

COMMENTS

Murray v. Giarratano: Right to Counsel in Postconviction Proceedings in Death Penalty Cases

Introduction

Joseph Giarratano, an inmate on death row, describes the ordeal of an inmate seeking postconviction remedies¹ without the aid of counsel:

Picture yourself in this situation. You've been convicted of capital murder and sentenced to death. You are indigent, functionally illiterate and mildly retarded. Your court-appointed lawyer tells you that you have a right to appeal your conviction and sentence but that he will no longer represent you. . . . You've been moved into the death house. Your only choice is for you to represent yourself. You must file something with the court or be executed in less than 14 days. You have the right to file a petition for certiorari and a petition for habeas corpus and a motion for a stay of execution. But before you can file you must learn to read, write, overcome your retardation, obtain your trial transcript, understand the science of law, learn how to conduct legal research, analyze vast amounts of case law, formulate your issues, learn all the procedures, learn all the various court rules, understand civil procedure, constitutional law, criminal law and acquire the art of legal writing. You must do all of this and much more in less than 14 days²

Giarratano's plea for counsel fell on deaf ears. In *Murray v. Giarratano*,³ the United States Supreme Court held that an indigent inmate on death row does not have a constitutional right to state-appointed counsel when seeking postconviction relief at the state level. For the inmate on death row, a postconviction review is an important forum for remedying constitutional errors and a final chance to plea for his life or

1. Postconviction remedies, as used here, refer to any proceeding that reviews the validity of a conviction or sentence upon completion or expiration of direct appellate review.

2. Robbins, *Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases*, A.B.A. SEC. CRIM. JUSTICE, Task Force on Death Penalty Habeas Corpus 45 n.85 (May 1989) (quoting McCarthy, *A Defender on Death Row*, Wash. Post, Apr. 15, 1989, at A21, col. 6).

3. 109 S. Ct. 2765 (1989).

claim his innocence. Without the assistance of counsel, however, the inmate faces insurmountable obstacles in petitioning for state postconviction relief. The Supreme Court has failed to recognize that the state postconviction review promotes reliability by invalidating death sentences "flawed by fundamental factual, legal or constitutional procedural error."⁴ Reliability—indicia that "death is the appropriate penalty in a particular case"⁵ and that "the sentence was not imposed out of whim, passion, prejudice, or mistake"⁶—is today's constitutional standard for capital punishment. This standard is mandated by the eighth amendment cruel and unusual punishment clause.

This Comment begins with a summary of *Murray v. Giarratano*. Part II discusses the standard of reliability as required by the Eighth Amendment. Part III describes the state postconviction proceeding and argues that it ensures the reliability of a death sentence. Part IV shows that the availability of postconviction relief is meaningless without the assistance of counsel. The complexity of petitioning for postconviction review and the dilemma faced by the average inmate emphasize the need for appointed counsel in a state postconviction proceeding. Without representation, an inmate's valid claims justifying a sentence less than death may never be raised.

I. *Murray v. Giarratano*

Joseph Giarratano represented a class of indigent inmates on Virginia's death row who could not afford counsel in their postconviction proceedings. He filed a section 1983⁷ class action suit against various state officials.⁸ His *pro se* complaint alleged that the state's refusal to appoint counsel in state postconviction proceedings violated the inmates' sixth amendment right to counsel, the eighth amendment protection against cruel and unusual punishment, and the fourteenth amendment right to due process and equal protection, including the right of access to the court.⁹

In Virginia, an indigent inmate like Giarratano does not have a right to an appointed attorney for the purpose of filing a claim for postconviction relief.¹⁰ If the inmate files a nonfrivolous claim, however, and gains a postconviction hearing, counsel may then be appointed at the discretion of the trial judge.¹¹ Otherwise, assistance to inmates on death row is

4. Robbins, *supra* note 2, at 13.

5. *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988).

6. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

7. 42 U.S.C. § 1983 (1988).

8. *Giarratano v. Murray*, 668 F. Supp. 511, 512 (E.D. Va. 1986).

9. *Id.*

10. *Id.* at 514-15; see VA. CODE ANN. § 14.1-183 (1989).

11. *Giarratano*, 668 F. Supp. at 515.

limited to the provision of books from a law library and the services of part-time attorneys at various state penitentiaries.¹²

In *Giarratano*, the district court found that Virginia failed to provide its inmates with meaningful access to the courts.¹³ Such access was required by *Bounds v. Smith*.¹⁴ In *Bounds*, the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."¹⁵ The district court in *Giarratano* concluded that neither allowing inmates time in the prison law library nor loaning them law books constituted meaningful access, particularly for those incapable of doing legal research.¹⁶

The district court found that the assistance of seven part-time attorneys was inadequate to satisfy the standard of meaningful access to the courts because the attorneys did not provide continuous legal services and functioned only as legal advisors.¹⁷ The district court described these attorneys as "talking lawbooks" who did not "sign pleadings or make court appearances."¹⁸ Moreover, the attorneys served a total of more than 2,000 prisoners.¹⁹ As a remedy, the district court ordered the state of Virginia to develop a program for furnishing individual counsel upon request to indigent death row inmates.²⁰

The Fourth Circuit Court of Appeals reversed the district court's order,²¹ relying on the Supreme Court ruling in *Pennsylvania v. Finley*,²² which was decided subsequent to the district court's decision. In *Finley*, the Court held that a noncapital defendant had no constitutional right to a postconviction proceeding and therefore no right to an appointed counsel. The Fourth Circuit Court of Appeals, however, reconsidered *Giarratano* at an *en banc* hearing and affirmed the district court, reasoning that *Finley* did not apply because it involved neither the death penalty

12. *Id.* at 513-14.

13. 430 U.S. 817 (1977).

14. *Giarratano*, 668 F. Supp. at 515 (citing *Bounds v. Smith*, 430 U.S. 817 (1977)).

15. *Bounds*, 430 U.S. at 828.

16. *Giarratano*, 668 F. Supp. at 513. The district court declared the *Bounds* alternative of a law library inapplicable in *Giarratano*, noting that the *Bounds* decision relied on "'experience indicat[ing] that *pro se* petitioners are capable of using lawbooks to . . . raise legitimate claims.'" *Id.* (quoting *Bounds*, 430 U.S. at 826). The district court in *Giarratano* found that today's capital inmates are incapable of doing legal research and therefore the *Bounds* assumption did not apply. *Id.*

17. *Id.* at 514.

18. *Id.*

19. *Id.*

20. *Id.* at 517.

21. *Giarratano v. Murray*, 836 F.2d 1421 (4th Cir. 1988).

22. 481 U.S. 551 (1987).

nor meaningful access.²³

A. The Supreme Court Decision

Following petition by the State of Virginia, the United States Supreme Court granted certiorari. On certiorari review, a plurality of three justices and two concurring justices reversed the *en banc* court of appeals.

1. *The Rehnquist Plurality*

In an opinion joined by two other justices, Chief Justice Rehnquist held that an indigent death row inmate has no constitutional right to counsel in a state postconviction proceeding under either the Eighth Amendment or the due process clause of the Fourteenth Amendment.²⁴ Although “the holding of neither [*Finley*²⁵ nor *Bounds*²⁶] squarely decide[d] the question presented in this case,”²⁷ the plurality concluded first that *Finley* applied to capital inmates and, secondly, that *Finley* limited *Bounds*. Chief Justice Rehnquist rejected the argument that “death is different,” reasoning that the capital inmate’s special protection under the Eighth Amendment is limited primarily to the trial stage and does not extend to the postconviction stage.²⁸ Moreover, the inmate’s right to meaningful access to the court under *Bounds* did not necessarily require the assistance of counsel.²⁹ Pointing out that a single standard suffices for both capital and noncapital cases on federal habeas review,³⁰ Rehnquist questioned the need “to require yet another distinction between the rights of capital case defendants and [defendants] in noncapital cases” in the state courts.³¹

2. *The Concurring Justices*

Justices O’Connor and Kennedy each filed concurring opinions identifying the issue as a legislative one. In addition, Justice O’Connor pointed out that postconviction remedies are civil in nature and not part of the criminal process.³² She alluded to the fact that the sixth amendment right to counsel is limited to criminal cases and therefore should

23. *Giarratano v. Murray*, 847 F.2d 1118, 1121-22 (4th Cir. 1988) (*en banc*).

24. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989). Rehnquist’s opinion was joined by Scalia and White.

25. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

26. *Bounds v. Smith*, 430 U.S. 817 (1977).

27. *Giarratano*, 109 S. Ct. at 2772.

28. *Id.* at 2769-70.

29. *Id.* at 2772.

30. *Id.* at 2770 (citing *Smith v. Murray*, 477 U.S. 527, 538 (1986)).

31. *Id.* at 2771.

32. *Id.* at 2772 (O’Connor, J., concurring).

not apply to a prisoner's civil suit against the state.³³

Justice Kennedy acknowledged the importance and complexity of postconviction proceedings for death row prisoners.³⁴ He found, however, that the state's procedures were constitutional, stating that "no inmate on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings."³⁵

3. *The Dissenters*

Justice Stevens authored the dissenting opinion, which was joined by Justices Blackmun, Brennan, and Marshall. Justice Stevens framed the issue as not "whether there is an absolute 'right to counsel' in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies."³⁶ He concluded that fundamental fairness requires the appointment of counsel to provide capital inmates with a fair opportunity to present their state postconviction claims.³⁷

Justice Stevens reflected on the critical differences between capital postconviction and noncapital postconviction litigation. First, higher stakes in capital cases underscore the importance of a meaningful appellate review process because the loss of life cannot be reversed or compensated.³⁸ Second, state procedures preclude some claims from review until the postconviction stage.³⁹ Even federal habeas relief for such claims is unavailable until the inmate has pursued and developed his postconviction claims at the state level.⁴⁰ Finally, the capital inmate confronts a situation more pressing than a noncapital inmate. Facing an upcoming execution date, the inmate on death row has limited time to grapple with the procedures of capital litigation, a task that is unusually complex even for an attorney to master.⁴¹ Absent an impending execution and the complexity of capital litigation, the noncapital inmate may, however, be left to his own resources in pursuing state postconviction relief.⁴² These differences convinced Justice Stevens that a capital inmate requires the assistance of counsel to raise postconviction claims.⁴³

33. *Id.*

34. *Id.* at 2772-73 (Kennedy, J., concurring).

35. *Id.* at 2773.

36. *Id.* at 2776 (Stevens, J., dissenting).

37. *Id.* at 2781.

38. *Id.* at 2777.

39. *Id.* at 2778.

40. *Id.* at 2779.

41. *Id.* at 2780.

42. *Id.*

43. *Id.* at 2781.

II. Reliability as the Constitutional Standard in Capital Litigation

The Eighth Amendment guarantees that "cruel and unusual punishments [shall not be] inflicted."⁴⁴ Although the Supreme Court has never found capital punishment to be per se unconstitutional,⁴⁵ it has interpreted the Eighth Amendment as requiring a standard of reliability in capital cases.⁴⁶ The Court has recognized that

the qualitative difference of death from all other punishment requires a correspondingly greater degree of scrutiny of the capital sentencing determination. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.⁴⁷

By making procedural safeguards and sentencing guidelines the mainstay of modern capital litigation,⁴⁸ the Court rationalizes that a reliable procedure is more likely to result in a reliable, and therefore constitutional,

44. U.S. CONST. amend. VIII. The Eighth Amendment applies to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Robinson v. California*, 370 U.S. 660, 666 (1962).

45. In 1972 the Supreme Court held that then-existing death penalty statutes constituted cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The decision was based on the "wanton and freakish" application of the death penalty by statutes that failed to guide sentencing discretion. Justices Marshall and Brennan declared that the death penalty was per se unconstitutional, but Justices Douglas, Stewart, and White limited their individual holdings to the particular statutes.

46. Modern capital litigation began with the Supreme Court upholding the state death penalty statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976) and its companion cases, *Proffitt v. Florida*, 428 U.S. 242 (1976) and *Jurek v. Texas*, 428 U.S. 262 (1976). At the same time, the Court struck down the state death penalty statutes in *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

A constitutional death penalty statute "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting, respectively, *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 253; and *Woodson*, 428 U.S. at 303).

47. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); see *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988) ("evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case").

The imposition of death mandates reliability in the capital convicting and sentencing procedures. See *Johnson v. Mississippi*, 108 S. Ct. 1981, 1986-87 (1988) (there exists at sentencing a special "need for reliability in the determination that death is the appropriate punishment"); *Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (procedures that "introduce a level of uncertainty and unreliability into the factfinding process . . . cannot be tolerated in a capital case").

48. The procedures approved by the Court in *Gregg* included the following: (1) separate trials for conviction and sentencing phases; (2) automatic appellate review by the state supreme court; (3) enumeration of categories of crimes as capital offenses; (4) mandatory consideration

death sentence.⁴⁹

Two principles that are inherent in reliability and required by eighth amendment jurisprudence are "individualized sentencing" and "guided sentencing discretion." First, any limitation on the defendant's presentation or the sentencer's consideration of relevant mitigating evidence violates the principle of individualized sentencing.⁵⁰ A mandatory death penalty for a crime is unconstitutional because it precludes consideration of the individual defendant's case at sentencing and risks being inappropriate in light of mitigating evidence.⁵¹

Second, the state has a "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."⁵² Without guidelines to control jury discretion, a sentence may become an arbitrary exercise of the death penalty.⁵³

of aggravating and mitigating circumstances by the sentencer; and (5) the finding of at least one statutory aggravating circumstance before death may be imposed. *Gregg*, 428 U.S. at 153.

In using aggravating and mitigating circumstances at sentencing, "[p]rosecutors, reciting the brutality of the crime, will argue that aggravating factors predominate and death is appropriate. The defense will contend that mitigating evidence is sufficient and justice does not demand death." Coyle, Strasser & Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L.J., June 11, 1990, at 41 [hereinafter *Fatal Defense*].

49. The Court has stated that

[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by the Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern.

Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

One commentator explained that "[i]f a death sentence is inaccurate, it is not because it is the 'wrong' sentence but because there is a defect in the [sentencing] selection process that impermissibly altered the odds to favor execution." Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1043 (1985).

50. *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987) ("the sentencing authority must be permitted to consider 'as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense'") (emphasis in original) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); see also *Mills v. Maryland*, 108 S. Ct. 1860, 1865 (1988).

51. *Sumner*, 483 U.S. at 75-76.

52. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); see also *id.* at 433 ("any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion"); *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

53. This is not to say that the death penalty is never imposed arbitrarily or capriciously when guidelines for discretionary sentencing exist, only that such arbitrary imposition occurs less frequently. See Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986). The author identified much unfettered discretion that remains. For example, prosecutors have complete discretion whether to seek the death penalty or charge a capital offense. *Id.* at 799. In three states the judge has discretion to override a jury's decision to give a life sentence and instead to sentence the defendant to death. *Id.* at 820.

The Court may strike an aggravating circumstance⁵⁴ as unconstitutionally vague when it fails to channel the jury's discretion and provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁵⁵

III. The Importance of a Postconviction Review in Capital Litigation

The Supreme Court's plurality opinion in *Giarratano* turned on the Court's belief that a prisoner seeking postconviction relief has already had a fair trial. Chief Justice Rehnquist assumed that the trial and direct appeal of the judgment adequately assured the reliability of a death sentence. He stated that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed."⁵⁶ The plurality thus minimized the significance of the postconviction proceeding in ensuring the reliability of the death sentence.

A state postconviction proceeding permits an inmate to challenge the validity of his conviction or sentence. An inmate enters the postconviction stage once a state appellate court affirms his conviction and the United States Supreme Court decides not to grant any writ of certiorari filed on the inmate's behalf. The inmate usually initiates a postconviction proceeding by petitioning in the trial court. If the trial court denies the petition, the prisoner then moves through the state appellate court system with his postconviction claims and may again apply for certiorari to the United States Supreme Court. After completing his cycle in the state system, the defendant may file his petition for relief in the federal court system,⁵⁷ beginning with the district court.⁵⁸

State postconviction remedies, also called collateral reviews, include modernized writs of habeas corpus and *coram nobis*, motions for new trial and to set aside sentence, and postconviction hearing statutes.⁵⁹ The

54. An aggravating circumstance is used to distinguish capital murder from non-capital murder. The death sentence cannot be imposed unless the jury finds at least one aggravating factor. *See supra* note 48 and accompanying text.

55. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring); *see also Godfrey*, 446 U.S. at 427; *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

56. *Murray v. Giarratano*, 109 S. Ct. 2765, 2770-71 (1989).

57. Federal habeas corpus, codified at 28 U.S.C. § 2254 (1983), is available to state prisoners.

58. The hypothetical given here is neatly organized. In reality, an inmate may have several claims that are pending in various courts at one time.

Charts illustrating postconviction proceedings in the court systems can be found in Tabak, *supra* note 53, at 829; Mello, *Facing Death Alone: The Postconviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 520 (1988); Wright & Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 664-65 (1986).

59. The postconviction proceeding may also entail a stay of execution.

principal postconviction remedy available varies from state to state. For example, the principal postconviction remedies in California, Virginia, and Texas are based on the common law writ of habeas corpus.⁶⁰ Other states, including Illinois, Pennsylvania, Mississippi, and Tennessee, have statutory postconviction hearing acts.⁶¹ Nevada, Idaho, Oklahoma, and South Carolina are among the states with principal postconviction remedies derived from the 1966 version of the Uniform Post-Conviction Procedure Act.⁶² Other jurisdictions, such as Florida, Nebraska, and Arkansas, have modelled their postconviction remedies on the federal habeas corpus statute.⁶³ Most states have additional postconviction remedies in addition to a principal one.⁶⁴

Postconviction remedies provide relief for constitutional, jurisdictional, and fundamental errors. Under the Uniform Post-Conviction Procedure Act,⁶⁵ an inmate may obtain relief for the following reasons:⁶⁶ (1) either the conviction obtained or the sentence imposed was based on an unconstitutional statute; (2) the conviction obtained was based on conduct that is constitutionally protected; (3) the court lacked jurisdiction over the inmate or the subject matter; (4) the sentence was not authorized by law; (5) evidence not previously heard requires vacation of the conviction or the sentence in the interest of justice; (6) there is a significant change in substantive or procedural law that, in the interest of justice, should be applied retrospectively; (7) the inmate's custody was unlawful.⁶⁷

Generally, the inmate bears the burden of proving his postconvic-

60. See D. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF App. A (1987 & Supp. 1989).

61. *Id.*

62. *Id.* In 1955, the National Commissioners of Uniform State Laws drafted the *Uniform Post-Conviction Procedure Act* for use by the states. In 1966, and again in 1980, the Commissioners revised the Act. A copy of the 1966 version of the Act can be found in NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 266-77 (1966).

63. D. WILKES, *supra* note 60, App. A; 28 U.S.C. § 2255 (1983).

64. In Arkansas, for example, other remedies include: statutory habeas corpus; common law writ of error *coram nobis*; motion to correct sentence imposed in an illegal manner; motion to correct unlawful sentence; and motion to reduce sentence. D. WILKES, *supra* note 60, App. A.

65. UNIFORM POST-CONVICTION PROCEDURE ACT § 1 (National Commissioners on Uniform State Laws (1980)) [hereinafter UNIFORM POST-CONVICTION PROCEDURE ACT] (available in NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 333-42 (1982)).

66. The grounds enumerated in the *Uniform Post-Conviction Procedure Act* represent the typical postconviction remedy. Some states' postconviction remedies, however, are more restrictive. For example, Georgia and Tennessee limit postconviction claims to those of constitutional dimension. GA. CODE ANN. § 50-127(a) [9-14-42] (Harrison 1989); TENN. CODE ANN. § 40-30-105 (1982).

67. UNIFORM POST-CONVICTION PROCEDURE ACT, *supra* note 65, § 1.

tion claims by a preponderance of the evidence.⁶⁸ An inmate traditionally may raise his claims at anytime.⁶⁹ As a remedy, the inmate may request the postconviction court to vacate the conviction or sentence and to order a new trial or sentencing.⁷⁰

Postconviction relief is not a substitute for remedies at trial and on direct review.⁷¹ A court may reject claims that were apparent in the trial record and should have been raised in the direct appeal.⁷² The postconviction proceeding, however, may address claims precluded on direct appeal, such as claims based on facts outside the record,⁷³ claims for retrospective application of a new law,⁷⁴ and claims not properly preserved by counsel's objection at trial.⁷⁵ Remedies available on direct appeal are subject to time limitations.⁷⁶ Claims discovered after the expiration of direct remedies will therefore be raised at the postconviction stage.

A. Examples of Capital Convictions and Sentences Overturned in State Postconviction Cases

Many capital inmates have raised claims that warranted a new trial or sentencing. This section discusses various claims that may arise in a state postconviction review. These examples are based on actual cases in which state courts have granted relief to capital inmates.

1. *Unconstitutional Death Penalty Statutes*

Capital inmates commonly raise constitutional claims in postconviction proceedings.⁷⁷ A capital conviction or sentence is unconstitutional if

68. D. WILKES, *supra* note 60, at 8.

69. *Id.* at 5; *see also* UNIFORM POST-CONVICTION PROCEDURE ACT, *supra* note 65, § 3(b). *But see infra* notes 135-41 and accompanying text.

70. D. WILKES, *supra* note 60, at 8.

71. "As a general rule, the grounds for postconviction relief are fewer in number and narrower in scope than in direct remedy proceedings." *Id.* at 4; *see also* FLA. R. CRIM. PROC. 3.850 (West 1989); MISS. CODE ANN. §§ 99-39-21(1), -21(2), -5(3) (Cum. Supp. 1989); MONT. CODE ANN. § 46-21-105 (1989); NEV. REV. STAT. § 177.315(2) (Michie Cum. Supp. 1989) (claims that could have been raised at trial or on direct appeal are precluded from postconviction redress).

72. *See* UNIFORM POST-CONVICTION PROCEDURE ACT, *supra* note 65, § 12(b)(1) (relief may be denied on ground of misuse of process).

73. L. YACKLE, POSTCONVICTION REMEDIES 100 (1981 & Supp. 1989). The author refers to claims in federal habeas review, but these claims are first raised in state postconviction proceedings. *See Beck v. Zant*, 258 Ga. 527, 386 S.E.2d 349 (1989) (state postconviction court learned for first time from sources outside the record that defendant was mentally retarded).

74. L. YACKLE, *supra* note 73, at 101.

75. *Id.* at 97.

76. D. WILKES, *supra* note 60, at 3.

77. *See* Tabak, *supra* note 53, at 822-30, for descriptions of typical postconviction cases requiring reversal. For examples of capital cases reversed by the Florida Supreme Court, *see id.* at 836-37, and by other state courts, *see* Greenberg, *Capital Punishment as a System*, 91

imposed under a statute that fails to meet the Eighth Amendment's reliability standard. For example, a postconviction court may reverse a death sentence because sections of a state's death penalty statute unconstitutionally permit victim impact statements.⁷⁸ A proscribed sentencing form used by the jury may limit its consideration of mitigating evidence and provide an improper basis for a death sentence.⁷⁹ A new sentencing hearing may be warranted for a death penalty that was based on an aggravating circumstance later found invalid.⁸⁰ A reviewing court may determine that an inmate's death sentence is disproportionate to the crime.⁸¹ Finally, retroactive application of new developments in capital litigation may be the subject of postconviction relief.⁸²

2. *Constitutional Violations Occurring Before or During Trial*

In addition to challenging the constitutionality of the conviction or sentence, the capital inmate may raise claims of constitutional violations that occurred before or during trial. The exclusion of jurors who generally object to the death penalty may deprive the defendant of the sixth amendment right to a cross-sectional and representative jury pool.⁸³ Another constitutional claim may result from failure to warn a defendant of the right to remain silent during a psychiatric evaluation, such failure violating the fifth amendment right against self-incrimination.⁸⁴ The

YALE L.J. 908, 920-22 (1982). For a survey of errors found by federal courts reviewing state capital cases, see L. YACKLE, *supra* note 73, at 366-69.

78. Victim impact statements (VIS) refer to evidence about the character of the victim and the impact of the victim's death on family members and other people. The use of VIS shifts the focus from the defendant's culpability to the victim's character. The Supreme Court held that evidence of victim impact statements is inadmissible. *Booth v. Maryland*, 482 U.S. 496 (1987); see *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989).

79. See *State v. Colvin*, 314 Md. 1, 548 A.2d 506 (1988).

80. See *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (state failed to prove the two prior convictions that were used as aggravating circumstances); *Teague v. State*, 772 S.W.2d 915 (Tenn. 1988) (use of an invalid conviction to support an aggravating circumstance requires new sentencing hearing), *cert. denied*, 110 S. Ct. 210 (1989).

81. See *Reddix v. State*, 547 So. 2d 792 (Miss. 1989) (court reduced sentence to life imprisonment based on evidence that defendant was a mildly retarded and mentally ill 18-year-old, that he did nothing physically to assist the murder, and that the partner whom he assisted did not receive a death sentence, but imprisonment for life).

82. See *Mikenas v. Dugger*, 519 So. 2d 601 (Fla. 1988) (retroactive application of *Hitchcock v. Dugger*, 481 U.S. 393 (1987)); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) (retroactive application of *Lockett v. Ohio*, 438 U.S. 586 (1978)).

83. U.S. CONST. amend. VI; see *Ex parte Williams*, 748 S.W.2d 461 (Tex. 1988) (improper disqualification of a juror); *Ex parte Hughes*, 728 S.W.2d 372 (Tex. 1987) (same); see also *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (Supreme Court limited removal for cause to a venire member who explicitly indicated that she would automatically vote against a death sentence or could not remain impartial in determining the guilt or innocence of defendant with the knowledge that conviction might lead to a death sentence.).

84. See *Ex parte Chambers*, 688 S.W.2d 483 (Tex. 1984), *cert. denied*, 474 U.S. 864 (1985).

state's use of "impermissibly suggestive" investigative procedures may constitute a denial of due process of law under the Fourteenth Amendment.⁸⁵

3. *Prejudicial Jury Instructions and Jury Misconduct*

Postconviction claims that the trial court gave improper jury instructions may require the reversal of a capital conviction or sentence. Jury instructions may limit the consideration of nonstatutory mitigating evidence and render any resulting death sentence unreliable.⁸⁶ Mentioning the governor's power to commute a death sentence to life in the jury instructions may factor improperly into the jury's deliberation.⁸⁷ Instructions that the jury "should" recommend death if the aggravating circumstances outweigh mitigating evidence may improperly compel the jury to impose the death sentence.⁸⁸

A postconviction court may find error if essential information is omitted from the jury instructions. A defendant is entitled to a new trial if the court fails to instruct the jury on all of the elements required for finding a particular capital offense.⁸⁹ The court may neglect to tell the jurors that they could recommend a life sentence even on finding a statutory aggravating circumstance.⁹⁰

Finally, jury misconduct that affects jury deliberations and the decision to impose a death sentence may surface at the postconviction stage. For example, a juror's erroneous statement of the law may constitute prejudicial juror misconduct.⁹¹

4. *Prosecutorial Misconduct*

Another source of postconviction claims is prosecutorial misconduct discovered after the affirmance of the death sentence. The defendant may learn that the prosecutor suppressed exculpatory evidence⁹² or that

85. See *Ex parte* Brandley, 281 S.W.2d 886 (Tex. 1989).

86. See *O'Callaghan v. State*, 542 So. 2d 1324 (Fla. 1989) (court instructed the jury to consider only statutory mitigating evidence); *Waterhouse v. State*, 522 So. 2d 341 (Fla. 1988) (same), *cert. denied*, 109 S. Ct. 123 (1989); *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) (same), *cert. denied*, 485 U.S. 960 (1988); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (same); *Morgan v. State*, 515 So. 2d 975 (Fla. 1987) (same), *cert. denied*, 486 U.S. 1036 (1988).

87. See *People v. Garrison*, 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1989) (court found such instruction to be prejudicially misleading, inviting the jury to be influenced by speculative and improper consideration).

88. See *Williams v. State*, 525 N.E.2d 1238 (Ind. 1988).

89. See *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984) (jury instructions on felony murder did not define elements of the underlying felony).

90. See *Stynchcombe v. Floyd*, 252 Ga. 113, 311 S.E.2d 828 (1984).

91. See *In re Stankewitz*, 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1986) (juror convinced other jury members that, as a former police officer, he knew the law).

92. See *Roman v. State*, 528 So. 2d 1169 (Fla. 1988) (state failed to disclose exculpatory pretrial testimony of the witness); *Ex parte Womack*, 541 So. 2d 47 (Ala. 1988) (state sup-

the prosecutor knowingly relied on perjured testimony.⁹³ The defendant may object to a prosecutor's argument that distorts constitutional requirements.⁹⁴ Incorrect information that a death sentence is not commutable may influence a jury's decision.⁹⁵ The prosecutor may use a witness to produce inadmissible victim impact evidence.⁹⁶

5. *Prejudicial Evidentiary Errors*

A trial court's wrongful admission or exclusion of evidence may taint a death sentence. The court's refusal to permit the defense counsel to present relevant mitigating evidence may produce an unreliable death sentence.⁹⁷ The court may allow anticipatory rebuttal of mitigating evidence by the prosecution even without the introduction of such mitigating evidence by the defense.⁹⁸ The defendant may challenge a judge who refuses to consider mitigating evidence in his decision to sentence the defendant to death.⁹⁹ For the same reason, a judge's override of a jury's recommendation of a life sentence may be inappropriate when the judge did not consider the mitigating evidence.¹⁰⁰

6. *Newly Discovered Facts or Evidence*

New facts or evidence indicating an erroneous conviction or sentence may be revealed at the postconviction stage. For example, a suspect's confession to a murder may exculpate an inmate on death row.¹⁰¹ Ordinarily, the remedy for newly discovered evidence is a motion for a

pressed police reports indicating inconsistent statements of witnesses, evidence of a witness' attempt to recant grand jury testimony that implicated the defendant, and a memorandum containing information that state witnesses had committed the crime).

93. See *Ex parte Adams*, 768 S.W.2d 281 (Tex. Ct. App. 1989).

94. See *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984) (prosecutor's statement of his personal opinion for seeking death penalty may have unduly influenced jury).

95. See *Jones v. State*, 101 Nev. 573, 707 P.2d 1128 (1985) (statements that parole board may commute sentence of life imprisonment without possibility of parole, but not a death sentence, may have led jury to impose death sentence).

96. See *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (prosecutor asked supervising sheriff about reputation of deceased officer and impact of his death on his colleagues).

97. See *Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Foster v. State*, 518 So. 2d 901 (Fla. 1987); *Morgan v. State*, 515 So. 2d 975 (Fla. 1987); *McCrae v. State*, 510 So. 2d 874 (Fla. 1987); *Harvard v. State*, 486 So. 2d 537 (Fla.), *cert. denied*, 479 U.S. 863 (1986).

98. See *Fitzpatrick v. Wainwright*, 490 So. 2d 938 (Fla. 1981).

99. See *Hall v. State*, 541 So. 2d 1125 (Fla. 1989); *Cooper v. Dugger*, 526 So. 2d 900 (Fla. 1988); *Chaffee v. State*, 294 S.C. 88, 362 S.E.2d 875 (1987).

100. See *Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988).

101. See *State v. Scott*, 710 S.W.2d 212 (Ark. 1986). The presence of innocent people on death row is not uncommon. See *Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); *Malcolm, Tainted Trials Stir Fears of Wrongful Executions*, N.Y. Times, May 3, 1989, at A1; *Moran and Ellis, One Error Out of 280 Is Not Bad, Unless You're an Undiscovered Randall Adams*, L.A. Times, Mar. 9, 1989, pt. II, at 8; *Pull the Plug on the Death Penalty*, Oakland Tribune, Mar. 8, 1989, at C6.

new trial that is made at trial or during the appeal.¹⁰² This remedy requires, however, that the motion be made within a specific time frame.¹⁰³ When the time period for filing a motion for new trial expires, the inmate is left only with postconviction remedies to present new exculpatory evidence.¹⁰⁴

A postconviction review of newly discovered evidence may require a new trial. Randall Dale Adams, the subject of *The Thin Blue Line* documentary,¹⁰⁵ spent twelve years in prison, five of which were on death row, for a murder he did not commit.¹⁰⁶ A subsequent hearing revealed evidence warranting a new trial. James Richardson made similar headlines.¹⁰⁷ He was convicted and initially sentenced to death for poisoning his seven children. Nearly two decades later, his attorney unearthed evidence regarding the actual timing of the murder. The murder occurred several hours earlier than originally believed, at a time when Richardson was eight miles away from the murder site. This evidence led to the postconviction reversal of Richardson's conviction.¹⁰⁸

7. *Ineffective Assistance of Counsel*

Ineffective assistance of counsel claims are raised routinely at a post-

102. D. WILKES, *supra* note 60, at 10.

103. *Id.*

104. *Id.* at 11.

105. *The Thin Blue Line* (Miramax 1988).

106. Randall Adams was sentenced to death in 1977. The Governor of Texas commuted his sentence to life. The Supreme Court affirmed Adams's conviction in 1981. The documentary film assisted Adams in gaining a postconviction hearing in 1989. In *Ex parte Adams*, 768 S.W.2d 281 (Tex. Ct. App. 1989), the court found that the state's failure to correct perjurious testimony of a witness and to disclose improper coaching of a witness by police violated Adams's right to a fair trial. The court ordered a new trial, but the state decided not to prosecute in light of the timely confession of David Harris to the murder for which Adams was accused. See Johnson, *Freed From the Specter of Death*, Austin American-Statesman, May 7, 1989, at C10; Belkin, *Dallas Will Not Retry Man in Killing of Officer*, N.Y. Times, Mar. 24, 1989, at A6, col. 2; Belkin, *Dallas Frees Man in Verdict Appeal*, N.Y. Times, Mar. 22, 1989, at A9, col. 1; Kennedy & Cerone, *Conviction Set Aside for "Thin Blue Line" Character*, L.A. Times, Mar. 2, 1989, pt. I, at 1; Pasztor, *Confession, Judge's Plea Fail to Win Adams Parole*, Dallas Times Herald, Feb. 26, 1989, at A1; Applebome, *Texas Judge Says He'll Urge a New Trial in 1976 Murder*, N.Y. Times, Dec. 3, 1988, at A8, col. 1; Applebome, *Texas Has Chance to Seek New Trial*, N.Y. Times, Nov. 4, 1988, at A14, col. 1; Applebome, *Verdict in 1976 Murder Still Raising Questions*, N.Y. Times, Oct. 31, 1988, at A8.

107. James Richardson was saved from execution when the United States Supreme Court invalidated all existing death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972). Richardson remained imprisoned for an additional sixteen years before the discovery of evidence leading to his release. See Johnson, *supra* note 106, at C10; *Florida Won't Retry Man in Poisoning Case*, N.Y. Times, May 6, 1989, at A8, col. 5; *After 21 Years, Man is Freed in Poison Case*, N.Y. Times, Apr. 27, 1989, at A10, col. 3.

108. See *supra* note 107.

conviction hearing.¹⁰⁹ Such claims may stem from counsel's failure to investigate and present mitigating evidence,¹¹⁰ the failure to disqualify a biased juror on voir dire, or the failure to make a timely objection that will provide a basis for later appeals.¹¹¹ To obtain relief for ineffective assistance of counsel under the Sixth Amendment, the defendant must show not only the source of counsel's error, but also actual prejudice resulting from that error.¹¹² The additional burden of showing actual prejudice increases the difficulty of proving claims of ineffective counsel.¹¹³ State postconviction courts, however, have granted relief.¹¹⁴ The failure to present any mitigating evidence at a defendant's sentencing hearing may constitute ineffective assistance of counsel.¹¹⁵ Likewise, counsel may have a conflict of interest which affects his representation of the inmate.¹¹⁶ A defense counsel's failure to obtain an independent psy-

109. Robbins, *supra* note 2, at 24-25; see A.B.A. Amicus Curiae Brief at 19-21, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411) [hereinafter ABA Amicus] (claims of ineffective assistance normally require investigation beyond the record and thus can only be raised in postconviction review); American Civil Liberties Union Amicus Curiae Brief at 4-5, *Giarratano* (No. 88-411) [hereinafter ACLU Amicus] (Virginia limits direct appellate review of ineffective assistance of counsel claims to those in which matter is fully contained in the record; all other claims of counsel ineffectiveness are limited to the postconviction proceeding). Moreover, an ineffective counsel claim is not raised on direct appeal because the same attorney usually represents the defendant both at trial and on direct appeal. *Id.* at 6. A defense attorney is unlikely to raise any claim of her own ineffectiveness. *Id.* See *infra* note 159-70 and accompanying text for a discussion of the prevalence of ineffective assistance of trial counsel in capital cases.

110. One commentator has explained:

Although a capital defendant might have mitigating evidence that could persuade a judge or jury not to impose death, a death sentence will not appear unprincipled or arbitrary *on the record* where such evidence is not presented. . . . The adequacy of counsel's *preparation*, which does not appear on the record of a trial, is at least as important as the adequacy of counsel's *presentation*, which does appear.

Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 319 (1983) (emphasis in original).

111. See *infra* note 114 and accompanying text.

112. Strickland v. Washington, 466 U.S. 668 (1984).

113. See Goodpaster, *supra* note 110, at 345-52; Hengstler, *Attorneys for the Damned*, A.B.A. J., Jan. 1, 1987, at 59-60; Tabak, *supra* note 53, at 806-08; Comment, *Washington v. Strickland, Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544 (1983); Comment, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

114. See *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984); *State v. Fisher*, 152 Ariz. 116, 730 P.2d 825 (1986); *People v. Ledesma*, 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987); *Zant v. Cook*, 259 Ga. 299, 379 S.E.2d 780 (1989); *Smith v. State*, 511 N.E.2d 1042 (Ind. 1987); *State v. Taylor*, 535 N.E.2d 161 (Ind. App. 1989); *State ex rel. Busby v. Butler*, 538 So. 2d 164 (La. 1988).

115. See *In re Sixto*, 48 Cal. 3d 1247, 774 P.2d 164, 259 Cal. Rptr. 491 (1989); *Bassett v. State*, 541 So. 2d 596 (Fla. 1989); *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989); *Wilson v. State*, 771 P.2d 583 (Nev. 1989).

116. See *In re Easley*, 46 Cal. 3d 712, 759 P.2d 490, 250 Cal. Rptr. 855 (1988); *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984); *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984).

chiatric evaluation of the defendant may amount to ineffectiveness.¹¹⁷ Finally, a postconviction court may decide that the appellate counsel failed to provide effective assistance.¹¹⁸

B. Some Claims Will Be Heard for the First Time in the Postconviction Proceeding

In most states, the state appellate court automatically reviews any capital case that results in a death sentence. Direct review alone, however, cannot assure the reliability of a death sentence because not all valid claims are raised on direct appeal. These valid claims, many of which were described in the previous section, provide a basis for overturning a capital conviction or sentence.

In addition to the preclusion of claims on substantive grounds, state procedures may prevent claims from being heard on direct appeal. Virginia, like many other states,¹¹⁹ has a contemporaneous objection rule which precludes the review of any issue that was not preserved by the defense counsel's objection, or provision of reasons for any objection, raised at the trial.¹²⁰ Unlike the appellate court, the postconviction court may address these precluded claims if it finds that counsel was ineffective in failing to preserve the issue. Virginia has another procedural device that limits a direct review only to those issues that are assigned as errors, and not to the entire trial record.¹²¹ The court will not review the record to assure the accuracy of a death sentence, but only to resolve the appellate claims of error.

IV. The Need for Representation in a Postconviction Proceeding

The inmate's right to postconviction remedies is meaningless without representation by counsel. Petitioning and preparing for a postconviction proceeding require a specialized knowledge of the procedural and substantive rules of capital litigation.¹²² Postconviction capital litigation

117. See *State v. Michael*, 530 So. 2d 929 (Fla. 1988); *Curry v. Zant*, 258 Ga. 527, 371 S.E.2d 647 (1988).

118. See *Tyler v. State*, 507 So. 2d 660 (Fla. Dist. Ct. App. 1987).

119. Robbins, *supra* note 2, at 59 (all states have contemporaneous objection rule or other procedural bars); see, e.g., LA. CODE CRIM. PROC. ANN. art. 841 (West Cum. Supp. 1990); N.C. GEN. STAT. § 15A-1446 (a), (b) (1988); see also *Cochran v. State*, 548 So. 2d 1062 (Ala. 1989); *Rose v. State*, 461 So. 2d 84 (Fla. 1984); *Collier v. Francis*, 251 Ga. 512, 307 S.E.2d 485 (1983); *In re Hill*, 460 So. 2d 792 (Miss. 1984).

120. ACLU Amicus, *supra* note 109, at 1-2 (courts have refused to address claims raised by capital defendants on direct appeal on the ground that counsel failed to preserve or raise the issue at trial); see R. VA. SUP. CT. 5.25 (1989).

121. ACLU Amicus, *supra* note 109, at 2-3; see also R. VA. SUP. CT. 5.17(c) (1989); LA. CODE CRIM. PROC. ANN. art. 920 (West 1984).

122. See *infra* notes 155-58 and accompanying text.

is complex and difficult for many attorneys.¹²³ The expectation that an inmate, without the schooling or experience of a lawyer, can master what eludes most attorneys is absurd.¹²⁴

The myriad state and federal procedural rules for raising postconviction claims further complicate capital litigation. Failure to adhere to a procedural rule may cost the inmate his claims in both the state and the federal courts. Strict state rules delineating the procedure for raising postconviction claims increase the need for the assistance of counsel. Before the inmate petitions for relief, he must choose the most advantageous and appropriate postconviction remedy. Some states have a wide assortment of postconviction remedies.¹²⁵

Next, the petitioner must file his petition with the proper court. Some states require that the petition be filed with the convicting trial court,¹²⁶ while others direct the petitioner to file with an appellate court or the highest state court.¹²⁷ In Virginia, the convicting court and the supreme court have original jurisdiction over postconviction petitioners in criminal cases.¹²⁸ Thus, a petition erroneously filed in the Virginia Court of Appeals is subject to dismissal.¹²⁹

States have adopted summary procedures for disposing of postconviction applications. To obtain a hearing, the petitioner must make a

123. Tabak, *supra* note 53, at 531-43. While serving as a judge on the Eleventh Circuit Court of Appeals, John Godbold observed that "[t]aking a habeas case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis." Mikva & Godbold, *Representing Death Row: A Dialogue between Judge Abner J. Mikva and Judge John C. Godbold "You Don't Have to Be a Bleeding Heart,"* HUMAN RIGHTS, Winter 1987, at 24.

To assist attorneys, the American Bar Association Postconviction Death Penalty Representation Project prepared a habeas corpus handbook, a directory of experienced lawyers, and sample pleadings. Blodgett, *Death Row Inmates Can't Find Lawyers*, A.B.A. J., Jan. 1, 1987, at 58.

124. It has been observed that

[postconviction] capital cases by their nature are more factually and legally complex and demanding of legal expertise than any other cases, while the frequent need to litigate such cases quickly under the threat of an unstayed execution, the especially confining custodial constraints placed on death row inmates in most prisons, and the psychological pressures associated with an impending execution render condemned prisoners less capable . . . of adequately representing themselves.

L. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 83-84 (1981).

125. For example, the remedies available in Florida include statutory relief, a common law writ of error *coram nobis*, a writ of habeas corpus under the state constitution, and motions for reviewing sentences. Texas is unique, possessing one exclusive postconviction measure for felons and capital defendants. D. WILKES, *supra* note 60, App. A.

126. See, e.g., ARIZ. R. CRIM. PROC. 32.4(a) (West 1990).

127. See, e.g., WASH. R. APP. PROC. 16.3(c) (1977).

128. VA. CODE ANN. § 8.01-654(B)(1) (1983).

129. *Bullock v. Dept. of Corrections*, 1 Va. App. 70, 334 S.E.2d 150, *cert. denied*, 474 U.S. 1023 (1985).

substantial showing of a constitutional violation or risk dismissal.¹³⁰ In Arkansas, a petitioner cannot apply for postconviction relief without prior approval from the state supreme court.¹³¹ Illinois requires the court to act on a postconviction petition within thirty days of receipt of the petition.¹³²

Some state statutes limit the defendant to a single petition.¹³³ Such limitations jeopardize the defendant's chances for postconviction relief. The inexperienced inmate must seek and develop all available claims in his first petition or waive them.¹³⁴

States not only limit the number of petitions, but require petitions to be filed within a prescribed time period.¹³⁵ For example, Nevada statutorily requires that, in the absence of good cause, an inmate file for postconviction relief within one year of the affirmance of a death sentence.¹³⁶ Idaho requires a capital inmate to file for postconviction relief within forty-two days from the filing of the death sentence.¹³⁷ In Virginia, state law permits the state to execute an inmate as early as thirty days following his conviction,¹³⁸ providing little time for the inmate to seek a stay of

130. See, e.g., ILL. ANN. STAT. ch. 38, § 122-2 (Smith-Hurd 1973); see also *People v. Howard*, 94 Ill. App. 3d 797, 801, 419 N.E.2d 702, 705 (1981) (citing *People v. Farnsley*, 53 Ill. 2d 537, 549, 293 N.E.2d 600, 608 (1973)); UNIFORM POST-CONVICTION PROCEDURE ACT, *supra* note 65, § 9 (provision for summary disposition, leaving question of a hearing to the discretion of the court.)

The procedure in Maryland strives to be fair, providing petitioner with counsel and a hearing as a matter of right for his first postconviction application. MD. CRIM. LAW CODE ANN. art. 27 § 654A(f) (Cum. Supp. 1989).

131. ARK. R. CRIM. PROC. 37.2(a) (1989); see *Wilson v. State*, 285 Ark. 271, 686 S.W.2d 414 (1985) (postconviction petition dismissed because the defendant failed to obtain prior permission from the Supreme Court); *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1 (same), *cert. denied* 454 U.S. 933 (1981).

132. ILL. ANN. STAT. ch. 38, § 122-2.1(a) (Smith-Hurd Cum. Supp. 1989); cf. NEV. REV. STAT. § 177.380(6) (Michie Cum. Supp. 1989) (60 days).

133. See ALA. R. CRIM. PROC. 20(b) (1989); ARIZ. REV. STAT. ANN. § 13-4234(F) (West 1989); ARK. R. CRIM. PROC. 37.2(b) (1989); MONT. CODE ANN. § 42-21-105 (1989); NEV. REV. STAT. § 177.380(3) (Michie Cum. Supp. 1989); UTAH R. CIV. PROC. 65B(i)(4) (1989); VA. CODE ANN. § 8.01-654(B)2 (1983); cf. MD. CRIM. LAW CODE ANN. art. 27 § 645(a)(2) (Cum. Supp. 1989) (inmate limited to two petitions).

134. See *supra* note 133 and accompanying text.

135. Several states have adopted statutes of limitations that begin running at the end of the direct appellate review. See NEV. REV. STAT. § 177.315(3) (Michie Cum. Supp. 1989) (one year); ALA. TEMP. R. CRIM. PROC. 20.2(c) (1989) (two years); FLA. R. CRIM. PROC. 3.850 (West 1989) (same); ARK. R. CRIM. PROC. 37.2(c) (1989) (three years); MISS. CODE ANN. § 99-39-5(2) (Cum. Supp. 1989) (same); MONT. CODE ANN. § 46-21-102 (1989) (five years from date of conviction); ILL. ANN. STAT. ch. 38, § 122-1 (Smith-Hurd Cum. Supp. 1989) (ten years).

136. NEV. REV. STAT. § 177.315(3) (Michie Cum. Supp. 1989).

137. IDAHO CODE § 19-2719(3) (1987) (upheld in *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988)). Noncapital inmates have a statute of limitations of five years. *Id.* § 19-4902.

138. VA. CODE ANN. § 53.1-232 (1983); see *Giarratano v. Murray*, 668 F. Supp. 511, 513 (E.D. Va. 1986).

execution or to petition for postconviction relief. The inmate in Florida must file all postconviction motions within thirty days from the date on which the governor signs the death warrant.¹³⁹ In Arizona, a court cannot grant a stay of execution unless the inmate requests the stay at least ninety days before the date of execution.¹⁴⁰

These time limitations alone remain an obstacle for the unrepresented inmate in applying for state postconviction relief. The district court in *Giarratano* remarked, "Even assuming that a death row inmate would be intellectually capable of such a task, it is beyond cavil that a prisoner unversed in the law and methods of legal research would need much more time than a trained lawyer to explore his case."¹⁴¹

Current federal habeas corpus practices emphasize the need for assistance of counsel in state postconviction proceedings. A federal habeas proceeding cannot make up for claims overlooked at the state postconviction review because the outcome of that state review determines the extent of the federal court's habeas review. Before an inmate can present any claims to a federal postconviction court, the inmate must exhaust all state remedies.¹⁴² Procedural default¹⁴³ or an independent-state-ground ruling in a state postconviction proceeding may preclude federal habeas review of those issues dismissed in the state postconviction review.¹⁴⁴ The federal court, in deciding issues pursuant to a habeas petition, must presume that the state's factual findings are correct.¹⁴⁵

139. FLA. R. CRIM. PROC. 3.851(a) (West 1989). In Utah, the court will not accept an application for postconviction relief within 30 days of the scheduled execution. UTAH CODE ANN. § 78-12-31.2 (1987). These time constraints cause hardship because "[p]etitioners often do not file a collateral attack until the warrant has been signed" Wright & Miller, *supra* note 58, at 672.

140. ARIZ. REV. STAT. ANN. § 13-4234(D) (1989). In addition, a court will not grant a stay of execution unless the defendant presents a substantial claim that will probably be determined in the applicant's favor and result in a new trial. *Id.*

141. *Giarratano*, 668 F. Supp. at 513 (citation omitted).

142. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c) (1983); see Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177 (1985); Robbins, *supra* note 2, at 104-26.

143. A procedural default occurs when the defendant's failure to adhere to procedural rules precluded the appellate or postconviction court from reviewing his claims. For example, procedural default can result from the defendant's failure to make a timely objection at trial or to raise a claim within the prescribed time period.

144. See *Smith v. Murray*, 477 U.S. 527 (1986) (state dismissal based on failure to assign errors on direct appeal bars federal review); *Engle v. Isaac*, 456 U.S. 107 (1982) (state dismissal based on lack of contemporaneous objection bars federal review); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (same); see also Robbins, *supra* note 2, at 59-104; Robson & Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 87 (1988); Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1120 (1986).

145. *Sumner v. Mata*, 449 U.S. 539 (1981); see 28 U.S.C. § 2254(d) (1983). The presumption may not attach if one of eight enumerated exceptions applies. *Id.*

The nature of state postconviction remedies imposes other limitations on federal review. For example, the federal court will not relitigate a claim objecting to the admission of evidence as a fourth amendment "search and seizure" violation.¹⁴⁶ In addition, the inmate needs to raise all claims in the first habeas petition because a federal court may dismiss successive petitions on grounds of an abuse of the writ.¹⁴⁷ Finally, the filing of federal habeas petition is subject also to time limitations because federal circuit courts have adopted summary procedures to expedite federal habeas petitions.¹⁴⁸ In some cases these summary procedures provide less time for capital cases than for noncapital cases.¹⁴⁹

Inadequate trial representation further hinders the inmate's *in pro per* representation in the state postconviction proceeding.¹⁵⁰ An American Bar Association task force on death penalty habeas corpus reports that "[i]t is simply unrealistic to expect the [postconviction] system to operate better when its most fundamental component—informed, diligent, and effective advocacy—is missing at the trial level."¹⁵¹ Similarly, the *Guidelines for Appointment* note that "poor performance by trial counsel cannot be ignored on the theory that appellate or postconviction review will cure trial level error; in several instances deficient performance has not led to reversal."¹⁵²

The problems that plague the general criminal defense system for indigents, including unmanageable caseloads, inadequate funds, and lack of supervision or support for new attorneys,¹⁵³ are particularly acute in

146. *Stone v. Powell*, 428 U.S. 465 (1976).

147. 28 U.S.C. § 2254, Rules Governing § 2254 Cases in the United States District Court, Rule 9(b) (1983); *Sanders v. United States*, 373 U.S. 1 (1963); see Robbins, *supra* note 2, at 126-43.

148. A summary procedure was first recognized and upheld by the Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880 (1983), in which the Fifth Circuit Court of Appeals expedited the briefing and scheduling of arguments for cases. See Tabak, *supra* note 53, at 834-38 and Mello, *supra* note 58, at 546-48 for discussions of *Barefoot* and of the rules of the Third and Fifth Circuit Courts of Appeals allowing both the district court's ruling and the appellate court's disposition of a case to occur on the same day. Robbins, *supra* note 2, at 175-96 also discusses *Barefoot*. See Tabak, *supra* note 53, at 834-38 for a discussion concerning the lack of time for preparing for federal habeas petitions.

149. American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 34 (1989) [hereinafter *Guidelines for Appointment*]; Mello, *supra* note 58, at 547; Tabak, *supra* note 53, at 835.

150. Robbins, *supra* note 2, at 18-26; see Hengstler, *supra* note 113, at 58 for "horror stories of death cases bungled by trial counsel" shared by postconviction lawyers.

151. Robbins, *supra* note 2, at 25.

152. *Guidelines for Appointment*, *supra* note 149, at 33 (citation omitted).

153. American Bar Association, Special Committee on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 39-43, 52-54 (1988) (identifies the indigent criminal defense service as one of six major problems in today's criminal justice system).

capital defense representation.¹⁵⁴ Capital litigation requires specialized knowledge¹⁵⁵ and familiarity with constant changes in the law.¹⁵⁶ The prevalence of incompetent trial representation in capital cases prompted the American Bar Association to publish its *Guidelines for Appointment* and establish resource centers in thirteen states.¹⁵⁷ The *Guidelines for Appointment* explain that

death penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. . . . At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.¹⁵⁸

Despite the fact that capital litigation is such a specialized field, most states, including Virginia,¹⁵⁹ appoint trial attorneys without regard to their experience or abilities.¹⁶⁰ “Sometimes what the indigent gets is the town drunk,’ . . . [or w]hatever lawyer happens to be sitting in front”¹⁶¹ The National Law Journal, in a six-month study of the death penalty in the South, found that “more than half of the defense counsel questioned . . . said they were handling their first capital trials when their

154. Tabak, *supra* note 53, at 801-10. “Attorney error [in capital cases] is often the result of systemic problems, not individual deficiency.” *Guidelines for Appointment*, *supra* note 149, at 35.

155. The *Guidelines for Appointment* emphasizes sophisticated jury selection techniques, utilization of expert witnesses and evidence, effective cross-examination, substantial pretrial investigation, and coordination and integration of the evidence presented during the guilt phase and the penalty phase. *Guidelines for Appointment*, *supra* note 149, at 31-32; see also Goodpaster, *supra* note 110, at 317-39.

156. In 1987, for example, the United States Supreme Court handed down ten cases. DEP’T OF JUSTICE, *Capital Punishment 1987*, BUREAU OF JUSTICE STATISTICS BULL. 2-3 (1988) [hereinafter *Capital Punishment 1987*]. In 1989, the Court decided nine cases. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. 2 (Mar. 1, 1989).

157. *How Good are Death Row Lawyers?*, HUMAN RIGHTS, Spring 1989, at 37 [hereinafter *How Good Are Death Row Lawyers?*].

158. *Guidelines for Appointment*, *supra* note 149, at 31 (citation omitted).

159. Virginia lacks either specific requirements or standards for appointing counsel to represent capital defendants. ABA Amicus, *supra* note 109, at 25.

160. “In many states, there is no standard for the appointment of counsel. Lawyers are inexperienced or don’t have resources. Many of the people on death row are poorly served.” *How Good are Death Row Lawyers?*, *supra* note 157, at 37. Congress recognized this need for qualified counsel in capital cases and, in its enactment of the Anti-Drug Abuse Act of 1988, specified minimum qualifications for a trial attorney representing an inmate subject to the death penalty. Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4393-94 (1989). The *Guidelines for Appointment* recommends a standard of attorney eligibility at all stages of capital litigation and the appointment of two qualified counsel to one capital case. *Guidelines for Appointment*, *supra* note 149, at 41-44, 55-64.

161. Hengstler, *supra* note 113, at 58 (quoting Stephen Bright of the Southern Prisoners’ Defense Committee and George Kendall of the American Civil Liberties Union, respectively.)

clients, now on death row, were convicted."¹⁶²

Insufficient attorney compensation and inadequate funding for clerical, investigative, or expert witness assistance¹⁶³ further undermine the quality of representation.¹⁶⁴ A capital case runs three-and-a-half times longer than a noncapital case and thus consumes more attorney hours.¹⁶⁵ The one thousand dollar cap on attorney fees in Mississippi typically represented an hourly rate of five dollars or less,¹⁶⁶ leading the National Law Journal to conclude that "[w]holly unrealistic statutory fee limits on defense representation . . . act as disincentives to thorough trial investigation and preparation."¹⁶⁷ Even in states providing for "reasonable fees," the specific amount is left to the discretion of the trial judge and is "often small or non-existent."¹⁶⁸ Virginia is no exception, providing attorney fees that are among the lowest in the country.¹⁶⁹ Inadequate funding of the defense representation in capital cases increases the risk of erroneous death sentences.¹⁷⁰

Without counsel, "[t]he isolation of death row means that even a condemned inmate with the skills of Clarence Darrow could not mount a proper postconviction effort."¹⁷¹ Death row inmates lack the resources or freedom adequately to prepare postconviction claims.¹⁷² To conduct a postconviction investigation of a meritorious claim, a petitioner requires access to a law library, updated information on legal changes, and sup-

162. *Fatal Defense*, *supra* note 48, at 30. *Fatal Defense* discusses the lack of training for trial counsel and the lack of standards for appointing counsel in capital cases. *Id.* at 31, 38, 41, 44.

163. *Guidelines for Appointment*, *supra* note 149, at 73-75; Robbins, *supra* note 2, at 37. Congress acknowledged this need by providing for "reasonable compensation" for the attorney for her services as well as for other necessary services such as clerical and investigative assistance in the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4393-94 (1989).

164. Robbins, *supra* note 2, at 33-37. A Texas study indicated that 93 percent of capital inmates with appointed counsel were convicted as compared to 65 percent of inmates with retained counsel. In addition, 79 percent of the inmates with appointed counsel received the death sentence as compared to 55 percent of the inmates represented by retained counsel. Tabak, *supra* note 53, at 828.

165. Comment, *The Cost of Taking A Life: Dollars and Sense of the Death Penalty*, 18 U. C. DAVIS L. REV. 1221, 1258; see *id.* at 1245-66 for an explanation of why capital cases require more expenses, time, and attorney labor than noncapital cases.

166. *Fatal Defense*, *supra* note 48, at 33. For a chart comparing the method of compensation among eight states, see *id.* at 32.

167. *Id.* at 30.

168. Wilson & Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 335-36 (1989).

169. ABA Amicus, *supra* note 109, at 24-25 (citing Spangenberg Group, *Study of Representation in Capital Cases in Virginia* 25 (1988)).

170. Robbins, *supra* note 2, at 24 (inadequate trial representation increased the risk of flawed conviction or sentence); see also *Guidelines for Appointment*, *supra* note 149, at 79-83.

171. Mello, *supra* note 58, at 548.

172. *Id.* at 543-46.

port from outside the prison, including experts (forensic and psychiatric, for example), prior counsel and witnesses, and materials maintained in the trial court (such as records, evidence, and exhibits).¹⁷³ In addition, claims that are based on facts or evidence outside the trial record require further investigation. These claims include the underrepresentation of women and blacks in the jury pool, the withholding of exculpatory evidence by the prosecutor, and ineffective assistance of counsel.¹⁷⁴ An inadequate investigation by the trial attorney and an incomplete trial record frequently compound the need for further investigation of post-conviction claims.

The need to cope with an impending execution impedes the inmate's ability to represent himself. Scholars have recognized that life on death row can produce mental anguish or even mental illness.¹⁷⁵ In his dissent in *Giarratano*, Justice Stevens noted the district court's finding "that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims."¹⁷⁶

Inmates on death row often struggle with mental or emotional impairments, illiteracy, and poverty.¹⁷⁷ In Virginia, twenty-four of fifty-seven prisoners on death row had ninth grade education or less.¹⁷⁸ Nationwide, 20.5 percent of the inmates on death row had not passed the eighth grade and an additional 36.5 percent had not completed high school.¹⁷⁹ Indigency is even more widespread, affecting 99.5 percent of prisoners on death row.¹⁸⁰

Not surprisingly, a represented defendant has greater chances for relief than a *pro se* defendant. "In the capital setting, the difference [of representation] can mean the difference between life or death."¹⁸¹ One attorney estimated that represented inmates obtained relief in fifty per-

173. *Id.*

174. ABA Amicus, *supra* note 109, at 15-24 (descriptions of cases in which the defense raised meritorious constitutional claims. These claims required the investigation and development of facts and evidence outside of the trial records. Without the assistance of counsel, inmates in prison could not have uncovered these claims).

175. Professor Mello suggests *Ford v. Wainwright*, 447 U.S. 399 (1986) as an illustration of the mental deterioration of an inmate on death row. Mello, *supra* note 58, at 551 n.250. Professor Mello cites additional sources. *Id.* at 551 n.251; see also Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962); Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167 (1972); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 L. & PSYCHOLOGY 141 (1979).

176. *Murray v. Giarratano*, 109 S. Ct. 2765, 2780 (1989) (quoting *Giarratano v. Murray*, 668 F. Supp. 511, 513 (E.D. Va. 1986)).

177. Mello, *supra* note 58, at 548-53.

178. ACLU Amicus, *supra* note 109, at 20 n.7.

179. *Capital Punishment 1987*, *supra* note 156, at 7.

180. Mikva & Godbold, *supra* note 123, at 23.

181. Mello, *supra* note 58, at 531.

cent of postconviction cases.¹⁸² Counseled petitioners receive postconviction relief fifteen times more often than *pro se* petitioners.¹⁸³

The high rate of capital sentences overturned on federal habeas review is perhaps the greatest evidence of the capital inmate's need for appointed counsel in the state postconviction proceeding,¹⁸⁴ especially in light of current discussions to limit federal habeas corpus jurisdiction.¹⁸⁵ Data collected over a ten-year period ending in 1987 indicate that 1,034 out of 3,163 death sentences were disposed of by the federal court as a result of statutes struck down on appeal, vacated sentences or convictions, and commuted sentences.¹⁸⁶ One commentator calculated that sixty to eighty-five percent of capital cases were reversed compared to 6.5 percent for other criminal convictions during the same time period.¹⁸⁷ The fact that federal courts frequently overturn postconviction decisions by state courts shows that the state courts are not doing their share in enforcing federal constitutional rights.¹⁸⁸ The inadequacy of such state postconviction remedies in ensuring the reliability of death sentences necessitates the appointment of counsel in the state postconviction proceeding.

States such as Virginia¹⁸⁹ cannot continue to rely on volunteer attorneys to provide postconviction representation without imposing a statutory requirement for appointed counsel.¹⁹⁰ The nationwide shortage of

182. Blodgett, *supra* note 123, at 58.

183. Mello, *supra* note 58, at 565-66; Wright & Miller, *supra* note 58, at 670. Miller and Wright also point out that this increase may also reflect the counsel's ability to screen out frivolous claims. *Id.* at 670 n.32.

184. In his dissent in *Giarratano*, Justice Stevens recognized the high incidence of cases overturned by the federal courts. *Murray v. Giarratano*, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting). Few statistics exist about state postconviction reviews.

185. Lavelle, *Habeas Reform Proposal Passed*, Nat'l L.J., July 30, 1990, at 3; *Fatal Defense*, *supra* note 48, at 44; see also Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989), for the proposal recommended by a committee appointed by Justice Rehnquist.

186. *Capital Punishment 1987*, *supra* note 156, at 9.

Professor Anthony Amsterdam observed that "between 1976 and 1983, the federal courts of appeals decided a total of 41 capital habeas appeals and had ruled in favor of the condemned inmate in 30, or 73.2 percent, of them . . ." Amsterdam, *In Favorem Mortis*, HUMAN RIGHTS, Winter 1987, at 15; see also Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. A. B. CITY N.Y. 859, 873-74 (1987); Wright & Miller, *supra* note 58, at 669.

187. Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982); see Tabak, *supra* note 53, at 521 (73.2 percent success rate for capital inmates compared to 6.5 percent for ordinary criminal defendants).

188. Wright & Miller, *supra* note 58, at 672-87; Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359 (1987).

189. Virginia is among seven states that rely primarily on volunteer counsel for postconviction representation. Wilson & Spangenberg, *supra* note 168, at 335.

190. Wilson and Spangenberg concluded from their studies that "a system of volunteer counsel cannot be a long-term solution. . . . The pool of volunteer lawyers cannot expand rapidly enough to meet the growing need." *Id.* at 337.

volunteer attorneys to represent inmates on death row is well-documented.¹⁹¹ Attorneys are deterred from volunteering their services by the complexity of cases, the lack of support and guidance, the enormous time commitment, and the money and emotional energy involved in capital postconviction litigation.¹⁹² One survey estimated that taking one capital case through the state postconviction proceeding alone requires one-fifth to one-fourth of a private attorney's yearly workload.¹⁹³ Another survey indicated that attorneys in Virginia spent an average of 992 hours and \$3686 in each state postconviction capital case.¹⁹⁴ Judge Godbold, in an effort to recruit volunteers to represent capital inmates in postconviction proceedings, warned attorneys:

But don't say that I promised you a rose garden. A death penalty case will be as difficult and demanding litigation as you will ever participate in. It will require a substantial investment of time. The law is difficult. It's complex. It changes every week. Research is tough. The case will be emotionally draining no matter how hard you steel yourself against it.¹⁹⁵

V. Conclusion

The eighth amendment protection against cruel and unusual punishment compels the review of individual death sentences for reliability. The finality of the death penalty further warrants the state's interest in an execution reasonably free from errors. The state postconviction proceeding is a vital step in ensuring the reliability of death sentences. The state review process remedies constitutional claims not heard at trial or on direct appeal and reinforces the accuracy of a death sentence as an appropriate punishment. The state postconviction review therefore serves a

191. See Balske, *An Urgent Plea for Help from the Alabama State Bar*, 47 ALA. LAW. 14 (1986); Blodgett, *supra* note 123, at 58; Kroll, *Deathwatch*, CAL. LAW., Dec. 1987, at 25; Tabak, *supra* note 53, at 829-34; Wilson & Spangenberg, *supra* note 168, at 337; Oliver, *Hard Work, Low Pay; Death Row: Few Lawyers for Big Task*, L.A. Times, Mar. 21, 1988, pt. I, at 1, col. 1; Terry, *Lawyers Scramble to Fill Void in Death Row Appeals*, Wash. Post, July 24, 1988, at A11; Taylor, *Many Are Called, Many Respond*, Nat'l L.J., May 23, 1988, at 15; see also *Murray v. Giarratano*, 668 F. Supp. 511, 515 (E.D. Va. 1986) (district court noted the lack of volunteer counsel for state postconviction representation of capital inmates).

Recognizing the severity of the problem, the American Bar Association established the Postconviction Death Penalty Representation Project to recruit ABA members to represent indigent death row inmates in postconviction proceedings. See Blodgett, *supra* note 123, at 58; see also ABA Amicus, *supra* note 109, at 3-5.

192. See *supra* note 191; Mello, *supra* note 58, at 554-63; ABA Amicus, *supra* note 109, at 29-37.

California Lawyer identified the parallel between the decrease of available and skilled appellate lawyers and the increase of prisoners on death row needing representation in state postconvictions. Kroll, *supra* note 191, at 26.

193. Wilson & Spangenberg, *supra* note 168, at 336-37.

194. ABA Amicus, *supra* note 109, at 34.

195. Godbold, *supra* note 186, at 871.

crucial function in capital litigation because the "inexorable finality [of the death penalty] requires that no argument be left unaddressed in the process of assuring that the death-sentenced inmate is in fact guilty and was convicted fairly and in accordance with constitutional procedural safeguards."¹⁹⁶

The number of death sentences reversed by the federal courts indicates that state postconviction courts are overlooking the capital inmates' claims. The inmate cannot exercise his right to postconviction relief without the assistance of counsel. Isolated, indigent, and troubled, the inmate must confront the complexity of the state postconviction application procedure. As a prerequisite for federal habeas review, the state postconviction proceeding limits the availability of federal postconviction relief. Compounding the inmate's dilemma, trial representation is often inadequate and volunteer counsel unavailable. The state postconviction remedy cannot function in the reliability process without providing counsel to represent the capital inmate. The eighth amendment reliability standard mandates that the capital defendant have a right to an appointed counsel in a state postconviction proceeding. The absence of a constitutional right to an appointed postconviction counsel risks an erroneous execution, thereby silencing the individual with irreparable finality.

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196. Robbins, *supra* note 2, at 9.

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