EXECUTION OF DEATH ROW INNOCENTS AND THE FAILURE OF AMERICA'S LEGAL PROFESSION

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In early 1987, at the suggestion of partners in the Washington law firms of Covington & Burling and Arnold & Porter, I agreed to undertake the Post Conviction, Death Penalty defense of Walter Correll,1 with a young colleague, Robert Pokusa. Correll's case illuminates the problems endemic in the criminal justice system, problems that have been partially caused by and, therefore, should be confronted and solved by the institution most capable of remedying them: the legal profession. Yes, the legal profession itself, full of experienced and talented individuals, can be the catalyst for changing a system corrupted by inefficiencies and inequities. But to effectuate this change, the legal profession must reaffirm the values and commitments that once made our profession respected and even revered. Certainly Walter Correll's story will solidify these claims.

Walter Correll was a very young seventeen-year-old mentally retarded resident of Roanoke, Virginia who had been tried for robbery and murder without a jury, convicted, and sentenced to death by Judge B. A. Davis, III, in the Franklin County Circuit Court.2 The conviction was the product of a constitutionally infirm confession and a defense counsel who was tragically the epitome of constitutionally ineffective defense counsel.

A. Edwards Violation

In addition to withholding information from Correll's family or friends of his arrest, no attorney was provided for any of the many interrogations carried out by two separate teams of questioners over two days, after which the confession which

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1. The citations to the Correll case are as follows. Correll was originally convicted and sentenced in the Franklin County Circuit Court on March 5, 1986 [hereinafter Correll I]. The conviction and sentence of Correll by the Virginia Supreme Court is reported at Correll v. Commonwealth, 352 S.E.2d 352 (Va. 1987) [hereinafter Correll II]. The U.S. Supreme Court denied certiorari. Correll v. Virginia, 482 U.S. 931 (1987) [hereinafter Correll III]. Correll filed a petition for writ of habeas corpus in the Franklin County Circuit Court on August 15, 1987 [hereinafter Correll IV]. A plenary hearing was held as to Correll's claim relating to ineffective assistance of counsel in the Circuit Court of Danville on August 15, 1989, and Correll's petition for writ of habeas corpus was dismissed. [hereinafter Correll V]. In an unreported decision, the Virginia Supreme Court denied Correll's appeal [hereinafter Correll VI]. Correll's petition for writ of certiorari with the U.S. Supreme Court was denied. Correll v. Thompson, 498 U.S. 1041 (1991) [hereinafter Correll VII]. However, Correll petitioned for writ of habeas corpus in federal district court, and his petition for habeas corpus was granted. Correll v. Thompson, 872 F. Supp. 282 (W.D. Va. 1994) [hereinafter Correll VIII]. On appeal, the Fourth Circuit concluded that the district court erred in vacating Correll's convictions and sentences, therefore, the court reinstated Correll's convictions and sentences. Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995) [hereinafter Correll IX], cert. denied, 516 U.S. 1035 (1996) [hereinafter Correll X].
was admitted into evidence was finally obtained. The actual confession was given during an interrogation conducted away from the Roanoke jail in violation of rules requiring approval from the judge for such a trip. It was taken by the sheriff of Franklin County after Correll had been taken to Appomattox, Virginia, for a lie detector test, some 50 hours after Correll’s arrest. Further, the Franklin County Sheriff’s office did not enter or record Correll’s visitation at their detention center as required by rules of the center.

To pin this crime on Correll, the authorities had to do more than merely coerce an incriminating statement out of him. Their efforts became necessarily more complex and calculated in light of the two co-conspirators involved in this crime. That is, Correll was not alone during the robbery. The crime was committed with two other older persons who had criminal records and bad reputations. Both were older than Correll, both were represented by competent counsel, and both successfully plea bargained with the District Attorney. At the time of their arrest, they gave conflicting statements over the two-day period on the circumstances of the robbery/murder. After repeated interrogations by the arresting officers, they finally agreed on statements blaming everything on Correll. The reason for the three different statements taken from Correll was to systematically revise each Correll statement to conform with the changing statements of the other two defendants. The other two defendants received jail sentences as a result of their plea bargain.

U.S. District Judge Turk of the Western District of Virginia, Roanoke Division, after two separate hearings, handed down a carefully written opinion on August 24, 1994. He granted the “Great Writ” and ordered either a new trial or the release of Walter Correll. In this opinion, Judge Turk summarized the inadequate protection afforded Correll during his various encounters with police:

This court cannot imagine a more deliberate and egregious violation of Edwards than exists in this case. The petitioner invoked his right to counsel shortly after his arrest on August 16; however, that request was ignored. In the fifty hours following the petitioner’s request for counsel, police officers from two jurisdictions conducted three taped interrogations, one polygraph examination and an unknown number of unrecorded interrogations. At no time during these interrogations was the petitioner’s right to an attorney honored.

Unfortunately, a three-judge panel of the United States Circuit Court of Appeals, which included the Chief Judge of the Circuit, summarily reversed the District Court’s issuance of the Great Writ. Thus, Correll’s hopes of a new trial were shattered. Even more devastating, the possibility of avoiding the death penalty was much less likely. The court’s opinion held that the third confession was valid because, the court reasoned, Correll voluntarily responded to a Sheriff’s comment

3. Id. at 289.
4. Id.
5. Id. at 284-98.
6. Id. at 298.
7. Id. at 291.
8. Correll IX, 63 F.3d at 1293.
about his lie detector test. The court’s holding completely ignored the improper and unlawful removal of Correll from the Roanoke jail to the Franklin County Sheriff’s office.

B. Ineffective Assistance of Counsel

The Walter Correll case was a tremendous labor-intensive project for my young colleague, Robert Pokusa, and me. In addition, Lynn Florence, a Federal investigator with 20 years experience in criminal investigations for the EPA and other federal agencies, “volunteered” his spare time. Florence’s initial involvement was more fortuity than anything else. He happened to be in Roanoke on an EPA investigation on the dates when Correll was originally convicted and later sentenced. After listening to TV accounts and reading the paper, Florence realized that the trial and conviction did not pass his “smell test.” After a little personal investigation of his own, Florence was satisfied that justice had not been served. When we entered our appearance in the case, he called us to volunteer his free time.

Over a seven-year period, the three of us committed weekends and vacation time to the cause, not to mention the substantial hours of office time Bob and I committed. We completed the investigative work that should have been done prior to the original trial before Judge Davis. We covered the Rocky Mount and the Roanoke regions locating and interviewing witnesses, retracing events leading up to, and following, the crime, as well as locating death-scene evidence. Our efforts were “welcomed” and encouraged by Judge Davis, whom I believed was genuinely concerned that he had not been presented with all the facts. We also were initially assisted by the original defense counsel.

The evidence we found was substantial and determinative. It could have and should have been found prior to the trial. Unfortunately, defense counsel failed to conduct even a basic investigation. In fact, Correll’s attorney made no real effort to find or interview the key witnesses whose testimony was material to the defense, nor did he make a serious attempt to find the evidence which was vital and material to the defense.

Defense counsel’s meager performance was presumably not attributable to his abilities since he was an experienced lawyer with criminal trial experience. Instead, it should probably be chalked up to the fact that he had been pressured by the local court to defend a client he did not want to represent. Whatever his motivations, or lack thereof, sadly, if Walter Correll had been a wealthy client able to retain and pay his lawyer, I do not believe this case would have ever reached trial. If it had, trial counsel would have requested a jury trial, prepared the case, and Correll would have very likely been acquitted.

Tragically, however, Correll’s attorney was never interested in the case—not even remotely interested. He never understood or related to his client, a young mentally

9. Id. ("The record does not support a conclusion that the third confession was obtained in violation of Edwards or that it was inadmissible because tainted by earlier involuntary confessions.").
10. Correll VIII, 872 F. Supp. at 289. According to the custodial transportation order, Correll was to return to Roanoke immediately following the polygraph exam. Id. However, Detective Ferguson took Correll to the Franklin County Jail instead of Roanoke after the examination. Id.
retarded seventeen year old who had been sent from one welfare agency to another for most of his growing up years. He did not prepare for trial and, when trial actually arrived, he made no real effort to defend his client. He failed to cross examine the sheriff’s deputies on the circumstances of Correll’s confession. He bent over backward to be accommodating to the sheriff’s deputies who testified on behalf of the prosecution. Correll’s defense counsel’s opening statement covered less than half a page of transcript. His closing argument was only a few pages. When questioned by Judge Davis as to why the defendant was not asking for a jury trial, counsel deliberately misled the judge when he told him the case was too complicated for a jury to understand—an unfounded and ridiculous assertion for the most simple and basic criminal case.

Defense counsel then followed up by failing to introduce any evidence to challenge the State’s case. Defense counsel, moreover, failed to put Deputy Sheriff Ferguson on the stand as a Correll witness. Deputy Ferguson could have destroyed the State’s argument that the third confession (taken at the sheriff’s office in Franklin County on Sunday after taking a lie detector test in Appomattox) was voluntary. Remember, the Fourth Circuit found that Correll asked to talk with the sheriff, therefore, making his third confession voluntary. However, this conclusion would clearly have been different if Deputy Ferguson had testified that, despite lacking a court order, he was commanded by his superior not to return Correll to the jail in Roanoke, but instead to divert and deliver him to the sheriff’s office in Franklin County. The court’s conclusion would have certainly been altered if Deputy Ferguson had further testified that he informed Correll of the problems with the polygraph, and that he had no recollection of Correll ever asking to see the sheriff.

In short, defense counsel barely “went through the motions.” If Correll had been represented by any senior at the University of Virginia Law School or the University of Toledo Law School, he would have been ten times better served.

While I was shocked by the true inadequacies of Correll’s defense counsel, I was absolutely dismayed by the attitude and position taken by the Virginia Attorney General’s representatives. During my prosecutorial years as the U.S. Attorney in Maryland, one of my responsibilities included protection of the innocent (as well as prosecution of the guilty). This concept seemed foreign indeed unacceptable to Virginia’s Attorney Generals. I was dumbfounded by Virginia’s Attorney General’s “knee jerk” refusal to consider any of the newly discovered evidence and witnesses we found.

Not only was the Attorney General’s office not interested in determining whether “Justice had miscarried,” they were willing to resort to unethical and reprehensible tactics to uphold the death penalty verdict. For instance, they intimidated a witness

11. It should be mentioned that Correll’s defense counsel had a close personal relationship with both the Franklin County District Attorney who prosecuted the case and the sheriff’s office who investigated the case.

12. In our State habeas corpus hearing before Circuit Judge Ingram in Danville, Virginia, after almost ten consecutive hours of a hearing bitterly contested by the Virginia Attorney General’s office, Judge Ingram adopted Virginia’s proposed findings of fact verbatim and our ineffective assistance of counsel evidence was accordingly never subject to review by Judge Turk in U.S. District Court. Correll VIII, 872 F. Supp. at 285.
to prevent us from introducing evidence which would have upset the death penalty. The Virginia Deputy Attorney General also threatened to have Lynn Florence, our Pro Bono investigator, censored or fired by the EPA for working in defense of a Virginia criminal defendant. Thus, the Deputy Attorney General of Virginia, having successfully intimidated and prevented a key witness from testifying, tried his hardest to prevent a second witness, our investigator, Lynn Florence, from testifying. The court at my request ordered the Virginia Deputy Attorney General not to carry out his threat.

After we had challenged the illegal police practices, the shameful effort made by Correll's original defense attorney, and the draconian maneuvering by the Virginia Attorney General's Office, George Allen, who was then Governor of Virginia, decided that he could not yield to our arguments for commutation of the death sentence to life imprisonment. He allowed the execution to go forward. Walter Correll's execution was the saddest day of my legal career.

C. An Internal Solution

How can our states continue to allow similar tragic breakdowns in our criminal justice system? Why do so many powerful and affluent lawyers and law firms today decline to undertake the defense of unpopular, indigent, and for the most part, mentally retarded and minority defendants on Death Row? The bar and bench have equal access to all the statistical surveys that show how many defendants are innocent and are on Death Row principally because they were not represented in court by a competent and willing lawyer. Unfortunately, the failure of the defense counsel in this case to conduct even a basic investigation is too often mirrored in death penalty cases in almost every state in our Nation.

At the risk of raising the ire and animosity of many of my peers in the legal profession, I believe that one reason we have this situation today is because of the failed relationships and responsibility of practicing attorneys to their communities.

Public opinion surveys today consistently indicate that the only "professional" viewed with greater disrespect and antipathy than the lawyer is the journalist or the politician. I submit that the latter two professions are disliked because of the unpopular stories they expose and write about or the unpopular actions or votes they frequently take. But these professionals represent efforts or causes that make our democracy function. In other words, the dismay that they produce derives from the nature of their jobs in our constitutional system and under our Bill of Rights, not the unsatisfactory way in which they discharge the responsibilities of their jobs.

13. The sheriff's office staggered the first two confessions over a two-day period in order to make Correll the "triggerman," which under Virginia law makes him eligible for the death penalty. VA. CODE § 18.2-31 (2003). The actual triggerman, who pleaded, bragged that he had stabbed the victim and that Correll was too timid to touch the knife. (When we brought a witness from the prison in Powhaton to testify to this before Judge Ingram in our State Habeas Corpus trial, the witness was visited by the Deputy Attorney General, without our permission and without us present, and threatened to have the jail sentence for which he was serving time re-opened and have him prosecuted again. The witness was frightened and then declined to testify. I protested vehemently but unsuccessfully at Judge Ingram's hearing.)
The legal profession in the 51 years since I was admitted to the bar, once garnering great respect, has continued to fall in public esteem. This incremental loss of respect for the legal profession is arguably due to so many of our most financially successful law firms and lawyers failing to take their responsibility as officers of the court half as seriously as their role as business rainmaker—or money maker.

In 1954, when I was first elected to the Maryland Legislature from rural Harford County, Maryland, one of my strongest qualifications was the fact that I was an attorney practicing law in Maryland. In fact, over 50% of Maryland’s legislature at that time were lawyers, who, for the most part, served at a financial sacrifice ($1,800 a year for 90 days), committing a substantial portion of their time to help govern and oversee the management of our State. Our constituents generally appreciated our service and thanked us for it.

The sense of commitment during that time went beyond simply being engaged in local and regional politics. When I first practiced law, to be a court-appointed lawyer or to defend, or even to help a senior court-appointed lawyer defend a criminal defendant was considered a praiseworthy recognition of legal competence and achievement. The finest law firms, large and small, in Baltimore City and our twenty-three counties, recognized the court-appointed (basically pro bono) criminal defense of unpopular indigents as a responsibility of our profession. Every such defense was viewed as a legal positive in a lawyer’s career.

Unfortunately, over the last half century, too many members of our profession have drifted away from a sense of obligation and service to their community. Today, in too many cases, we see the focus of our profession quietly shifting to billable hours, profit per partner, portable business. Frequently, the pro bono committees in many law firms fail to have the real support and personal participation of the leaders of the firm (partners with the major billings). Too often, young, willing lawyers hear the quiet comments, “We have built up a strong practice and are trying to improve our client base—how would these clients feel if they saw us in court defending an unpopular client in a notorious criminal appeal?”

Even more disheartening today we find contemporary legal practices drifting away from a commitment to an “officer of the court” standard of years past. Instead, we find powerful attorney groups spending millions of dollars lobbying in legislative corridors for special legislation benefiting their client base. Some of the most financially successful lawyers in the nation, brazenly play crass “money” politics in the election of state judges favorable to their clients’ point of view. In at least one state, corruption of the State’s highest court by a lawyer special interest group and the manner in which judges are selected are the focus of serious censure and concern. In another state, there are many counties whose local judges either are or appear to be so contaminated with lawyers’ campaign contributions that a competent lawyer will drop a major party in a lawsuit to make certain he can litigate in a federal court venue on “an even playing field.” Why risk “rolling the dice” in a state court where local counsel do not hesitate to “advise potential clients of their large campaign contributions to local judges with clear inference that the outcome

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14. I am fortunate to practice in a firm which honors its commitment as officers of the court and prides itself on service to the community and rewards it associates and partners for pro bono work.
of cases tried in their state courts can be influenced by their ability to ex parte the local judge?"

The tragic situation in too many states involving innocent defendants awaiting execution should be a wake-up call to the lawyers of our nation, including those who have been financially successful. When the Governor of the State of Illinois commutes every defendant sentenced to death because of the failure of the Illinois criminal justice system, it should be a clarion wake-up call to us all. I am afraid, however, that if we did an honest headcount, we would find that over half of the lawyers who practice in our Nation’s 300 largest law firms have never helped their firm fund the representation of an indigent defendant in a criminal case, let alone undertake a personal pro bono defense. I further warrant that over 75% of this same group have never represented an indigent criminal defendant in any part of the proceedings of a capital murder case.

Our profession should give the highest priority to strengthening and reforming our legal system so that defendants in all death penalty cases have effective representation at all stages of our criminal justice system. Our profession should mobilize to ensure that every state and our federal government will provide adequate financing for such legal representation.

In states where the governor and legislators refuse to provide funding necessary for a viable legal defense for indigents charged with capital crimes, successful lawyers and law firms nationwide should support the American Bar Association Death Penalty Project and contribute to these defenses regardless of the venue.

Today, every lawyer admitted to practice should either personally volunteer to serve as pro bono or court-appointed counsel for an independent capital murder defendant at least once during his or her legal career or, in the alternative, help fund such a defense by another competent lawyer. The failure of our national, state, and local criminal justice system is a failure of every lawyer and judge in our Nation.