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MEANINGFUL ACCESS UNDER BOUNDS

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Joseph Giarratano is a prisoner on Virginia's death row following his conviction for capital murder in 1979. His petition to the U.S. Fourth Circuit Court of Appeals (Murray v. Giarratano, *847 F2d 1118 (1988) is analyzed in this issue) argued that meaningful access to the courts, as required by* Bounds v. Smith, *430 U.S. 817 (1977), can only be achieved if the courts appoint counsel for defendants who want to pursue collateral appeals. The Fourth Circuit sitting* en banc *agreed.*

The Commonwealth of Virginia has appealed the Fourth Circuit decision and the United States Supreme Court granted cert. 57 U.S.L.W. 3236 (No. 88-411)—Ed.

Since the resumption of capital punishment in this country there has been a mounting crisis concerning the need for post-conviction representation in death cases.[1] This crisis came to the forefront in Virginia when the State attempted to execute an unrepresented death row prisoner who, because he could not afford a lawyer, was unable to institute state habeas corpus proceedings. Earl Washington, who had just completed the direct review of his death sentence, asked a Virginia Circuit Court judge to appoint him a lawyer to help him file a state habeas petition. The Commonwealth opposed the motion, and the judge denied Mr. Washington's request; and, in the same order, scheduled his execution. Virginia was the first state to make a concerted effort to execute an unrepresented individual. There were also five other death sentenced individuals who were in need of counsel.

Marie Deans, director of the Virginia Coalition on Jails & Prisons (a non-profit organization), had been tirelessly trying to recruit volunteer counsel to represent these men on a *pro bono* basis. Because the number of men on Virginia's death row was continuously growing it became virtually impossible to locate lawyers to voluntarily take these cases. The need was great and filing deadlines were drawing near. In an effort to assist Ms. Deans and, to gain time to locate qualified counsel, Ms. Deans asked if I would help: I filed several motions for time extensions, motions to stay the mandates, and in two instances petitions for certiorari.

It was these circumstances, and the Commonwealth's unequivocal efforts to execute the unrepresented, that prompted my filing of *Giarranto v. Murray*.[2] It was my belief that the State's efforts to execute individuals, before they had the opportunity to exercise their right to seek post-conviction review, predicated solely on the fact that they were indigent, illiterate, mentally retarded, or otherwise handicapped clearly violated the constitutional mandate of "adequate and meaningful" access to the courts; and, the individuals 1st amendment rights.[3] With Mr. Washington facing his scheduled execution I contacted Ms. Deans, who had still not been able to locate volunteer counsel for any of the men. I then filed the case, *pro se,* and through the efforts of Ms. Deans and, the NAACP Legal Defense Fund, we were able to recruit the *pro bono* services of the New York firm Paul, Weiss, Rifkind, Wharton & Garrison, to handle the case.

After a two day trial before the Honorable Robert R. Merighe, Jr., U.S. District Judge, the court found that;

> The matter of a death row inmates habeas corpus petition is too important—both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved—to leave to, what is at best, a patchwork system of assistance. These plaintiff's must have the continuous assistance of counsel in developing their claims.

Judge Merighe ruled that indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts, and ordered the defendants to develop a system to assure such appointment.

The Commonwealth appealed this ruling and a three judge panel for the Fourth Circuit (by a two to one margin) overruled the lower court. We then petitioned the court for a rehearing *en banc* and, after oral argument, the court (by a six to four margin) affirmed the District Court decision.[4] The State has taken exception to this ruling, and their petition for certiorari is now pending before the U.S. Supreme Court. Regardless of the final outcome in this case it cannot be honestly argued that the Commonwealth provides adequate and meaningful access to the courts for those under sentence of death who are indigent, illiterate, mentally retarded, or are otherwise handicapped.

The problems surrounding representation in capital cases does not *begin* at the post-conviction level. The need for *effective* representation begins at the **trial** level. This is especially true in Virginia where excessively uncompromising "procedural default" rules are enforced.[5] These rules have binding effect in both state and federal post-conviction appeals.[6]

Capital murder trials are extremely complex. The body of death penalty law is vast, constantly in flux, and forever changing. Counsel is faced with the enormous task of coming to know the intricacies of this specialized area of the law. The question for the capital lawyer is far more than "guilt or innocence." Capital trials in Virginia are bifurcated. The penalty phase of a capital murder trial is a complex entity in and of itself; and, often as not, it is sorely neglected. The stakes are life or death, and the need for reliability and skill are demanding. In short, death is different. Those representing a capital defendant at any stage should not hesitate to seek assistance, and assistance is available in Virginia.[7]

Without knowledgeable counsel at the trial level the force of *Giarratano* v. *Murray*—should the case prevail or not—is drastically reduced. Unless trial counsel properly preserves the issues at trial and, on direct review, post-conviction relief will be forfeited. One will not find, on Virginia's death row, a single post-conviction appeal where "procedural default" is not at issue. Individuals have been executed in this state—not because they failed to raise meritorious claims—but because those claims were procedurally barred from review. The importance of the problem and, the need for effective trial counsel, cannot be overstated.

Footnotes:

[1]See, Mello, "Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 American U. L. Rev. (1988).

[2]688 F. Supp. 511 (1986)

[3]*Bounds* v. *Smith*, 430 U.S. 817 (1977).

[4]847 F.2d 1118, *en banc* (1988).

[5]See, Rules 5:17 and 5:25 of the Virginia Rules of Court. These rules are absolute in capital cases. E.g. *Quintana* v. *Comm.*, 295 S.E.2d 643 (1982); *Coppola* v. *Warden*, 282 S.E.2d 10 (1981). To date I have not been able to locate a single capital case in which the Virginia Supreme Court forgave an appellate level procedural default.

[6]See, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Smith* v. *Murray*, 106 S.Ct. 2661 (1986); *Whitley* v. *Muncy*, 843 F.2d 55 (4th Cir. 1987); and, generally: Batey, "Federal Habeas Corpus Relief and the Death Penalty: Finality with a Capital 'F'", 36 U. Fla. L. Rev. (1984).

[7]The Virginia Coalition on Jails & Prisons and, The Virginia Capital Case Clearinghouse, provide assistance programs.

CAPITAL JURY SELECTION IN VIRGINIA

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Selection of a jury in any criminal case is a difficult task for attorneys. First, though we talk a good game, it is a process we know a lot less about than we think we do. We have only an educated hunch, often based on folklore and our anecdotal experiences, of what kind of folks we want on our jury if we could get them. Second, identifying them through the *voir dire* process is a real problem. The atmosphere is artificial and stilted, and we are not really trained in conducting *conversations* with prospective jurors in every day language. The process is not helped by the fact that by the time we get to examine the prospective jurors, the trial judge has been required by law to ask them a series of stilted questions, hardly designed to elicit anything useful.[1] At the close of *voir dire*, we are often left with little more than we gleaned from examining the data contained in the jury list to inform our hunches.

All of these problems are present and magnified in a capital case, and there are more. In one process, we are to select a jury that will adhere to the presumption of innocence, give our client a fair trial on the merits, AND upon a finding of guilt of capital murder, not be predisposed to kill him. Moreover, the common defense counsel dilemma of trying to succeed at trial while making a proper record for appellate review is magnified in capital cases. In every phase of a capital case, including jury selection, it must be remembered that the Virginia Supreme Court will not have the only look or the last word on errors of law. But if errors are made by the court, they must be fully documented and objections made and preserved on all applicable grounds, INCLUDING FEDERAL GROUNDS. Otherwise, meritorious claims may be lost, and a person executed for whom the law says death is not the appropriate penalty. It has happened.[2] Capital jury selection is indeed a daunting task, but if we know what the law requires and what selection strategies have been successful, a fair jury can be found.

In capital cases, providing effective assistance of counsel requires that you investigate possible challenges to the array from which both the grand jury and petit jury are drawn, and that in some instances you even challenge the Commonwealth's use of peremptory challenges. All of these possible challenges are grounded in the right of an accused to be tried by a jury drawn from a fair cross section of the community, that is from which no cognizable group has been systematically excluded.[3] These issues will be discussed in the second half of this article.

Providing effective assistance of counsel in capital cases also requires that you do all in your power, whether the trial judge is impatient or not, to insure that no juror will automatically vote for death upon being satisfied that your client is guilty of capital murder, but rather that the juror will fairly consider all mitigating factors approved by the General Assembly as well as any other aspect of defendant's character, record or circumstances of the offense that he proffers as a basis for a sentence less than death.[4] You are also required to insure that prospective jurors who have conscientously held scruples against the imposition of the death penalty, but who could *consider* every penalty provided by law, including the death penalty are not successfully challenged for cause. It is to the law and techniques for fulfilling this duty that I turn first.

A. DEATH AND LIFE QUALIFIED JURY

1. Law

The 6th Amendment to the United States Constitution guarantees criminal defendants the right to trial by an impartial jury. The Supreme Court of Virginia has recognized that this guarantee is also one of an impartial *sentencing* jury.[5] As judges and Commonwealth Attorneys are aware, however, some opponents of the death penalty may be systematically excluded from serving on a capital jury. An unlimited number of challenges for cause may be used to exclude them. The most widely known test for excludability comes from the famous case of *Witherspoon v. Illinois*,[6] providing for exclusion of jurors who make it unmistakably clear during *voir dire* that they would automatically vote against the imposition of the death penalty without regard to any evidence that might be developed at trial, or that their opposition to the death penalty would prevent them from making an impartial decision about guilt. You can expect that the prosecutor, and sometimes the judge, will ask a series of questions about this qualification and will follow