

The Death Penalty and Socioeconomic Equity

Joanna Traffley Perini

Introduction

In December of 1997, Sam and Lilian Davenport were found dead in their home in Whitley County, Kentucky. The County Medical Examiner determined the elderly couple had died of smoke inhalation. The police had been alerted to the scene when they received a phone call from seventeen-year old Larry Osborne from “Kentucky Holler”, a desperately poor section of Whitley County. Osborne heard glass breaking at the house as he rode by on a motorbike. One year later, Larry Osborne was the youngest person to ever sit on Kentucky’s death row. The trial lasted one and a half weeks, from jury selection to conviction and sentencing.

In this trial Osborne was represented by two attorneys from the Kentucky Department of Public Advocacy. Before the trial, both attorneys were working on full case loads. Two weeks prior to the trial they were finally given a chance to review the case before presenting it to the court. DPA only had the funds to retain a part time investigator to perform a portion of the required investigative work. The rest of the investigation for the defense was left undone.

Osborne’s conviction relied entirely upon the testimony of Joe Reid, a fifteen year old friend of Osborne who was with him that night. The testimony of Reid posed three significant problems. The first problem was that there was no corroborative evidence to support Reid’s testimony. This made his testimony the only piece of direct evidence tying Osborne to the incident. The second problem with Reid’s testimony was that it was highly inconsistent and very likely coerced. When first interviewed Reid shared the same account as Osborne but his story changed drastically after a lengthy interrogation by

Detective Gary Lane. Considered alone, this would not be suspect. However, the turnaround in his account occurred only after there was an unexplainable four-hour break in the tape of the interrogation. Such a break would usually serve as a red flag to an investigator. In the Osborne case, because the investigation was grossly underfunded, it was not possible to fully explore this avenue. The third problem with Reid's testimony was that he died in a swimming accident before the trial commenced. Reid's death greatly magnified the problem that his testimony was inconsistent. Had Reid been alive to testify at the trial, the defense would have had the opportunity to impeach him on the inconsistencies in his story. Since he was not able to testify, the prosecution read his Grand Jury testimony aloud. This violated Osborne's right to confront his accuser. Despite the motions filed by the defense, the judge allowed the presentation of Reid's testimony. This combination of insufficient funding for the defense, overzealous police work and a prosecution-friendly bench brought Osborne to death row, at age seventeen, in 1998.

Luckily for Larry Osborne, the state of Kentucky has a strong post-conviction capital appeals bureau in the Department of Public Advocacy. The Kentucky Supreme Court reversed the conviction on the constitutional issues raised by the admission of Reid's Grand Jury testimony. While the head office of DPA in Frankfurt handled the case, two of the most experienced attorneys in the capital trial unit took note of the case. After looking at the evidence and transcripts, the attorneys noticed the injustices that plagued the first trial and became convinced of Osborne's innocence. Because of the additional support from the Frankfurt office, the retrial proved to be a much different case than the first trial. The core defense team for the retrial consisted of three attorneys, two

investigators, and a mitigation specialist. While the defense still faced the problem of carrying large caseloads at the same time as a capital case, the additional manpower on the team made a distinct difference. After a full investigation, the defense proved that the police work done by the state was sloppy at best. The legal team also protected Osborne from any other gross violations of his rights. After two years on death row, and five years in the Kentucky prison system, Osborne was acquitted on August 1, 2002, at the age of twenty-two.

The case of Larry Osborne raises a number of issues central to the death penalty debate. One of the most glaring issues raised by this case is that of equity in the application of the death penalty. Is a defendant who receives appointed counsel, and must rely on the state for funding, at a great disadvantage compared to a defendant who has the financial resources to provide his own defense? How does the issue of socioeconomic equity vary from state to state? Specifically, how does a rather wealthy and liberal state, New York, differ from a more conservative state with fewer resources, Kentucky?

Death Penalty History

The death penalty has been a controversial part of American history since the country's inception. The framers of the constitution did not speak directly to the death penalty, but they did broach the topic in the Eighth Amendment, prohibiting cruel and unusual punishment. Arguments concerning the death penalty often center on the Eighth Amendment. The Fifth and Sixth Amendments are also frequently mentioned in arguments concerning the death penalty (Vila & Morris 24). The Fifth Amendment states that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless

on the presentment or indictment of a grand jury . . . nor be deprived of life, liberty or property, without due process of law.” The Sixth Amendment directly grants the right to an impartial jury in all criminal prosecutions. Denial of Fifth and Sixth Amendments rights has been the keystone of many equity arguments made against capital punishment. This constitutional argument proved successful in having state death penalty statutes held unconstitutional for a brief period in the early 1970’s.

In January of 1972, the United States Supreme Court heard the case of *Furman v. Georgia*. The case was a joint case brought by three petitioners, all of who had been convicted and sentenced to death by their state court. The petitioners argued that under current standards death sentences were “arbitrary and capricious” and violated the constitutional protection from cruel and unusual punishment. On June 29, 1972 the Supreme Court, in a landmark 5-4 decision, announced that the death penalty, as then administered, was unconstitutional. Justice Douglas, writing the opinion for the majority, stated that,

It is cruel and unusual to apply the death penalty selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards, and that because of the discriminatory application of statutes authorizing the discretionary imposition of the death penalty, such statutes were unconstitutional in their operation. (408 U.S. 238).

The decision did not rule the death penalty itself unconstitutional. Instead, the court found it unconstitutional for the death penalty to be imposed in a capricious or

discriminatory manner based on race, religion, wealth, social position, or class (408 U.S. 238). Prohibiting such discrimination proved enough to deem the death penalty unconstitutional across the United States.

In answer to the decision on *Furman v. Georgia*, the Georgia legislature changed the death penalty statute. Thirty-four other states and the federal government also changed their death penalty statutes (Vila & Morris 161). These changes sought to make the process more uniform in application and less prone to prejudice, thereby complying with the Furman decision. Only four years later, the case of *Gregg v. Georgia* brought the death penalty issue back to the Supreme Court. The new statute was ruled constitutional. The new statute had five major stipulations that have had a great influence on death penalty litigation; (1) guilt or innocence is determined in the first part of a bifurcated trial, (2) mitigation evidence is heard in the sentencing part of the trial, (3) aggravating circumstances must be specified in the statute and proven beyond a reasonable doubt in the trial, (4) the defendant is granted automatic appeal on the death sentence to determine if the sentence was imposed free of passion or prejudice and is proportional to the crime, and (5) if the death sentence is confirmed the appeals court must include references to similar cases the court has considered (Vila & Morris 162). At the same time, the Supreme Court heard the case *Woodson v. North Carolina*. North Carolina had amended their death penalty statute to mandate the death sentence for certain crimes. The Supreme Court, in a 5-4 decision, ruled such a mandatory statute unconstitutional (Vila & Morris 165).

Since the Gregg decision, it has been deemed unconstitutional to seek the death penalty for juveniles under the age of sixteen (*Thompson v. Oklahoma*) or for those with

an IQ under seventy-five (*Atkins v. Virginia*). With the exception of these two decisions, the Supreme Court has shown support for the death penalty. National support for the death penalty has continued to grow. As of 2002, 3697 prisoners sat on death row (Death Row USA 1). Thirty-eight states and the federal government presently have capital punishment statutes. Despite the new statutes and growing popular support, large question marks remain concerning whether the death penalty now complies with the Furman decision and is free of prejudice and gross injustices.

State Statutes and Process: New York and Kentucky

New York was not one of the thirty-five original states to amend their death penalty statute. New York State reinstated the death penalty in 1995 under Governor George Pataki. The current death penalty statute in New York says that the state may seek the death penalty in cases of first degree murder for defendants over the age of eighteen (NY CLS Penal Law 125.27). Murder is considered first degree when it is premeditated and when accompanied by one or more of the twelve aggravating factors.¹ The Kentucky Death Penalty statute allows the prosecution to seek the sentence of death in cases of murder or kidnapping for defendants over the age of sixteen years old when one or more of eight aggravating factors² occur. In both states, the aggravating factors

¹ These twelve factors are (1) the victim was a police officer, (2) the victim was a peace officer, (3) the victim was an employee of a state or local correctional facility, (4) the defendant is under a criminal sentence of fifteen years to life in prison, (5) the victim was a witness in a prior criminal act and the murder is an act to prevent the witness from testifying or an act of retribution, (6) the murder is committed for monetary reward, (7) the murder is committed during a robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, (8) intentional murder of more than one person, (9) the defendant had been previously convicted of murder, (10) the defendant acted in an especially cruel and wanton manner in inflicting torture upon the victim, (11) there were multiple victims within twenty-four months with similar patterns in the murders, and (12) the murder is part of a terrorist act (NY CLS Penal Law 125.27).

²These eight aggravating factors are, (1) the offender's substantial history of serious assaultive criminal convictions, (2) the offense was committed while the offender was engaged in the commission of arson in

only make it possible for the prosecution to seek the death penalty. These aggravating factors do not make it mandatory that the prosecution does so. The decision to seek the death penalty is at the prosecution's discretion. The Kentucky statute also lists the mitigating factors³. These factors are considered to determine the appropriate penalty once the jury finds the defendant guilty. Although the New York statute does not list the mitigating factors, they emulate those listed in Kentucky's statute. New York, similar to Kentucky, uses the commonly accepted federal guidelines for mitigation (Keahon, 3/13/03).

In most states that use capital punishment, including New York and Kentucky, the higher court automatically reviews the verdict. Only in South Carolina can a defendant choose not to have the decision reviewed. New York and the majority of the other states require both the conviction and the sentence be reviewed. Kentucky only requires the sentence be reviewed (Bureau of Justice Statistics). This requires the defendant to submit a petition to have the conviction reviewed. Except for this difference, the appeals process in Kentucky and New York are nearly identical.

The appeals process has three main stages. The defendant receives an automatic direct appeal and oral argument to the state's highest court of appeals. The appellate

the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree, (3) the offender knowingly created a great risk of death to more than one person in a public place, (4) the offender was paid to commit the murder, (5) the victim was a prison employee and the offender was a prisoner, (6) the murder was intentional and resulted in multiple deaths, (7) the murder was intentional and the victim was a state or local public official or police officer, (8) the murder was committed while the victim was under some form of legal protection from the offender (KRS 532.025).

³ These eight mitigating factors are 1) no significant criminal history, (2) the defendant was under the influence of extreme mental or emotional disturbance, (3) the victim was a participant in the defendant's criminal conduct, (4) the offense was committed under circumstances where the defendant believed himself to be morally justified, (5) the defendant was an accomplice to the capital offense and played only a minor role, (6) the defendant acted under the duress or control of another person in the commission of the crime, (7) the capacity of the defendant to appreciate the criminality of the conduct was impaired at the time of the crime by mental illness, retardation or intoxication, (8) the youth of the defendant at the time of the crime.

court can reverse the conviction or sentence. If reversed, the defendant receives a second trial or sentencing. The Supreme Court of Kentucky reversed and remanded Osborne's initial conviction at this stage. Had the court of appeals affirmed the trial court's decision, Osborne could have submitted a Writ of Certiorari to the United States Supreme Court asking for a review of the case and issues raised in appeal. If the Supreme Court reviews the decision, it determines if the trial court and the appeals court violated the defendant's constitutional rights. The Supreme Court rarely reviews decisions at this stage (Ky DPA, appeals).

The second phase of the capital appeals process is the state post-conviction petition and appeal. In Kentucky the defendant begins this process in the trial court on an RCr 11.42 petition. This allows the defendant to "claim a right to be released on the ground that the sentence is subject to collateral attack and may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it" (RCr 11.42, Lexis-Nexis). A collateral attack raises specific issues not directly dealt with at trial. The equivalent in New York State to this stage of appeal is a NY CPL 440.10 appeal (Hoerger, 4/1/03). Both the RCr 11.42 and NY CPL 440.10 petitions are brought directly to the trial court where the case was originally heard. The most common claim at this stage, in both states, is ineffective assistance of counsel. Other possible issues raised include newly discovered evidence or improprieties by the jurors, the prosecution or the judge. If the issues being raised are outside of the record, as a claim of ineffective counsel would be, a new hearing must be held. In New York and Kentucky, if trial counsel represents the defendant on the 440.10 or RCr 11.42 appeal, the defendant has the right to raise the issue of ineffective assistance of counsel *de novo* in the appellate

court. If the court grants this petition, the defendant receives a new trial or sentencing. If denied, the defendant may petition the higher appeals court of the state or submit a Writ of Certiorari to the United States Supreme Court. Again, the Supreme Court rarely hears this petition (Ky DPA, appeals).

The third stage of appeal, the Federal Post-Conviction Petition and appeal, is identical for the two states. A defendant who exhausts his state appeals rights may then appeal at the federal level. In this federal appeal the defendant must provide evidence that the state violated rights granted to him by the federal constitution. This stage begins in the federal district court with a Petition for a Writ of Habeas Corpus. The defendant asks the court to look at the federal constitutional issues raised in trial, in direct appeal and in state post-conviction appeal. The judge who reviews the case decides whether or not to hold a hearing on the claims raised in the defendant's petition. If the court denies the petition, the defendant can appeal to the appropriate Circuit Court of Appeals. The case is orally argued to a panel of three Circuit Court judges. If the panel affirms the lower court's decision, the defendant may ask that the decision be heard *en banc*. If the court again affirms the decision, the defendant can ask the United States Supreme Court to review the case. The decision to hear the case is left to the Supreme Court's discretion. A decision not to hear the case affirms the earlier decision (Ky DPA, appeals).

Through the many levels of appeals, one would assume that any valid claim of injustice would be addressed. This is not always the case, especially since the Anti-Terrorism and Effective Death Penalty Act of 1996. This act, strongly supported by both political parties, was an attempt to appear tough on crime. This act significantly limits a

defendant's right to appeal at a federal level (Hansen, 1996). In addition to this act, recent case law has made appellate procedure more important than potential innocence. This often leaves capital cases short of "full and fair appellate and post-conviction judicial review," (Ky DPA, Clemency). Recent rulings of the Supreme Court have effectively made it so that "a man could be executed because he could not provide a good enough reason why his winning constitutional claim had been raised in his second habeas petition rather than his first" and "a man could be executed because his lawyer had filed his notice of appeal in the state habeas proceedings three days late," (Reinhardt, 1999).

Such injustices occurred in the case of Thomas Thompson, who was executed in July 1998 in California (Reinhardt, 1999). Unique to this case, the error in the appeals process was not made by the defense counsel, but rather justices of the Ninth Circuit. Although prosecutorial misconduct and ineffective assistance of counsel on behalf of Thompson's defense attorney plagued Thompson's trial, the state appeals courts denied Thompson's appeals. The federal District Court judge who heard the case, Justice Richard Gadbois, determined Thompson's trial attorney's performance constituted ineffective assistance of counsel. His ruling vacated the sentence of death, but affirmed the conviction. Both the state and Thompson appealed to the Circuit Court. In June of 1996, the three-judge panel of the Ninth Circuit ruled against the district court's decision to vacate the death sentence, stating, "We are mindful of the limited role of the federal courts in habeas review of state convictions," (Reinhardt, 1999). Immediately following this decision, Thompson filed a timely petition for a rehearing en banc. When the other judges of the Ninth Circuit received the petition, the majority agreed the petition warranted an en banc hearing. Unfortunately, none of these justices filed the necessary

paperwork in time, due to a simple misunderstanding. When one of the justices finally filed the paperwork to hear the petition en banc, the three-judge panel replied that, “the panel has unanimously agreed that nothing will be done by the panel to extend the time within which an en banc call can be made. We see no reason to delay further consideration by the Supreme Court,” (Reinhardt, 1999). In the opinion by the United States Supreme Court affirming the death sentence, Justice Kennedy stated that “the state court’s judgment must be honored because the ‘finality’ of that judgment would deter future crimes, allow the victims of the crime to move forward and preserve the federal balance,” (Reinhardt, 1999). This step of the appeals process was denied, and Thompson was executed in 1998. In Reinhardt’s words, “In *Thompson*, the Court took on further step to elevate state procedural interests over concern for human life, over due process of law, and yes, over the Constitution itself,” (1999).

Washington and Lee University

As the defendant’s final safeguard against wrongful conviction or sentencing the governor has the right to grant clemency. In both New York and Kentucky the defendant makes a motion for clemency through the parole board, which the governor relies on for clemency recommendations. Historically nine factors figure in grants of clemency: judicial expediency, humanitarian or justice enhancing reasons, unqualified mercy, lingering doubt of guilt, defendant’s mental problems, proportionality, equity, rehabilitation, or remorse. A governor is expected to ask himself, “Is there any doubt about the appropriateness of death for this person; is the punishment of death truly fair and commensurate with the defendant’s blameworthiness?” (Ky DPA, Clemency). Clemency stands apart from the rest of the appeals process in that it is, “standardless in procedure, discretionary in exercise, and unreviewable in result . . .” (Ky DPA,

Clemency). Governor granted clemency is not common, but is used at times. For example this past year Governor Ryan from Illinois used his power of clemency to commute all the state's death sentences to life imprisonment. Governor Ryan did this after learning that more men have been exonerated off of Illinois' death row than have been executed (Chicago Daily Law Bulletin, 11/20/02).

Capital Case histories in New York and Kentucky

Most states have very similar statutes and processes for capital cases. However, in reality all states take very different approaches to the application of the death penalty. The difference between the death penalty in New York and Kentucky serve as a clear example of how greatly states can differ on this issue.

The differing political climates of the two states help to shine some light on the differences seen in their application of the death penalty. In New York, Governor Pataki made the reinstatement of the death penalty a major part of his campaign platform in 1994. This platform proved crucial to his election as he challenged incumbent governor Mario Cuomo, a well-known opponent of the death penalty. With the ground swell movement to be "tough on crime," the death penalty fit nicely into New Yorkers' intentions. However, New York has proven to be a contradiction. Theoretically, New Yorkers' want a death penalty on the books; practically, they do not want to impose it (Groot, 3/18/03). To ensure such intentions are met, New York has created a series of safeguards against the abusive application of the death penalty. Also, many district attorneys in New York are highly reluctant to file notice to seek the death penalty. For example, in the past eight years, neither Staten Island, Nassau County nor Manhattan has

ever filed notice to seek the death penalty, despite their high violent crime rates (CDO, Death notice cases by county).

In contrast to New York's cautious political views about the death penalty, Kentucky holds much more traditional views of applying the death penalty. In a study looking at attitudes about the death penalty in Tennessee and Kentucky, ninety-one percent of prosecutors favored the death penalty. Forty-three percent of the prosecutors disagreed with the statement, "The death penalty should not be imposed on a mentally retarded person," (Whitehead, 1998). Thirty-five percent of prosecutors openly disagreed with the statement, "Death penalty laws should guarantee no racial bias," (Whitehead, 1998). The finding that speaks most to the overall political climate of the area is that sixty-eight percent of the prosecutors believe that showing anti-death penalty sentiments would greatly hurt their chance of re-election (Whitehead, 1998). This political climate leaves prosecutors little room to exercise their own discretion. This political situation was evident throughout the Osborne case. Although the prosecution had little evidence, they knew they must obtain a conviction in the case to appease the affluent family of the victims and the community. Also, the judge allowed the testimony of Reid knowing it would be overturned in the appellate court. This allowed the judge to shift the blame to an outside source (Norris, 3/25/03). Such political differences help to explain the clear differences in the imposition of the death penalty between states in this region and more liberal states.

Since the reinstatement of the death penalty in New York in 1995, district attorneys in New York have filed notice to seek the death penalty only forty-four times (CDO). The state originally investigated seven hundred and thirty homicides with the

intent to seek the death penalty. Under New York law the prosecution must decide whether or not to seek death within one hundred and eighty days from the beginning of the investigation. When an investigation of any death eligible first degree murder is opened, the Capital Defenders Office receives notification. Once notified, the Capital Defenders Office begins work to avoid the initial death penalty notice. In six hundred and forty of these cases a combination of circumstances and pretrial work done by the Capital Defenders Office has led the District Attorney not to seek the death penalty. Of the forty-four cases in which notice was filed to seek the death penalty, sixteen have gone to trial. In thirty-nine of the forty-four cases in which the death notice was filed, the defendant was either convicted of first-degree murder at trial or pled to sentences ranging from twenty-five years to life without parole. In one case the defendant was convicted of a crime less than first-degree murder; in another case, in which the death notice had been withdrawn before trial, the defendant was acquitted. Three cases are still pending. Six of the men convicted of first degree murder at trial have been sentenced to death. The New York State Court of Appeals recently overturned the death sentence in one case. The other five cases are currently in the appeals process (CDO, Quick Answers).

After the Furman decision, Kentucky amended its death penalty statute and reinstated the death penalty in 1976. Since 1976 Kentucky has executed only two people from death row. Kentucky currently has thirty-eight men and one woman on death row (Death Row USA). However, in contrast to the precise statistics kept by New York on capital issues, Kentucky does not maintain such accurate records. In fact, Kentucky, similar to other active death penalty states, intentionally does not publish aggregate records of death penalty cases (Norris, 3/25/03). Aggravating the problem is that

without a centralized agency like the Capital Defenders Office in New York, statistics are not kept on cases initially investigated for death, cases in which death noticed was filed but did not go to trial, and death penalty cases lost at the trial level. Although the state does not keep these statistics, it is generally accepted knowledge that the state of Kentucky files approximately twenty death notices every year (Norris, 2/25/03). Also, it is more common in Kentucky for a death certified defendant to be convicted of a crime less than murder or outright acquitted than in New York. During the July 2002 trial term in Whitley County, two defendants were acquitted in cases seeking the death penalty. This discrepancy in the frequency that the states seek the death penalty characterizes the states' general attitudes toward the death penalty.

Issues with counsel

Kentucky and New York also differ in the appointment of counsel to capital cases. In New York, all court assigned murder cases are handled by an elite panel of attorneys. This panel, the 18-A list, consists of private attorneys who must apply and demonstrate experience with and commitment to serious criminal legal work. When New York reinstated the death penalty, the legislators did not feel comfortable with the 18-A list handling death eligible cases. The same legislation that reinstated the death penalty in New York also created the Capital Defenders office. William Keahon, co-counsel for Robert Shulman⁴ in his capital murder trial, champions the Capital Defenders Office as “a move of social conscience, to ensure justice,” (Keahon, 3/13/03). The creation of the Capital Defenders Office was a crucial political component in the reinstatement of the

⁴ Robert Shulman was convicted of one count of murder in the first degree and four counts of murder in the second degree and sentenced to death in 2000. Shulman allegedly killed and dismembered prostitutes in Suffolk County, New York. Shulman was represented at trial by William Keahon and Paul Gianelli, whom he retained for \$500,000.

death penalty in New York State. Anti-death penalty state legislators saw the Capital Defenders Office as a safeguard against a capricious application of the death penalty. The Capital Defenders Office ensures that the accused is provided with the most competent and prepared counsel possible. The establishment and support of the Capital Defenders Office has been an important step in ensuring the death penalty is not applied in a prejudicial manner and is carried out in only cases where guilt is certain.

The Capital Defenders Office, an independent agency, receives funding from the state. The mission statement of the Capital Defenders Office, as assigned by the legislation in 1995, declares the Office “the guarantor of effective representation in every capital and potentially capital case, no matter the source of capital counsel,” (CDO, Introduction). To accomplish this mission, the Capital Defenders Office provides highly qualified attorneys to defendants who cannot afford private counsel and help to supplement the cost of the defense for those who do retain private counsel. They assess attorneys’ qualifications based on their background as criminal attorneys, willingness to take capital cases and specific capital training. The state requires that two attorneys who meet the basic qualifications of the Capital Defenders Office handle all stages of any capital case. The capital training program is essential because presenting a defense in a capital case is very different from presenting a defense in other cases. For private counsel the Capital Defenders Office offers assistance in jury selection, legal research, legal writing and any other area requiring outside aid. Capital defenders are paid approximately \$175 per hour as the lead counsel and \$150 per hour for the co-counsel (Keahon, 3/13/03). Such fees allow capital defenders, and private attorneys who take on

capital cases, to focus on the capital case without having to carry a large additional private case load.

In Kentucky, the Department of Public Advocacy, which handles all criminal offenses for indigent defendants, also handles approximately ninety percent of all capital cases. Within DPA, there is a department designated as the capital division which is located in Frankfurt. The capital division is broken into two units, the Capital Trial Unit and the Capital Post-Conviction Appeals Unit. The Capital Trial Unit assists in training, jury selection and strategic planning for all capital trials. The Capital Post-Conviction Appeals Unit handles all post-conviction appeal work on both the state and federal level. Branch office attorneys are responsible for the actual trial work in capital cases. DPA always assigns two attorneys to handle capital cases. One of these attorneys must have formal capital training or experience. While these qualifications are invaluable, both attorneys take on the capital case while still managing a full case load, greatly hampering even the most well-trained attorney. A full case load for a DPA branch attorney can consist of as many as four-hundred felony cases and seven-hundred to one-thousand misdemeanor cases per year (Norris, 3/13/03). Attorneys receive no additional pay for handling capital cases. They may receive compensation pay for overtime work; if they have already exhausted their compensation pay, they receive no payment for working the overtime necessary in a capital case. Only within two weeks of the capital trial is the attorney's case load lightened so he may prepare for trial.

The state of Kentucky does not dictate any standards for attorney qualifications in death penalty cases. Because DPA is responsible for the majority of Kentucky's capital cases, they have created a series of standards for their attorneys who handle these cases.

Every year DPA attorneys must attend a trial training seminar. Once every three years the focus of this seminar is on capital cases. Within DPA there are regular updates on capital news circulated throughout the network to ensure that all attorneys are well informed. The training requirements and standards imposed by DPA ensure a modest level of competence in the handling of a capital case. Some feel that, because of this training and support network, the public defenders are more effective at the trial level than privately retained counsel in certain parts of the state (Norris, 3/13/03). However, the public defenders are always greatly disadvantaged because of time constraints due to their case load.

These discrepancies in quality of counsel between New York and Kentucky indicate a nationwide problem. In 1932, in *Powell v. Alabama*, the United States Supreme Court ruled that in a capital case “the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the Fourteenth Amendment” (Vila & Morris 86). While this decision required all capital defendants be assigned counsel, it did not assure the quality of counsel. Legal scholar Stephen B. Bright has published a series of research articles examining the injustices incurred by capital defendants unable to retain private counsel. Bright has found that

Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed case after case. It is not the facts of the crime, but the quality of legal representation, that distinguishes this case, where the

death penalty was imposed, from many similar cases, where it was not.

(Bright, 1994).

Neither state examined in this paper directly illustrates the problem of unqualified counsel in capital cases to the extent that Bright discusses. New York takes special care to assure that the capital defenders have ample resources and are well qualified to handle any case. Kentucky struggles to assure the same quality of resources and training for capital defenders as New York. Although not meeting the standards of quality that the American Bar Association recommends and many would hope for, Kentucky does show an effort to provide competent counsel to indigent capital defendants. Certain other states do not show similar efforts. In many states with very high death row populations (e.g. Texas, Georgia and California) the court often assigns only one attorney who has little or no experience with capital or serious criminal cases and who is highly reluctant to take the case (Bright, 1994). In a case from Talladega County, Alabama the assigned defense attorney filed a motion admitting his inadequate experience and incompetence to defend a capital case. The judge who appointed him denied the motion. During the trial the attorney appeared before the court openly drunk and failed to produce any mitigating evidence in the case. The court sentenced the woman to death (Bright, 1994). In a Texas case the court appointed attorney was paid only \$11.84 per hour. Due to a combination of lack of resources, lack of experience, and lack of motivation the attorney failed to present key elements of the defense. The court sentenced the man to death. When the case was later picked up pro bono by a firm in Washington, D.C., the defendant won on an appeal; upon return to the court, the Grand Jury refused to indict him due to lack of

evidence (Bright, 1994). Such examples demonstrate that assigning inadequate counsel to indigent defendants greatly increases the state's chance of obtaining a conviction.

The problem of inadequate counsel has been debated by many legal scholars and addressed by the American Bar Association. Because of the discrepancies in quality of counsel, the ABA recommended a nationwide moratorium on death sentences in 1997. The ABA restated a series of recommendations made in 1990 that has yet to be fully met by the majority of states. The ABA recommends a minimum of two experienced and qualified attorneys handle all stages of the case. These attorneys should be chosen by a panel with authority to find candidates with "specified professional credentials, experience and skills," (ABA). Also, all jurisdictions with a capital punishment statute should create and fund organizations to "recruit, select, train, monitor, support and assist attorneys representing capital clients," (ABA). Despite these recommendations, little has been done to change the quality of counsel offered in capital cases or institute a national moratorium on death sentences.

Issues with funding

Funding for capital cases reveals additional problems. Funding plays a crucial role in the defense's ability to conduct an adequate investigation and retain quality experts to testify. The manner in which funding for investigators and experts is obtained varies from state to state.

New York provides capital defense attorneys with funding through two avenues, beginning with the Capital Defenders Office. The Capital Defenders Office employs private investigators to perform all investigation work. The majority of the investigation is completed in the first one hundred and eighty days of the case to prevent the state from

filing the initial death notice. Investigative support remains present throughout the case. In 2000, over the course of twelve cases, the Capital Defenders Office spent \$8,003,486.76 for investigation, experts and extraneous expenses. In the case of Robert Shulman, the only defendant on New York's death row to retain private counsel, an approximate total of one million dollars was spent by the Capital Defenders Office. This is in addition to the \$500,000 paid by the client to the attorneys William Keahon and Paul Gianelli. When the defense exhausted the initial \$500,000, the Capital Defenders Office began to cover the expenses. The second avenue for funding is through the court. To retain funding for an expert the defense petitions the court. The court grants the defense a set amount of money with which it may retain the expert. In the Shulman case the court granted the defense \$62,413.61 in expert fees. In support of the New York capital defense system, Mr. Keahon maintains that New York does everything possible to make the playing field even for the prosecution and the defense (Keahon, 3/13/03).

Obtaining funds in Kentucky proves to be more difficult. The Department of Public Advocacy receives a set budget from the state. Within this budget there are funds for investigators. Since the budget is relatively restricted, many offices must contract out investigation work. When an office is fortunate enough to employ an investigator, his/her services must be shared by the entire office. In the case of the London, Kentucky office, which handles the second highest number of death penalty cases in Kentucky, the investigator splits his time between all cases, capital and non-capital, for five counties. Such an extreme case load does not allow even the most competent investigator the time needed to perform an investigation adequate in a capital case. Many crucial points of an investigation often fall on the attorney or remain neglected.

Also because of the highly restricted budget, the defense must petition the court for all experts. This leaves the defense almost entirely at the mercy of the court to piece together an effective defense. Courts rarely grant the defense funds for more than two experts. Courts frequently limit the defense to one or no experts (Norris, 3/25/03). If possible, the defense must use experts available through the state. However, experts are often needed to contradict the findings of the state's experts. When receiving direct funds, the court often grants only enough money to retain second tier experts who often miss crucial findings or appear unreliable in their testimony. The denial of funds by the court is not necessarily a function of a lack of state resources. Kentucky has created a "superfund" to be used to provide funds to capital defenses. However, due to local politics, a lack of understanding by judges and some other external circumstances, these funds are often denied to the defense (Norris, 3/25/03). Such a denial of funding can prove to be devastating to a defense.

Funding for experts proved a critical issue in the Osborne case. Because the police's theory of the case was based on the possibility of hearing glass breaking over the sound of a motorbike, the defense required the testimony of a sound expert. The court denied the petition for funding for an expert in the first trial. In the second trial, the court, under pressure from higher courts, granted the funding needed for a sound expert. The court granted insufficient funding for the expert to conduct the necessary experiments. Fortunately, the expert willingly donated his time and equipment to ensure a thorough investigation. In a post-verdict interview one jury member told reporters that the experiments conducted by the sound expert and his testimony were critical factors in the decision to acquit Osborne.

Perhaps the most telling statement about the funding of death penalty defense in Kentucky was a statement from a Kentucky public defender who has handled a number of capital cases. When asked what amount he thought would be required to put together a truly adequate defense, including attorney fees, investigation and experts, Mr. Norris replied, “at least \$50,000.” While this dream of \$50,000 seems miniscule compared to the actual budget allotted to the New York Capital Defenders, it remains a dream in Kentucky and unimaginable in other states. An attorney from Arkansas refers to the work he does with the resources available as “legal triage.” The attorney claims that because of the neglected avenues of investigation and defense inevitable with this legal triage, “The lawyer pays some in his reputation, perhaps, but it is his client who must pay with his liberty or life,” (Bright, 1994). In a case in Alabama the court appointed a single attorney to handle a capital murder case and granted him only \$500 for expert and investigative expenses. When asked about the case the attorney replied, “Without more than \$500 there was only one choice, and that is to go to the bank and finance this litigation myself, and I was just financially unable to do that,” (Bright, 1994). In California, the state with the highest death row population, attorneys place bids to be assigned capital cases. The attorney with the lowest bid receives the case. The attorney is allowed no extra funding in addition to the bid he placed. This gives capital defense attorneys in California direct incentive to use no investigators or experts (Keahon, 3/13/03).

Lack of funding can hinder effective mitigation. In most states, mitigation is unique to capital cases. Mitigation requires “the collection of reliable, objective documentation about the client’s life history,” (Capital Case Management Handbook,

Mitigation). Because most attorneys are not qualified to conduct a thorough mitigation investigation, a mitigation specialist plays a critical role in a capital defense (Groot, 3/18/03). A mitigation specialist is an expert trained as a mental health or sociology professional who focuses his/her work on capital mitigation. Failure to properly conduct a mitigation investigation has been repeatedly found by the appeals courts to qualify as ineffective counsel (*Sanders v. Ratelle*, 21 F.3d 1446; *Williams v. Taylor*, 529 U.S. 362).

Mitigation in New York falls upon the Capital Defenders Office. The Capital Defenders Office employs in house mitigation specialists. The Capital Defenders Office completes most of the mitigation work within the first one-hundred and eighty days while trying to prevent the death notice from being filed. Beyond the initial investigation, the mitigation investigation includes thoroughly searching personal and family records and conducting personal and family interviews.

Under counsel from the mitigation specialists at the Capital Defender Office, the attorneys for Robert Shulman used a two pronged approach. First they used mitigation as a chance to “humanize” the client. Second they sought to convince the jury that imposing a life sentence, the only alternative to the death penalty for a first degree murder, would be just. To do this they called various correction officials to speak about life sentences in the prison system. Due to the number of witnesses and extensiveness of the mitigation in the Shulman case, the penalty phase of his trial lasted a number of weeks, which is not uncommon for a capital case in New York (Keahon, 3/13/03). Despite the mitigation efforts, Shulman was sentenced to death.

The availability of mitigation specialists in Kentucky varies from county to county. Some DPA offices have mitigation specialists on staff. Other offices contract

out cases to mitigation specialists in the area. Mitigation specialists employed by DPA are very similar to the investigators employed by DPA in that they frequently have a large number of cases open at one time and therefore inevitably neglect certain aspects of the mitigation in a case. These neglected pieces of mitigation either fall upon the attorney or remain unaddressed.

In the first trial of Larry Osborne, the mitigation took less than one day to present. The mitigation was handled by a contracted mitigation specialist. Due to a miscommunication, Osborne's attorney allowed the psychologist to testify that Osborne would be a great threat to society should he ever be placed back on the street. Another failure of the mitigation occurred when Larry's father, Cecil, appeared in court too drunk to testify. Such mistakes proved devastating to the defense and played a large part in Larry's initial death sentence.

What can be done?

The information and cases presented in this paper show clear support for the fact that a great deal of inequity still exists in death penalty cases. In 1974 Charles Black Jr., Yale Law School professor and death penalty scholar, predicted such residual discrimination in death penalty cases,

[The new statutes] do not effectively restrict the discretion of the juries by any real standards. They never will. No society is going to kill everybody who meets certain preset verbal requirements, put on the statute books without awareness or coverage of the infinity of special factors the real world can produce (Vila & Morris, 153).

Because outside factors play a large role in determining who receives the death penalty, discrimination remains inevitable. The evidence shows that the new statutes have not been enough to sufficiently eliminate the social discrimination that has always plagued capital punishment. New steps must be taken.

First we need a national moratorium on all death sentences until a new system has been established. The margin of error under the present system exceeds what we should tolerate. While such a moratorium has been proposed and defeated, it is a necessary step to creating a fair capital punishment system.

To achieve a moratorium a national change in attitudes must be achieved. The majority of Americans support the death penalty. Unfortunately, the flaws of the current system have not been in the spotlight of American politics. When they have been brought to the forefront, the public has been reluctant to acknowledge them. This was seen in the harsh reaction of many Illinoisans when Governor Ryan commuted all death sentences in the state. Bold actions, like those of Governor Ryan, are necessary to change the system. A massive education campaign is also necessary. Such a campaign would not be anti-death penalty. The campaign would provide an open dialogue about the death penalty where people could obtain facts. An education movement might be sufficient to change national attitudes to support a moratorium.

Once a moratorium is achieved, we should reconstruct the way attorneys are assigned to capital cases. Capital cases should only be assigned to attorneys who have training and trial experience in serious criminal matters. Defense attorneys in capital cases should be required to attend training in handling capital cases. Defense attorneys handling capital cases should also be able to dedicate the time necessary to putting

together a capital defense. This recommendation can be slightly unrealistic because finding such motivated and qualified attorneys in certain areas can be nearly impossible. However, to make the system fair and just, such standards for attorneys must be required. To achieve this, the federal and state governments must fund capital training programs. Also, the state must pay assigned attorneys enough to ensure they do not need to carry a large additional case load or have specific attorneys who handle only capital work, and handle only a set number at one time. These minimum requirements must be federally enforced.

Third, we must provide more funding. A capital defense team must have access to investigators, mitigation specialists and necessary experts. In building a case the state has access to an entire police force and a wide array of experts. The defense must be able to compete. Without proper funding for the defense, the state is not held responsible to anyone.

Fourth, appellate review should be revised. A person should not pay with his life because of a mistake made by the attorney. The higher courts must recognize the gravity of these cases. Placing the importance of procedure and the “federal balance” over the importance of a man’s life is a flagrant injustice. If a mistake is made at any level, the higher courts have a responsibility to correct it. If the mistake goes unchecked because the petition was filed late, the state runs the risk of executing an innocent man. A civilized society cannot accept such a margin of error.

This paper does not call for a complete end to the death penalty, but it calls for an end to the death penalty as we know it. The present system has little improved the

inequities deemed unconstitutional in *Furman v. Georgia*. Without serious changes the United States will continue to execute within the caste system created by the court.

Washington and Lee University

Works Cited

- American Bar Association. "Report with recommendations no. 107 from ABA 1997 midyear meeting."
- Bright, S.B. (1994) "Counsel for the poor: The death sentence not for the worst crime but for the worst lawyer." *Yale Law Journal*, 103.
- Capital Case Management Handbook, Mitigation.
<http://www.defender.org/DPAC/Handbook/V-Mitigation.html>.
- Capital Defender Office. "Capital Case Cost." <http://www.nycdo.org/finance/clocapcos.html>. 2/27/03
- Capital Defender Office. "Death Noticed Cases by County." <http://www.nycdo.org/caseload/county.html>. 2/27/03
- Capital Defender Office. "Introduction." <http://www.nycdo.org/finance/finance.html>. 2/27/03
- Capital Defender Office. "Quick Answers." <http://www.nycdo.org/caseload/answers.html>. 2/27/03
- Chicago Daily Law Bulletin*. "Lawyers push Ryan to commute death sentences." 11/20/03. p6.
- Groot, R., Washington and Lee Law Professor. Interview 3/18/03.
- Hansen, M. (1996) "With federally funded appeals from capital punishment on the way out, lawyers are wrestling with questions about who will pursue the arguments to keep condemned inmates from death's door." *ABA Journal* 82.
- Hoerger, M., former Bureau Chief of Suffolk County Appeals Bureau. Interview 4/1/03.
- Keahon, W., NY defense attorney. Interview 3/13/03.
- Kentucky Department of Public Advocacy. "Clemency." <http://www.dpa.state.ky.us/text/cppp.pdf>. 2/27/03
- Kentucky Department of Public Advocacy. "State and Federal Judicial and Executive Capital Review Process." <http://www.dpa.state.ky.us/text/9stepsexplanation.pdf>. 2/27/03
- NAACP. Death Row U.S.A. Fall 2002. "Death Row Statistics."
- Norris, J., Kentucky Public Advocate. Interview 3/25/03.

Reinhardt, S. (1999). "The anatomy of an execution: fairness vs. 'process'." *New York University Law Review*, 74, (2).

Snell, T.L. & Maruschak, L.M. "Capital Punishment 2001." *Bureau of Justice Statistics Bulletin*.

Vila, B. & Morris, C. *Capital Punishment in the United States: A documentary history*. Greenwood Press: Westport, Conn. 1997.

Whitehead, J.T. (1998). "Good ol' boys and the chair: Death penalty attitudes of policy makers in Tennessee and Kentucky." *Crime and Delinquency*, 44 (2). 245-257.

Washington and Lee University