I began this journey in 1985 with a simple thought: as a lawyer, I have an obligation to help those who cannot afford to help themselves. That thought was one of the driving forces that led me, a died-in-the-wool easterner, to stay in the midwest and take a job as an associate with the Chicago firm Jenner & Block. It was at Jenner & Block where I felt I could satisfy my desire to practice criminal law and do some pro bono work that I could feel good about, while still having a big firm litigation practice. In my first year as an associate, I sought out pro bono criminal defense work. My first case involved representing a Lithuanian Catholic priest who had been charged with a misdemeanor—disturbing the peace while protesting the closing of a Lithuanian community-based nursing home. Not exactly a case that tested the cutting edge of criminal or constitutional law! Once that case was resolved, I went looking for something else. I wasn’t looking for a death penalty case, but a death penalty case found me.

It was early 1985, and Illinois’ post-Furman1 death penalty statute2 had been in effect for about six years. Two cases, one involving Cornelius Lewis and the other Dickey Gaines, were ahead of the pack in their post-conviction process approaching federal court. It appeared likely that one of these cases would be the case in which the federal courts would have to decide the constitutionality of Illinois’ death penalty statute.3 The Illinois statute was significantly different from all of the statutes that the United States Supreme Court had reviewed post-Furman,4 and many thought at the time that there were substantial challenges to its constitutionality.5 In fact, a majority of the sitting justices of the Illinois Supreme Court had taken the position that the statute was not constitutional. But because those decisions came in two different cases—the latter after the composition of the Court had changed—the Court, nonetheless, upheld the statute’s constitutionality on the basis of stare decisis.6

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2. ILL. REV. STAT. ch. 38, §9-1(b) (1979).
3. Id.
4. Illinois’ statute was most similar—although not identical—to the statute enacted post-Furman in Pennsylvania, the constitutionality of which the Supreme Court ultimately upheld in Blystone v. Pennsylvania, 494 U.S. 299 (1990). The Supreme Court has never reviewed the constitutionality of the Illinois statute.
5. In fact, in the Lewis case the United States District Court for the Central District of Illinois expressed concerns about the constitutionality of the statute, but found it unnecessary to reach the issue because the court held that Lewis’ death sentence was unconstitutional. United States ex rel. Lewis v. Lane, 656 F. Supp. 181 (C.D. Ill. 1987), aff’d, 832 F.2d 1446 (7th Cir. 1987).
6. See People ex rel. Carey v. Cousins, 397 N.E.2d 809 (1979); People v. Lewis, 430 N.E.2d
By happenstance, Dickey Gaines enlisted the help of Jenner & Block, and I became one of his lawyers. Dickey wrote a letter to Bert Jenner, senior partner of Jenner & Block, saying that he was aware that Mr. Jenner had represented William Withershpoon in a landmark case in front of the United States Supreme Court. Mr. Gaines asked Mr. Jenner to represent him in a federal habeas corpus action challenging his convictions and death sentence. Mr. Gaines had been convicted of a double homicide that took place when he was eighteen years old, and he had been sentenced to death in a hearing in which his attorney had not presented any mitigating evidence.

A partner with the firm, Jeff Colman, decided to take the case. He was joined by a former Jenner & Block partner, David Bradford, who had recently left the firm to become, among other things, General Counsel of the MacArthur Justice Center, a new public interest organization dedicated to civil rights work. Jeff and David were looking for associates to help, and I was looking for a criminal case. Another new associate and I volunteered and before I knew it, I had begun what would become a twenty-year odyssey of death penalty work that would culminate, eventually, in a Republican Governor of Illinois granting clemency to everyone on Illinois' Death Row. That prospect was far from my mind—our focus was on saving one life and maybe in the process resolving the constitutionality of the Illinois death penalty statute.

The journey that ensued was often infuriating, usually frustrating, sometimes exhilarating, and always rewarding. I have no regrets about my twenty years of death penalty defense work.

*No Issue Is Hopeless*

I remember vividly my first visit to Death Row. We traveled to Menard Penitentiary on a beautiful early spring day. Menard sits on the banks of the Mississippi River, nearly as far south as one can go and still be in Illinois (so far south in Illinois, in fact, that the quickest way to get there from Chicago is to fly to St. Louis and drive two hours south). Menard's Condemned Unit (the name that the Illinois Department of Corrections gives to its Death Row units) sits atop a bluff overlooking the Mississippi. The view is spectacular, but once they entered, none of the prisoners who lived in the Condemmed Unit ever saw it. I remember being surprised that our new prospective client was my age. I was equally surprised that he wanted to interview us before deciding whether he would agree to let us represent him. In my naivety, I assumed that anyone lucky enough to have attracted the attention of three big-city, big-firm lawyers would jump at the chance of having us represent him. Ultimately, Mr. Gaines had no concerns, and we embarked on what would be an eight-year engagement representing him.7

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7. The citations to the Gaines case are as follows. Gaines' original conviction and sentence is at Gaines v. Illinois, No. 79C0485 (Cook County Cir. Ct. Nov. 2, 1979) [hereinafter Gaines I]. The affirmaice of his conviction and sentence by the Supreme Court of Illinois is reported at People v. Gaines, 430 N.E.2d 1046 (Ill. 1981) [hereinafter Gaines II]. The U.S. Supreme Court denied certiorari. Gaines v. Illinois, 456 U.S. 1001 (1982) [hereinafter Gaines III]. The Circuit Court of Cook County denied Mr. Gaines' post-conviction petition. Gaines v. Illinois, No. 79C0485 (Cook County
When we filed Mr. Gaines’ habeas corpus petition we found that, despite our efforts to challenge the Illinois death penalty statute, the federal district court preferred to dispose of the case without having to reach the constitutionality of Illinois’ death penalty statute. We labored away in the district court briefing and arguing claims ranging from ineffective assistance of counsel to an overture of Swain v. Alabama. We ultimately were granted an evidentiary hearing on our claim that Mr. Gaines’ trial counsel—an experienced criminal defense lawyer who had made a name for himself representing alleged mob figures, but who had never before handled a death penalty case, was ineffective. We investigated Mr. Gaines’ background thoroughly, and despite some resistance from family who did not want to open old wounds, uncovered evidence that Mr. Gaines had suffered horrendous abuse at the hands of an absentee father who had serious gambling and alcohol problems. Judge Plunkett of the United States District Court for the Northern District of Illinois issued an opinion in 1987, holding that Mr. Gaines’ constitutional right to effective assistance of counsel had been violated. Judge Plunkett reasoned that Gaines’ trial counsel was ineffective for failing to present any mitigating evidence at his capital sentencing hearing.

The State fought the case every step of the way, first appealing Judge Plunkett’s decision to the Seventh Circuit. I persuaded the other members of our team that we should cross appeal on two issues that went to the constitutionality of Mr. Gaines’ convictions. The first issue was the Swain v. Alabama issue, on which we had submitted extensive affidavits establishing the racial composition of the juries that had sentenced everyone then on Illinois’ Death Row. The second issue was the confrontation clause. The trial court had admitted a statement by Gaines’ brother and co-defendant implicating Mr. Gaines in the shootings, which was a clear

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Cir. Ct. Mar. 8, 1983) [hereinafter Gaines IV]. A notice of appeal was filed with the appellate court, but the state was successful in its motion to transfer the case to the Illinois Supreme Court in an unpublished opinion. The Supreme Court of Illinois affirmed the denial of post-conviction relief. People v. Gaines, 473 N.E.2d 868 (Ill. 1984) [hereinafter Gaines V]. The U.S. Supreme Court again denied certiorari. Gaines v. Illinois, 472 U.S. 1131 (1985) [hereinafter Gaines VI]. A habeas corpus hearing was held denying the writ except as to the death penalty, and a new sentencing hearing was ordered. Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987) [hereinafter Gaines VII]. The Seventh Circuit reversed the district court decision holding that the state could place Gaines on trial again, resentence him for felony murder, release him, or prove that he was directly responsible for the murders beyond a reasonable doubt and sentence him to death. Gaines v. Thieret, 846 F.2d 402 (7th Cir. 1988) [hereinafter Gaines VIII]. Rehearing was subsequently denied at Gaines v. Thieret, 1988 U.S. App. LEXIS 15992 (7th Cir. July 6, 1988) [hereinafter Gaines IX]. The state chose to pursue the death penalty and established eligibility, but the jury chose not to impose the death penalty based on mitigating factors, and Gaines was sentenced to natural life in prison. Gaines v. Illinois, No. 79C0485 (Cook County Cir. Ct. Nov. 17, 1988) [hereinafter Gaines XI]. That sentence was reversed and the case was remanded for resentencing because the eligibility finding which provided the basis for the natural life sentences was based on insufficient evidence. Illinois v. Gaines, 601 N.E.2d 949 (Ill. App. Ct. 1992) [hereinafter Gaines XII]. Gaines was resentenced to two concurrent 40-year sentences.

11. Id., rev’d by Gaines VII, 846 F.2d 402 (7th Cir. 1988), reh’g denied.
violation of *Bruton v. United States*. Every court considering the issue, however, had held the error to be harmless.

When the time came to argue the case, the Seventh Circuit panel assigned to hear arguments included two relatively newly-appointed conservative judges—Judges Posner and Easterbrook. We thought things looked hopeless.

Then came the first lesson I was to learn on the road to clemency—a lesson I was destined to relearn every several years: no issue is too hopeless to raise. To everyone’s surprise but mine, the court ruled in our favor on the *Bruton* issue. More specifically, the court initially held that Mr. Gaines’ convictions were unconstitutional, but ultimately revised its opinion to hold that Mr. Gaines’ convictions were adequately supported without the co-defendant’s statement, but only on the basis of a felony murder theory. The court gave the State a choice: either retry Mr. Gaines if the State wished to pursue a charge of intentional homicide or resentenced him for the felony murder convictions. If the State wished to pursue the latter course and to seek the death penalty again, it would have to establish beyond a reasonable doubt that Mr. Gaines was the trigger person in the crimes of which he stood convicted, pursuant to the statute in effect at the time of the crime.

The State opted to accept the felony murder conviction and try for death again. The State’s “star” witness at the eligibility stage of the sentencing—at which the State was required to establish beyond a reasonable doubt that Mr. Gaines was the trigger person—was a young man who admitted to having used marijuana and alcohol just prior to witnessing the shootings. We argued mightily that his identification of our client as the shooter was not reliable. Despite our efforts, the jury found Mr. Gaines eligible for the death penalty. Then, in an aggravation/mitigation hearing at which we called dozens of mitigating witnesses, the jury found that death was inappropriate. Under the curious language of the Illinois Pattern Jury Instructions, the verdict form actually read, “We the jury do not unanimously find that there are no mitigating factors sufficient to preclude a death sentence.” I had the honor of doing the closing argument at the final stage of the death hearing, and it was hands-down the most moving professional experience I have had. It is difficult to put into words the feeling of responsibility and privilege engendered by the thought that another human being was relying on me to argue for his very life. When the jury came back with the “no death” verdict, I was as high as a kite. I can remember thinking at the time that perhaps I should have gone to medical school, because doctors, who get the opportunity to save lives every day, are able to experience this overwhelming feeling of accomplishment and sheer joy that I felt all the time.

Here is where I learned my first lesson again—no issue is hopeless! When the jury came in with its “no death” verdict, the judge sentenced Mr. Gaines to natural life in prison, relying upon the jury’s finding of eligibility under the death penalty.
statute. At the time, there were two ways one could be sentenced to natural life: if one were found eligible for the death penalty but the death penalty was not imposed, or if the murders were exceptionally brutal and heinous.

Mr. Gaines was not happy about the natural life sentence, and wanted to appeal. I persuaded the firm to let me handle the appeal, even though David Bradford, who had first-chaired the case through the resentencing, decided to bow out at that stage. I filed the appeal, and to my surprise, the Appellate Court held that because of the serious questions regarding the eyewitnesses' ability to perceive and remember events and contradictions in his testimony, the State had not proved beyond a reasonable doubt that Mr. Gaines was the trigger person. That meant that Mr. Gaines was not eligible for death. That, in turn, meant that he could not be sentenced to natural life, because the trial court had imposed the natural life sentence solely on the basis of the jury's finding of eligibility.

After another round of sentencing, Mr. Gaines was given two concurrent 40 year sentences. With good time, he was released from prison in the fall of 1997. One of the first things he did was come to my office to have lunch with me—what a far cry from my first visit to the Condemned Unit at Menard twelve years earlier!

No Issue Is Hopeless: Reinforced

While I was handling Mr. Gaines' sentencing appeal, the second death penalty case found me. This client, Willie Thompkins, Jr., had been represented by the Cook County Public Defender's Office, which had a crushing caseload. The Illinois Supreme Court had just affirmed his convictions and death sentence on direct appeal. I agreed to take the case because I thought the record was peppered with constitutional errors in both Mr. Thompkins' convictions and in his sentencing.

The Thompkins case turned into a fourteen-plus year journey which continues to this day. We began by filing a state post-conviction petition for Mr. Thompkins. 26

21. Id.
25. The citations to the Thompkins case are as follows. Thompkins was originally convicted in Thompkins v. Illinois, No. 81C2153 (Cook County Cir. Ct. June 8, 1982) [hereinafter Thompkins I]. He waived sentencing by a jury and was subsequently sentenced to death by the judge at Thompkins v. Illinois, No. 81C2153 (Cook County Cir. Ct. July 1, 1982) [hereinafter Thompkins II]. The affirmance of his conviction and sentence by the Illinois Supreme Court is reported at People v. Thompkins, 521 N.E.2d 38 (Ill. 1988) [hereinafter Thompkins III]. The U.S. Supreme Court denied certiorari. Thompkins v. Illinois, 488 U.S. 871 (1988) [hereinafter Thompkins IV]. Rehearing was denied by the U.S. Supreme Court at Thompkins v. Illinois, 488 U.S. 977 (1988) [hereinafter Thompkins V]. Thompkins filed a petition for post-conviction relief with the county court and all claims were denied. Thompkins v. Illinois, No. 81C2153 (Cook County Cir. Ct. Oct. 8, 1991) [hereinafter Thompkins VI]. The Illinois Supreme Court reversed and remanded on the claim of ineffective counsel at sentencing. People v. Thompkins, 641 N.E.2d 371 (Ill. 1994) [hereinafter Thompkins VII]. On Oct. 3, 1994, rehearing was denied in an unpublished opinion. The U.S. Supreme Court again denied certiorari. Thompkins v. Illinois, 514 U.S. 1038 (1995) [hereinafter Thompkins VIII]. Thompkins' claim was again denied in an evidentiary hearing by the circuit court. Thompkins v. Illinois, No. 81C2153 (Cook County Cir. Ct. Jan. 11, 1996) [hereinafter Thompkins IX]. The Supreme Court of Illinois again remanded the case to the lower court directing it to reopen the
The case was assigned to an elderly judge who was determined not to allow us an evidentiary hearing on Mr. Thompkins’ post-conviction petition. Along the way, before his post-conviction proceedings were resolved, we appealed three times to the Illinois Supreme Court.\textsuperscript{27} In the first appeal, the Court ordered the Circuit Court to conduct a hearing on our claim that Mr. Thompkins’ counsel was ineffective at sentencing because he failed to present the wealth of mitigating evidence that was available.\textsuperscript{28} The trial court then gave us a hearing, which turned out to be merely perfunctory. Perfunctory because the judge excluded all of the expert testimony that we sought to offer, refused offers of proof for the testimony he excluded and, at the prosecutor’s invitation, left the courtroom while one of our excluded witnesses was testifying in an offer of proof.\textsuperscript{29} The Illinois Supreme Court, in a sharply worded opinion, reopened the hearing and ordered the Circuit Court to hear all the excluded testimony and issue new findings.\textsuperscript{30}

Luckily for Mr. Thompkins, while the second appeal was pending, the judge assigned to the case retired. The case was reassigned to the Honorable Sheila Murphy, who had recently ruled in favor of some of the defendants in the highly-publicized Ford Heights Four case, in which four men were exonerated from murder convictions (and two from Death Row).\textsuperscript{31} Judge Murphy heard all the excluded evidence and issued extensive findings. In our third post-conviction appeal, the Illinois Supreme Court, in June 2000, vacated Mr. Thompkins’ death sentence.\textsuperscript{32} It specifically held that his trial counsel was ineffective because he failed to even investigate, much less present, mitigating evidence that the Court described as “extraordinary.”\textsuperscript{33} Most notably, among that evidence was testimony from the Markham, Illinois’ former Chief of Police that Mr. Thompkins, during the Chief’s attempt to stop a gang fight, had saved his life by throwing himself on top of the Chief to prevent him from being stabbed.\textsuperscript{34} Back we went to the Circuit Court of Cook County, with the State, predictably, seeking the death penalty.

This brings me to 2000, and the third time I learned that same lesson. While I was fighting in the trenches for Mr. Gaines and Mr. Thompkins, extraordinary things were happening in death penalty cases in Illinois. First, an incessant series
of appeals and post-conviction cases were pounding the courts. The steady force of these cases, like waves against a cliff, began to erode the high capital sentencing rate that the State was achieving at trial. By the early 1990s, the Illinois Supreme Court had reversed approximately 50% of the death sentences imposed by the trial courts in post-Furman cases. Second, an alarming and ever-increasing number of prisoners on Death Row succeeded in establishing their innocence and were released or exonerated completely.35

This convergence of events led a creatively-thinking group of death penalty defense lawyers to urge then Governor George Ryan to impose a moratorium on executions in Illinois until the death penalty system could be studied and repaired.36 I cannot take credit for being part of that group, but I watched with interest as the Thompkins case wound its way through and to the end of post-conviction proceedings and toward a new sentencing hearing. Governor Ryan appointed a distinguished Commission—led by one of my partners, a former United States Attorney for the Northern District of Illinois, Thomas Sullivan—to study the death penalty system and recommend reforms.

That Commission’s Report is a forthright delineation of the many problems with the Illinois death penalty system and the Illinois criminal justice system as a whole. Governor Ryan, in his last year in office, tried mightily to persuade the State legislature to adopt the Commission’s recommended reforms, but the legislature was not interested.37

Enter clemency. In early 2002, Governor Ryan made a statement suggesting that if the reforms that his Commission recommended were not adopted, he might consider granting clemency to everyone on Illinois’ Death Row. And here is the third time for the familiar lesson—no issue is hopeless. The same brain trust that had pushed for the moratorium on executions went into clemency mode. They persuaded all of us who were representing prisoners on Death Row (or recently on Death Row and awaiting resentencing) to file clemency petitions in the hope that Governor Ryan would seriously consider clemency.

The rest of 2002 was a roller coaster ride. First, the push to file clemency petitions. Then, the decision whether to request clemency hearings, which, incidentally, my client, unlike most others, did. In most cases, it was the State, not the petitioner, who sought a hearing. The hearings, which were conducted in a marathon session of the Prisoner Review Board in October 2002, drew large media attention, albeit mostly to the heinous nature of the crimes involved and the losses suffered by the victims’ families. Many involved in the clemency effort thought all was lost at that point. But at the same time, the Illinois Legislature let the last session of Governor Ryan’s term go by without adopting his Commission’s reforms, and the die was cast. Governor Ryan did the unimaginable. He granted clemency and commuted the sentences of 167 Death Row inmates.38

35. Governor’s Report, supra note 31, at 7-10.
38. Eric Slater, Blanket Clemency in Illinois; Illinois Governor Commutes All Death Row Cases,
I venture to say that no one involved in death penalty defense work in Illinois throughout the decades of the 1980s and 1990s would have predicted that a Republican Governor of Illinois would grant clemency to everyone on Death Row. Even now, the battles are not over. Illinois Attorney General Lisa Madigan, like her predecessor, filed a mandamus action in the Illinois Supreme Court challenging Governor Ryan’s orders. She specifically challenged orders issued to prisoners who did not sign clemency petitions on their own behalf. She also challenged the orders issued to prisoners who, like my client, had been sentenced to death but were awaiting resentencing as the result of either successful habeas corpus actions or decisions by the Illinois Supreme Court vacating their original sentences. On January 23, 2004, the Illinois Supreme Court rejected Ms. Madigan’s challenges to the clemency orders. Characterizing the clemency power as “essentially unreviewable,” the court held that Governor Ryan had the constitutional authority to grant clemency to prisoners who did not sign petitions seeking clemency and to prisoners, like my client, who are convicted and awaiting resentencing. The court’s decision will stand as the most extensive analysis of the Governor’s clemency power under the Illinois constitution.

My twenty years of experience in death penalty work has not been what I thought it would be—it has been much more. It has been an education about the power that attorneys hold to navigate the legal system, establishing good precedents and tearing down bad ones. It has also been an education about the public policy changes that attorneys can bring, both through direct advocacy and through traditional legal work. And, perhaps most of all, it has been an education about never giving up on issues that appear to be hopeless.

40. Id.
42. Id.