

PROJECT PRESS



AMERICAN BAR ASSOCIATION

Death Penalty Representation Project

Winter 2010

Volume III, Issue I

UPCOMING EVENTS

Mar. 6-10, 2010, NLADA
Life in the Balance Seminar,
Nashville, TN

Mar. 11-14, 2010, NITA
Habeas Skills Workshop,
San Francisco, CA

Mar. 23, 2010, Annual
Benefit Dinner, Equal
Justice Initiative,
New York, NY

Mar. 25, 2010, ABA Death
Penalty Representation
Project Special Event,
Washington, DC

Apr. 22-25, 2010, Seventh
National Seminar on the
Development &
Integration of Mitigation
Evidence in Capital Cases
Seattle, WA

May 13-15, 2010, NLADA
Equal Justice Conference,
Phoenix, AZ

June 4-9, 2010, National
Defender Training Project
Public Defender Trial
Advocacy Program,
Dayton, OH

Project to host Special Event in Washington, DC on March 25th

On Thursday March 25, 2010 the Project will hold a special event in Washington, DC at the law offices of Sidley Austin LLP, 1501 K Street NW, from 4:00 until 6:00 PM. A complimentary reception will follow.

Part I: The first hour of the program will include a training session and a brief introduction to the world of capital representation. Attendees will learn basic information about training, timing, the need for experts, ethical issues, investigations, and the relationship with a Death Row client. This session will include a presentation by **Robert B. Dunham**, Federal Public Defender for the Middle District of Pennsylvania Capital Habeas Corpus Unit.

Part II: The second hour will feature DC attorneys who will discuss their experiences as volunteer death penalty lawyers. Death Penalty Representation Project staff will also explain why help is so urgently needed for the men and women on Death Row and answer any questions.

The following speakers are scheduled for Part II of the program: **Ronald S. Flagg**, DC Bar President-Elect and Partner, Sidley Austin LLP; **Jane C. Luxton**, Partner, Pepper Hamilton LLP; **David E. Kendall**, Partner, Williams & Connolly LLP; **Steven M. Schneebaum**, Partner, Greenberg Traurig LLP; and **Amanda M. Raines**, Associate, Skadden Arps LLP.

Special thanks to our hosts Sidley Austin LLP and DC Bar President-Elect Ronald Flagg. This event is cosponsored by the DC Bar Association Sections of Criminal Justice and Individual Rights, Litigation, and Courts, Lawyers, and the Administration of Justice.

To RSVP for this event, please see our website at <http://new.abanet.org/DeathPenalty/RepresentationProject/Pages/DCEvent2010.aspx> or email Katie Hughes at hughesk@staff.abanet.org. Please contact us for more information about this event or volunteering on a death penalty case.

Project Special Event speakers pictured below from left to right: Robert B. Dunham, Ronald S. Flagg, Jane C. Luxton, David E. Kendall, Amanda M. Raines, and Steven M. Schneebaum.



Volunteer Law Firm Highlights

Bingham McCutchen LLP

Volunteer attorneys at Bingham first accepted a death penalty case from the Project in 2005. Neal Rosen, a partner in the Boston office, leads a team representing Walter Ograd, who is on Death Row for the murder of a four-year-old girl in Philadelphia in 1988. Mr. Ograd was convicted in 1996 on the basis of a confession allegedly made under duress and testimony from a notorious jailhouse informant. The firm, with assistance from the Philadelphia Federal Defender Association, has worked tirelessly on Mr. Ograd's behalf.

On the other side of the country, another team of Bingham attorneys currently represents two Alabama Death Row prisoners. Bill Abrams, a partner at the firm's Silicon Valley office and a member of the Project's Steering Committee, represents clients who received ineffective counsel during their trials.

In January, Bingham accepted a new pro bono death penalty case at the request of the Project. A team of Washington, DC attorneys now represents a Texas Death Row prisoner in his federal habeas proceedings.

The following is an excerpt of a letter (dated Jan. 2010) from a Texas Death Row prisoner thanking the Project and volunteer law firm Bingham McCutchen LLP for taking his case:

"Hello there! I hope this reaches you all in the Best of health & spirits! I know I'm feeling out of this world right now. I just can't put it in to words how happy I am, thank you so much for all you've done. For Believing and not giving up. It means so much to me. You all are special. And will all ways carry a place in my heart for your dedication to what ya'll do... [You] have pumped Life Back in to this cause, and you will never be forgotten. I know its just what ya'll do its your job, But you have touched our lives in a special way. Ya'll keep your head up."

King & Spalding LLP

Justin Michael Wolfe was sentenced to death for allegedly ordering the execution of a Virginia drug dealer. Last month the court granted Mr. Wolfe an evidentiary hearing on the basis of

new evidence presented by his volunteer law firm. The new evidence included testimony by Owen Barber, the triggerman in the murder and the only witness who tied Mr. Wolfe to the killing, who has now recanted his earlier testimony against Mr. Wolfe.

"We're pleased with the court's opinion and we look forward to the opportunity to present the full case to the full district court," said King & Spalding partner James Griffin, a member of Wolfe's defense team.

Mr. Wolfe satisfied the *Schlup* standard and thus all procedurally defaulted claims are no longer barred. The case has been assigned to a newly appointed Magistrate.

Congratulations to the team at King & Spalding, with the able assistance of the Virginia Capital Representation Resource Center and Michelle Brace, for their tremendous efforts on behalf of Mr. Wolfe. Special thanks to James Griffin, Matthew P. Dullaghan, Steven Andrew, and former King & Spalding partner Jane C. Luxton.

Arizona Death Row prisoner in need of counsel

In September 2004 a twenty-four-year-old Arizona man was convicted and sentenced to death on two counts of first-degree murder and one count of first-degree burglary. His petition for certiorari was denied on January 7, 2008.

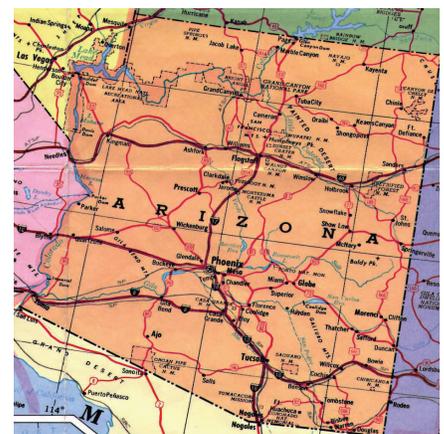
Since that time the prisoner has been unrepresented and therefore unable to enter post-conviction proceedings. His defense at trial was that an uncle had actually committed the murders, but that because his uncle was a police informant the police had covered up the real culprit's involvement in the crimes.

The prisoner may be mentally retarded and ineligible for execution. It is unclear from the

direct appeal opinion whether he was evaluated or tested prior to trial. Other potential issues on appeal include an ineffective assistance of counsel claim and a *Brady* violation because law enforcement agencies did not disclose all relevant records during trial. The *Brady* claim was briefly discussed in the prisoner's direct appeal, but denied because he could not show on the record that any documents had been withheld.

Finally, based on its procedural posture and events that have already occurred, this case will be important in determining whether the failure to timely appoint post-conviction counsel will affect the state's ability to accelerate habeas

proceedings for all Arizona prisoners. If you are interested in handling this case, please contact Staff Attorney Emily Williams at williams@staff.abanet.org.



Death Penalty in the News: Supreme Court Update

A complete schedule of the upcoming oral arguments can be found at http://www.supremecourtus.gov/oral_arguments/argument_calendars.html. The following completed and scheduled arguments may be of interest to those concerned with capital punishment and criminal law:

Nov. 9, 2009: Bobby v. Van Hook

Ohio Death Row inmate Robert Van Hook claimed that he received ineffective assistance of counsel during the sentencing phase of his trial in 1985. The US Court of Appeals for the Sixth Circuit granted habeas relief, relying on the 2003 ABA Guidelines. In a per curiam opinion, the United States Supreme Court reversed the judgment of the Sixth Circuit. The Court criticized the Sixth Circuit for failure to consider whether the norms embodied in the 2003 Guidelines were the same norms in place in 1985 when the trial occurred. The Court did not, however, overrule its own precedent holding that the ABA Guidelines are guides to determining what is professionally reasonable legal representation in capital cases. Read more about the case and the ABA's analysis at <http://new.abanet.org/DeathPenalty/RepresentationProject/PublicDocuments/van%20hook%20analysis.pdf>.

Jan. 12, 2010: Smith v. Spisak

In a unanimous decision the US Supreme Court struck down a circuit court ruling and reinstated the death sentence for Ohio prisoner Frank Spisak. The US Court of Appeals for the Sixth Circuit had held that defense counsel's performance during the sentencing phase denied Mr. Spisak his right to effective legal representation when counsel referred to him as "sick, twisted, and demented." But the US Supreme Court disagreed and found no prejudicial effect.

Jan. 19, 2010: Abu-Jamal v. Pennsylvania

Mumia Abu-Jamal was sentenced to death after the 1981 murder of a Philadelphia police officer. The Third Circuit Court of Appeals ruled that Mr. Abu-Jamal was entitled to a new sentencing hearing. Supporters of Mr. Abu-Jamal claim that racism pervaded the case. The Supreme Court denied Mr. Abu-Jamal a new sentencing hearing, overturning the decision of the Third Circuit.

Jan. 20, 2010: Wood v. Allen

The Supreme Court let stand the death sentence of a mentally impaired Alabama inmate convicted of killing his former girlfriend. Wood claimed that his trial attorneys left out crucial information pertaining to his mental deficiencies. In a 7-2 decision, the Court affirmed the decision of the Court of Appeals for the Eleventh Circuit. Justice Stevens issued a strong dissent, declaring "the only reasonable factual conclusion I can draw from this record is that counsel's decision [not to investigate and present evidence of mental deficiency] was the result of inattention and neglect."

Mar. 1, 2010: Holland v. Florida

The Court heard arguments about whether "gross negligence" by a defense attorney in a death penalty case provides a basis for extending the time to file a federal habeas challenge in a case where the habeas petition was filed late despite repeated instructions from the client. Albert Holland, a prisoner on Florida's Death Row, filed a pro se petition for a writ of habeas corpus in the US District Court for the Southern District of Florida after his lawyer did not do so. But Mr. Holland's petition was dismissed as untimely because it



Above: Mumia Abu-Jamal, a Pennsylvania Death Row prisoner, was denied a new sentencing trial by the US Supreme Court in January 2010.

was filed beyond the one year statute of limitations. The Eleventh Circuit held that, even though representation of Mr. Holland was "grossly negligent," such actions did not rise to the level of "extraordinary circumstances" required for equitable tolling.

MARK YOUR CALENDARS!

The Project will host its 24th Anniversary & Volunteer Recognition Event this September 2010 in Houston, TX. Law firms may begin submitting their Letters of Nomination to the Awards Committee this spring. For more information, please contact Katie Hughes at hughesk@staff.abanet.org. Check our website for updates and additional program details.

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South Dakota

Jurisdiction in need: Georgia

The economic crisis in the United States is having profound consequences for indigent capital defense in Georgia. Several capital defendants have waited more than four years for their trials to commence due to insufficient funds to pay for legal representation. The state nevertheless continues to seek the death penalty. Approximately 70 capital cases were pending in late 2009.

In response to the lack of funds and resulting trial delays capital defense attorneys have asked the Georgia courts to dismiss the charges against their clients or prevent the state from seeking the death penalty. Counsel allege that the delays have violated their clients' speedy-trial rights.

The Georgia Supreme Court heard oral arguments in one of these cases in November 2009. The capital defendant in that case waited nearly four years between his arrest and his scheduled trial. All delay was due to state action: first a nearly one-year wait for the state to file its notice of intent to seek the death penalty, then refusals to provide funding for experts, and finally the removal of his appointed counsel.

While waiting for trial, the defendant attempted suicide three times and tried to abandon any legal defense. His mother died a few days after the oral argument before the Georgia Supreme Court, a development that might impede the ability to collect critical mitigation evidence in the case.

Recognizing the significance of the legal issue, one of the justices on the Georgia Supreme Court asked at the oral argument, "Is this the case that will determine whether the state of Georgia can afford the death penalty or not afford the death penalty?"

The state's failure to provide basic funding for indigent criminal defense extends beyond capital cases. In December 2009, lawyers filed a class-action lawsuit on behalf of nearly 200 convicted indigent defendants who lack lawyers to represent them in their appeals.

In April 2009, lawyers filed a lawsuit to challenge the state's failure to provide trial attorneys to more than 300 defendants awaiting trial in northeast Georgia. The Southern Center for Human Rights and other attorneys in Georgia have championed this cause.

Georgia created a state-wide public defender system in 2005. Although specific fees and surcharges were established to fund the public defender system, the Georgia Legislature refused to transfer all of the funds collected to the public defender system. The Legislature has also refused to authorize emergency funding for the public defender system.

Georgia is already under scrutiny because of the evidentiary hearing that will occur to consider death-sentenced prisoner Troy Davis' claim of innocence. In August 2009 the U.S. Supreme Court ordered a federal court to conduct an evidentiary hearing and make findings of fact. Mr. Davis was convicted and sentenced to death in 1991 for the 1989 murder of an off-duty police officer. However, seven of the nine witnesses who testified against Mr. Davis have recanted, and other witnesses have implicated the state's primary witness as the actual killer.

At the end of 2009, Georgia had 107 death-sentenced prisoners, all but one of whom are men. The state executed three prisoners in 2009, the same number that it executed in 2008.

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