

# PROJECT PRESS



AMERICAN BAR ASSOCIATION

## Death Penalty Representation Project

Summer 2010

Volume III, Issue 3

### Projects to Host Program at ABA Annual Meeting on the Role of International Law in Capital Cases

#### UPCOMING EVENTS

July 31- August 5, 2010, The Bryan R. Shechmeister Death Penalty College, Santa Clara, California

August 7, 2010, ABA Annual Meeting, The Influence of International Law & Opinion in U.S. Death Penalty Cases, Bingham McCutchen LLP, San Francisco, California

August 26- 29, 2010, Fifteenth Annual National Federal Habeas Corpus Seminar, Marriott at Key Center, Cleveland, Ohio

September 22, 2010, ABA Death Penalty Representation Project 24<sup>th</sup> Anniversary & Volunteer Recognition Event, Downtown Aquarium, Houston, Texas

September 30, 2010, ABA Death Penalty Representation Project Recruitment Meeting, Dirksen Federal Courthouse, Chicago, Illinois

November 10- 13, 2010, National Legal Aid and Defender Association, Annual Conference, Sheraton Atlanta Hotel, Atlanta, Georgia

March 5- 8, 2011, National Legal Aid and Defender Association, Life in the Balance Conference, Orlando, Florida

Please join the [Death Penalty Representation Project](#) and the [Death Penalty Moratorium Implementation Project](#) at the 2010 ABA Annual Meeting in San Francisco for a special program featuring a panel discussion on the death penalty and international law. This program, entitled "The Influence of International Law and Opinion in U.S. Death Penalty Cases," will be held at the law offices of Bingham McCutchen LLP from 8:00-9:30 AM (PDT) on Saturday August 7, 2010.

President Obama has stated that he will seek to ensure that "international law is not an empty promise." We will host a panel of distinguished experts to discuss what this promise will mean in U.S. death penalty cases. Panelists will discuss the legitimacy of international human rights instruments and treaty obligations in capital cases, recent U.S. Supreme Court cases involving issues of international law and comity, and the effect of foreign governments' opposition to the implementation of the death penalty on foreign nationals. We will conclude the session with a discussion about whether universal principles of fairness and due process exist among countries that retain the death penalty.

This program will be moderated by **Maurice Possley**, Pulitzer-Prize winning journalist and former Chicago Tribune reporter who currently teaches at the University of Michigan Law School. The following speakers will also participate:

- **Gregory J. Kuykendall**, Director of the Mexican Capital Legal Assistance Program (MCLAP)
- **Richard Wilson**, Professor of Law, American University Washington College of Law, Washington, D.C.
- **Frank Zimring**, Simon Professor of Law and Wolfen Distinguished Scholar at UC Berkeley, and co-author of *The Next Frontier: Political Change, National Development and the Death Penalty in Asia*

## ABA2010

SAN FRANCISCO Annual Meeting  
August 5-10



YOUR EXPERIENCE.  
YOUR COMMUNITY.



This event is co-sponsored by the San Francisco Bar Association and the ABA Sections of Criminal Justice, Individual Rights and Responsibilities, International Law, and the Standing Committee on Legal Aid and Indigent Defense.

Please RSVP [here](#) to confirm your space. This is a complimentary event. There is NO cost to attend and participants do NOT have to be registered for the ABA Annual Meeting. For anyone unable to attend in person, a conference call-in number will be provided. Please contact Katie Hughes for additional information at [hughesk@staff.abanet.org](mailto:hughesk@staff.abanet.org).

## Pennsylvania Death Row Prisoner in Need of Counsel

The Project is seeking counsel for a 29-year-old African American male “AB” who is a life-long resident of Philadelphia. His sentence arises out of a period in his life when he became involved with cousins and childhood friends who were selling drugs in the notorious Mantua section of West Philadelphia.

### PENNSYLVANIA DEATH ROW FACTS

- Size of Death Row: 225
- Three executions since 1976
- Method of execution: lethal injection
- Life without parole is an option
- Sentence determined by a jury
- Governor has authority to grant clemency with advice of Board of Pardons and Paroles.

### QUICK CASE FACTS

- Prisoner Demographics: African American, Male, Age 29
- Conviction Date: 2005
- Case Stage: State Post-Conviction
- Potential Issues: Actual Innocence; Prosecutorial Misconduct; Mental Retardation

His case involves a cast of snitches, co-defendants, and detectives. Prosecutorial misconduct and improperly withheld evidence are alleged. AB received a death sentence for a shooting which occurred on December 1, 2002. The Commonwealth claimed that this was a retaliation shooting. However, AB has steadfastly maintained his innocence and documentary evidence suggests that an actual innocence claim may be viable in post-conviction.

At the time of trial the Commonwealth had in its possession an eyewitness statement that identified another man as the shooter and did not place AB at the scene. The statement was not disclosed to the defense and this witness did not testify. The “eyewitness” that did testify denied under oath the existence of any deals in exchange for his testimony. However, his docket in federal court reveals that an undisclosed plea deal did in fact exist. The record strongly suggests the existence of undisclosed plea deals for three additional prosecution witnesses.

AB is a cooperative, engaged, and thoughtful client. According to prison records, an IQ test administered in November 2005 returned a score of 72, which is



*Above: Pennsylvania Death Row prisoner AB, pictured with his daughter.*

within the range for mental retardation. He is trusting in his legal team, and news that a conflict would require new counsel caused him sadness and fear. He is resilient, though, and has a positive and hopeful outlook concerning his case and his future representation.

Investigation by volunteer counsel should begin immediately with a deadline for briefing within a year. If your firm is interested in learning more about this case, please contact Staff Attorney Emily Williams at [williams@staff.abanet.org](mailto:williams@staff.abanet.org).

## A Look at Pennsylvania’s Capital Appeals Process

Pennsylvania has the fourth largest death row in the country. Strikingly, Pennsylvania capital cases also have an usually high reversal rate on appeal. According to the [ACLU](#), 200 death sentences in Pennsylvania have been overturned since 1978. Of the 200 cases, only 6 defendants were re-sentenced to death.

After a defendant is found guilty of a capital crime, a sentencing hearing determines aggravating and mitigating circumstances. At the conclusion of the hearing the sentence is decided by the jury. A 2007 ABA study reported that an astonishing 98.6% of Pennsylvania capital jurors failed to understand at least some portion of the jury instructions, including key issues such as what a sentence of “life imprisonment” means. Once the trial concludes and the defendant is sentenced, the case moves into the “direct appeal” stage.

Although a defendant may waive the right to direct appeal, the death sentence is subject to automatic review by the Pennsylvania Supreme Court. The Court is required to review the case in order to ensure that the conviction complies with the Commonwealth’s death penalty statute. If the court affirms the conviction, a defendant may choose to file an appeal in the U.S. Supreme Court. When the Court denies review or affirms the lower court’s decision, or the time to apply for certiorari has expired, the sentence is considered “final.”

Defendants may then collaterally attack their conviction as governed by the Pennsylvania Post Conviction Relief Act. Post-conviction petitions typically include claims of ineffective assistance of counsel and may also include claims of other state constitutional violations such as juror or prosecutorial misconduct. These claims are brought

based on “newly discovered” evidence that was not available or could not have been raised at the time of trial. The defendant must show that his claims were not previously waived or litigated. The petition usually must be filed within one year of the conclusion of the direct appeal process.

After the petition is filed, the court may choose to grant an evidentiary hearing in which the defendant can submit evidence and create a record to support his claims. If the hearing is granted, the court must issue a decision granting or denying relief within 120 days.

If a defendant is denied relief at this stage, he may appeal to the Pennsylvania Superior Court and then to the Pennsylvania Supreme Court on a discretionary basis.

*(Continued on page 4)*

## Volunteer Law Firm Updates

### Exceptional Service Awards for Death Penalty Representation now being accepted

Every year the Project recognizes its dedicated volunteers at our Anniversary & Volunteer Recognition Event. Many nominations from attorneys and law firms have been received for our Exceptional Service Award. This year's 24th Anniversary & Volunteer Recognition Event will be held in Houston, Texas at the Downtown Aquarium on September 22, 2010 from 6:00 - 8:00 PM, where this year's winners will be recognized. Stay tuned for more details!

#### Dorsey & Whitney LLP



On April 28, 2010, a 5<sup>th</sup> Circuit Court of Appeals panel refused to consider new evidence that might establish the mental retardation of prisoner Bruce Carneil Webster. The court held that such evidence cannot be presented through a second or successor habeas petition under the Antiterrorism and Effective Death Penalty Act (AEDPA), because it relates not to his guilt but instead to his eligibility for the death penalty under *Atkins v. Virginia*, which found the execution of the mentally retarded to be unconstitutional.

In a concurring opinion, Judge Jacques Wiener wrote that if a judge or jury were ever presented with the evidence Mr. Webster sought to introduce, he would undoubtedly be found to be mentally retarded and ineligible for the death penalty. Judge Wiener agreed as a matter of law with the court's ruling but expressed his "deep and unsettling conviction" that the law compels the court to "condone ... an unconstitutional punishment." He referred to the outcome of the case as a "Kafkaesque result: Because Webster seeks to demonstrate only that he is constitutionally ineligible for the death penalty - and not that he is factually innocent of the crime - [the court] must sanction his execution."

The decision demonstrates the limiting power of AEDPA regarding successive petitions containing new evidence that does not challenge the guilt of the prisoner. Although Mr. Webster raised claims of mental retardation at each stage of the proceedings,

the most compelling evidence, such as records of his enrollment in special education classes and Social Security Administration assessments finding him to be mentally retarded, only recently became available. The 5<sup>th</sup> Circuit's ruling, if it stands, would prevent a court from ever examining this evidence.

Steven Wells of Minneapolis-based firm Dorsey and Whitney LLP represents Mr. Webster in his habeas proceedings. Another appeal is planned.

Special thanks to the volunteers at Dorsey & Whitney for their tremendous efforts on behalf of Mr. Webster.

### Bryan Cave and Carlton Fields attorneys win ABA Pro Bono Publico Award



This August, the American Bar Association Standing Committee on Pro Bono and Public Service will honor three individual lawyers and two law firms with its 2010 Pro Bono Publico Awards. The Project wishes to congratulate Sylvia H. Walbolt of Carlton Fields, Attorneys at Law (Tampa), and Bryan Cave LLP, for their outstanding pro bono work. Volunteer lawyers at both firms have worked with the Project and demonstrated a commitment to indigent defense in death penalty cases.

Sylvia Walbolt established and served as the first chair of the pro bono committee of her firm, Carlton Fields. Her pro bono activity has included the representation of several death row prisoners. In one successful case, Ms. Walbolt and a team from Carlton Fields won relief at the Florida Supreme Court when it unanimously reversed their client's conviction and sentence. She helped draft Carlton Field's petition for the Florida Innocence Initiative, requesting emergency relief from an oppressive state deadline for the preservation of DNA evidence.

Ms. Walbolt has also served as a member of the ABA Death Penalty Moratorium Implementation Project's Florida Death Penalty Assessment Team and is a long-standing supporter of the Death Penalty

Representation Project.

The firm of Bryan Cave LLP has demonstrated a commitment to serving its community through pro bono and public service work including numerous death penalty cases in post-conviction proceedings. In 2007, Bryan Cave attorneys successfully argued the case of a death row inmate before the U.S. Supreme Court and won him a new trial. Teams of volunteer attorneys from Bryan Cave have also accepted cases from the Project including the representation of a death-sentenced prisoner in Arizona.

Congratulations to Sylvia Walbolt and the law firms Carlton Fields and Bryan Cave LLP for their outstanding pro bono service and their commitment to justice for the men and women on death row.

## Project Staff Updates

On June 4, 2010, Staff Attorney David Grossman left the Project and embarked on a path that will culminate in a high school teaching certification and a new chapter of his career teaching either English or History. He began education classes this summer at Northwestern University in Chicago and will seek various volunteer opportunities to stay involved in our work at the Project in the years ahead.

Project Assistant Katie Hughes is also leaving this August to begin graduate school at George Mason University in Fairfax, VA. She will obtain her Masters in Justice, Law, and Crime Policy in their Administration of Justice Department. Katie has been with the Project since July 2007 and plans to remain in Washington, DC.

We wish David and Katie all the best in their future endeavors! For more information on job opportunities with the Project, please check our website for updates.

## PROJECT STAFF

Robin M. Maher, Director  
Emily M. Williams, Staff Attorney  
Katie Hughes, Project Assistant  
Mary Kate Holman, Undergrad Intern  
Tara Beech, Legal Intern

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## Supreme Court Roundup

**Jefferson v. Upton**

On May 24, 2010, the U.S. Supreme Court reversed a decision by the 11th Circuit Court of Appeals denying petitioner Lawrence Jefferson's claim for post-conviction relief. During state post-conviction proceedings, the court upheld Mr. Jefferson's conviction and death sentence and asked the State's attorneys to write the order, which it signed and issued verbatim. Mr. Jefferson filed a habeas petition in federal court, arguing that the findings in the state court's order were not entitled to deference. He pointed to evidence, such as descriptions of witnesses that never testified, that the order had not been read by the court. Nevertheless, the 11th Circuit presumed the correctness of the state court's findings. The U.S. Supreme Court reversed, holding that the 11th Circuit failed to appropriately consider whether it should defer to the state court's findings. The Court noted that it is critical of the practice of adopting orders drafted entirely by the State and questioned their lawfulness. The Court remanded the case for a determination of whether the state court findings are entitled to a presumption of correctness.

**Holland v. Florida**

On June 14, 2010 the U.S. Supreme Court reversed the 11<sup>th</sup> Circuit Court of Appeals decision that petitioner Albert Holland was not entitled to an extension of the deadline for filing his federal habeas petition which sought relief from his conviction and death sentence in Florida. Under the Anti-Terrorism and Effective Death Penalty Act, a federal habeas petition must be filed within one year of the conclusion of the defendant's direct appeals. Holland was aware of this deadline and repeatedly contacted his attorney with concerns that the deadline was approaching and seeking assurances that his petition would be filed on time, but he received no response. He also sought to have his attorney removed from the case, but the court would not consider his motions because he was represented by counsel.

After being notified that his attorney had missed the deadline, Mr. Holland filed a pro se habeas petition. The 11<sup>th</sup> Circuit found that that the attorney's conduct in missing the deadline was "gross negligence" but that such negligence did not warrant setting aside the imposed deadline, because Mr. Holland had not shown that his attorney acted with "bad faith, dishonesty, divided loyalty, or mental impairment." The U.S. Supreme Court reversed, finding this standard to be too rigid and instructed the 11<sup>th</sup> Circuit to reconsider an

extension of the deadline based on equitable principles. The Court emphasized that equity has been and continues to be a key part of habeas jurisprudence.

**Sears v. Upton**

On June 29, 2010, the U.S. Supreme Court vacated and remanded the judgment of the Georgia Supreme Court denying post-conviction relief to petitioner Demarcus Sears. The Court found that the Georgia Supreme Court applied the wrong analysis to determine whether Mr. Sears was prejudiced by the ineffective assistance he received from his trial counsel. The Georgia court had found that because Mr. Sears' counsel presented *some* mitigation investigation, although not the evidence that a "constitutionally adequate" investigation would have uncovered, it could not speculate about the effect that additional mitigation evidence might have had and therefore found that Mr. Sears had not met the "prejudice" prong of *Strickland*.

But the U.S. Supreme Court rejected this approach and instructed the court to undertake the standard prejudice inquiry regardless of whether counsel presented mitigation evidence at trial. The Court held: "We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."

For daily news updates about criminal justice and the death penalty, please see our websites and follow the Project on Twitter at <http://www.twitter.com/deathpenaltyrep>.

**A Look at Pennsylvania's Capital Appeals Process**

*(Continued from page 2)*

If the Pennsylvania Supreme Court denies the petition for post-conviction relief, the defendant may file a petition for certiorari in the U.S. Supreme Court. After the state post-conviction process is complete, the defendant may file a federal habeas petition in federal district court, so long as the one year time limit has not expired. The universe of claims that courts will consider in federal habeas proceedings is generally limited to the claims that were adjudicated in state post-conviction proceedings.

**CONTACT THE PROJECT!**

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

Phone: 202.662.1738 / Fax: 202.662.8649 / Email: [deathpenaltyproject@staff.abanet.org](mailto:deathpenaltyproject@staff.abanet.org)