). She laughingly told us that we were part of the role model for the defense counsel in the book. That book was later made into the movie of the same name, starring Susan Sarandon and Sean Penn and directed by Tim Robbins. DEAD MAN WALKING (Paramount Pictures 1995). Susan Sarandon and Tim Robbins came to know Sister Helen and later toured with her speaking out against the death penalty. Sister Helen is one of the most articulate and energetic spokespersons we have ever encountered and was an incredible source of support to our client throughout his stay on Death Row.

12. Williams XI, 125 F.3d at 269.
13. Id. at 284-85.
14. Williams XII, 524 U.S. at 934.
the phone, talking repeatedly to our local counsel in Louisiana, who in turn spoke often to the Death Clerk, a person he had come to know over the years.

As our client was walking down the hall to his last supper, which he is obliged to spend with the warden (although our client was allowed to choose the menu for the first time during his incarceration), we received word from the Death Clerk that the Supreme Court had granted a stay—a mere two hours before the scheduled execution!\textsuperscript{15} We were told by the Supreme Court’s Death Clerk that we could expect a ruling on the petition for certiorari on the first Monday in October. We were optimistic because obviously at least one of the three issues we had raised in the U.S. Supreme Court had attracted the attention of a sufficient number of justices, or a stay would not have been granted.

On the first Monday in October, we received the decision: petition denied.\textsuperscript{16} We were stunned and wondered what had happened in the interim.

Thereafter, we enlisted the help of Barry Scheck of O.J. Simpson fame and were able to conduct DNA testing based upon an alleged jailhouse confession by another inmate. The DNA testing was inconclusive. Another execution date was set. In the days before that execution date, we filed additional appeals in numerous courts and received rejections almost by return fax.

On January 8, 1999, we had our last conversation with our client. Gathered around a speakerphone in Minnesota (we declined the opportunity to witness the execution in Louisiana), we told him it had been a privilege to represent him and that we were sorry we could not do anything more. He told us how much he had appreciated our work. He seemed much calmer about his impending execution than we did.

At 6:00 that evening, our client was executed by lethal injection, the electric chair having been eliminated in Louisiana at some point during the eleven years we represented our client. Sister Helen was there with him to the end.

We will never forget that day. A year later, we took our second death penalty case.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Williams XIII}, 525 U.S. at 859.