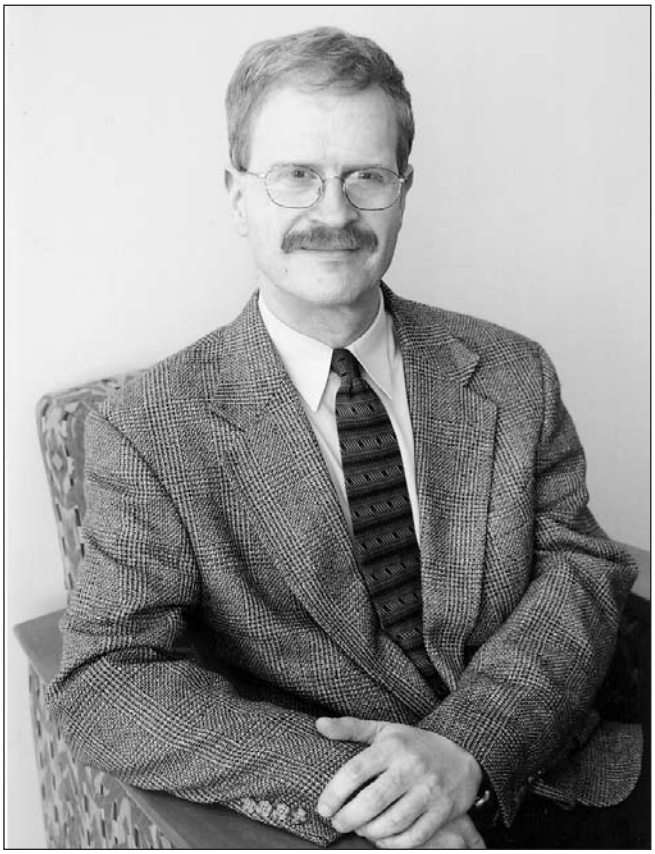
Priming Postconviction Representation

By Andrew E. Taslitz



Sentencing is not the end of the criminal process. Nor is appeal. Indeed, the process never really ends. Clients challenge convictions, claiming ineffective assistance of counsel; turn in desperation to state governors for pardons; continue to insist upon their innocence, looking for someone to champion their cause; seek to navigate the complexities of habeas corpus; protest the excessive nature of their sentences; and, upon release, struggle to find jobs, housing, and support networks in the surprising world of invisible punishments known as the "collateral consequences" of conviction (a phrase redolent of lost human lives as mere "collateral damage" in warfare). The postconviction world is a complex and important one, requiring counsel to keep up with its ever-changing complexities.

Yet that world cannot be relegated to postconviction "specialists," for, as this symposium issue on postconviction practice will demonstrate, careful counsel can anticipate and try to limit at sentencing or the time of a guilty plea the postconviction damage down the road. Nor is the postconviction arena one of concern only to defense counsel. Prosecutors must respond effectively and fairly to defense postconviction efforts; must at guilty plea or sentencing proceedings try to reduce later unwarranted postconviction challenges; and must, if they are to "do justice," take into account at such proceedings what might otherwise be the unintended consequences of their current choices for the defendant's later punishment and for the broader community's health. Law reformers likewise must have a heightened awareness of the strengths and weaknesses of our postconviction system if they are to make informed judgments about what legal changes to seek and how, and what allies they can call on, in this specialized world. Without continuing improvement in postconviction justice mechanisms, the machinery of American criminal justice can never do its best work.

This symposium seeks to make a contribution to enhancing the quality of the tactical, strategic, ethical, and policy judgments of defense attorneys, prosecutors, judges, and reformers in the postconviction realm. The goal of the authors is to move each of these audiences closer to mastering that realm.

The subject matter of Eve Brensike Primus's piece, for example, is clear from its title: *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings.* Primus explores the relationship between state and federal postconviction review procedures, then focuses on several structural obstacles to success in federal claims, including procedural default rules that end up effectively waiv-

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ing ineffective assistance of counsel claims; the limited availability of evidentiary hearings; the loss of witnesses due to delay; and the absence of a constitutional right to counsel in postconviction proceedings. In the course of doing so, Primus carefully reviews the relevant federal statutory provisions and the leading case law. She sees political obstacles to overarching law reform in this area as insurmountable. But rather than leaving defense counsel in despair, she finds ambiguities and gaps in the case law that support creative defense arguments for at least modest evolutionary changes in the rules supporting these obstacles.

Myrna Raeder, in *Postconviction Claims of Innocence*, shifts attention to the postconviction options and obstacles facing counsel raising wrongful conviction claims. Raeder surveys the tools available (and unavailable) for relief under the federal Innocence Protection Act and its state corollaries; the arguably limited nature of the United States Supreme Court's recent *Osborne* decision, purportedly finding that there is no constitutional right to obtain postconviction DNA testing; the role that crime victims, contrary to assumptions, can sometimes play in encouraging pursuit of innocence claims; the ethical obligations of prosecutors to go beyond the doors that the law opens to the seemingly innocent to open new doors that serve the community better; the minefield of statutes of limitations on relevant claims; the possibility of "gateway" claims to have actual innocence arguments heard despite procedural default on the grounds that the failure to listen will lead to a fundamental miscarriage of justice; the definition of "new" evidence of innocence; and the continuing viability (or its absence) of "free-standing" constitutional claims of innocence. Taken as a whole, this piece offers a comprehensive guide to handling postconviction innocence claims.

Kathleen (Cookie) Ridolfi and Seth Gordon shift ground, authoring *Gubernatorial Clemency Powers: Justice or Mercy?* "Clemency" is an umbrella term that includes "pardons" (a nullification of punishment), "commutation" (a permanent reduction in the degree or amount of punishment), and "reprieve" (a temporary postponement of execution). Ridolfi and Gordon survey the major variations in state clemency procedures, attaching a chart that summarizes the key procedures in each of the 50 states. The theme they develop in doing so is that, despite frequent claims to the contrary, clemency is less about "mercy" (though it is about that too) than it is about justice. In the authors' words, "the clemency power is not only flexible enough to be exercised as both an act of mercy and as the 'fail-safe' for an imperfect criminal justice system, but there is ample support from both the Supreme Court and the Constitution that dictates it be exercised broadly." So understood, it is a remedy not to be ignored by defense counsel and that alters the obligations of the executive, who has broad discretion in exercising this power. Argue the authors, the clemency power can be used to correct a wide array of wrongs, including, for example, correcting unduly severe sentences; allowing for mitigating circumstances; righting wrongful convictions; restoring civil rights; preventing deportations; and encouraging the giving of state's evidence. Conclude the authors, the clemency power has been underutilized, and they hope by their article to encourage increased use by defense counsel and increased receptivity by the state.

Finally, J. McGregor Smyth, Jr., in *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, addresses in detail the problem of the collateral consequences of conviction. Those consequences are not limited to felony convictions, indeed not limited to convictions at all (for example, mere arrest can trigger eviction from public housing). Moreover, consequences can occur in error because rap sheets are too often wrong, with great practical obstacles to timely and accurate correction. The consequences can affect immigration proceedings, halt student loans, deny clients custody of their children, kill future employment prospects, promote homelessness, and lead to expulsion from educational programs, all of which make recidivism more likely.

Yet, argues Smyth, many of these consequences can be avoided or minimized by careful planning at the time of trial or sentencing. Moreover, at least some of these consequences may simply not be ones that the prosecutor intends. Prosecutor awareness of the risks and remedies for otherwise unintended harms thus better enables the prosecutor to serve the needs of the people. Smyth counsels a comprehensive discovery, advocacy, and social services strategy to reduce collateral or too-often invisible punishments. That strategy includes ensuring rap sheet accuracy, taking advantage at times of federal preemption and related doctrines, considering constitutional challenges, demanding reasonable accommodations for the disabled, being aware of unusual but helpful local statutory protections, pursuing restoration of rights or certificates of rehabilitation, and crafting an appealing narrative of redemption that can make prosecutor and defense counsel allies rather than adversaries.

Taken as a whole, these four fascinating articles offer in one source a guide to postconviction pitfalls and promises. We hope many readers will use this guide early and often. ■