

In Alabama, Execution Without Representation

Nobody much likes the fact that Alabama does not provide indigent death row inmates with lawyers.

"Perhaps, in a perfect world, every inmate would have a lawyer at the ready at all times," the state's attorney general told a federal appeals court in a brief defending the practice last year. "But we live in the real world."

Three judges on that court, the United States Court of Appeals for the 11th Circuit, in Atlanta, also made sympathetic remarks about a utopian alternate reality in which prisoners about to be executed might actually be provided with lawyers.

"If we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek," Judge Joel F. Dubina wrote. The court unanimously rejected a class action suit from inmates asking for lawyers.

Not every bad idea is unconstitutional, the state and the judges said, and Alabama — the only state that refuses to provide indigent death row inmates with lawyers — should be able to go it alone in this area even at the risk of executing the unjustly convicted or the innocent.

Lawyers for the inmates will ask the United States Supreme Court to hear the case next month. There is, they say, a constitutional right of meaningful access to the courts. No condemned inmate, they add, can be expected without a lawyer to navigate the procedural minefields that Alabama has erected in capital cases.

In a series of cases starting with *Gideon v. Wainwright* in 1963, the Supreme Court has said that poor criminal defendants are entitled to free lawyers for their trials and their first round of appeals. But an ambiguous 1989 decision indicated that habeas petitions, which are civil suits challenging unjust convictions and sentences, may be a

different matter. That decision is widely understood to require only that inmates have access to adequate prison law libraries.

Refusing to provide lawyers for indigent death row inmates.

Alabama has about 200 people on death row. Few of them, presumably, have legal training or money to hire lawyers.

Yet if they are to challenge their convictions or sentences, they must master the hyper-technical intricacies of Alabama's rules of criminal procedure, conduct investigations from behind prison walls and prepare and file their own petitions for post-conviction relief. The deadline is one year, after which Alabama courts close their doors.

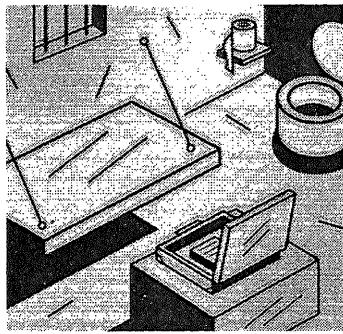
The attorney general's office cuts the inmates no slack, seeking and getting dismissals of the prisoners' petitions for all manner of procedural shortcomings.

If a petition survives, a judge has the option but not the obligation to appoint a lawyer. Even then, there is a catch: the cap on compensation is \$1,000, which will buy you an hour or two of a New York lawyer's time but must pay for the hundreds of hours of work that goes into a habeas petition. A properly prepared petition is based on painstaking review of the trial transcript and appellate record, witness interviews, other investigation and extensive legal research.

An Alabama death row inmate lucky enough to get a lawyer will have one who is willing to work for less than the minimum wage.

Alabama responds by pointing to the quality of the volunteer lawyers who do often take on capital cases there.

"The overwhelming majority of Alabama death-row inmates enjoy the assistance of qualified



Harry Campbell

(and often über-qualified) counsel in collaterally attacking their convictions and sentences," the state's lawyers told the appeals court. (Über-lawyers are apparently the sort who usually work for more than the minimum wage.)

That is pretty circular. Since good lawyers occasionally agree to fill the gap created by Alabama's refusal to provide any lawyers, the argument goes, the state may continue to provide no lawyers.

If the Supreme Court agrees to hear the case, it will have to decide what to do about its 1989 decision in *Murray v. Giarratano*. The decision is complicated, with four justices on either side, Justice Anthony M. Kennedy in the middle and Justice Sandra Day O'Connor saying two things at once.

"The complexity of our jurisprudence in this area," Justice Kennedy wrote, "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."

He was satisfied, he said, that the state in question in that case, Virginia, had complied with what the Constitution requires, given that no inmate there had gone without a lawyer and the prisons there were staffed with institutional lawyers to assist in preparing petitions.

In the almost 20 years since *Giarratano*, death penalty law has become even more complicated, and deadlines have tightened. But habeas petitions continue to succeed in overturning death sentences all the time. Scores of innocent inmates have been released from death row. In response, the rest of the country — everywhere but Alabama — provides people at risk of execution with lawyers.

To hear Alabama prosecutors and federal judges talk about it, those other states are a sort of inmate's Eden, a perfect world populated by über-lawyers. But it is not. It is America.