

SEVEN Seeking Postconviction Relief in Capital Cases

*D*uring the modern era of capital punishment, lawyers seeking postconviction relief on behalf of capital defendants have been remarkably successful. The Liebman study concluded that between 1976 and 1995, among all defendants sentenced to death, 68 percent were able to obtain postconviction relief.¹ Since 1995, however, Congress has taken actions designed to reduce the extent to which defendants sentenced to death are able to obtain such relief. As a result, obtaining some types of postconviction relief is more difficult than ever before. Nevertheless, defense attorneys are still able to obtain postconviction relief on behalf of capital defendants in a significant number of cases.

In this chapter, I will examine the work of lawyers seeking postconviction relief for capital defendants, focusing especially on the kinds of issues these lawyers are likely to raise, the obstacles they are likely to encounter when they raise these issues, and the circumstances under which they are able to succeed. First, I will provide an overview of death penalty lawyers' postconviction work, explaining the three forums in which capital defendants can seek relief, the different issues likely to be raised in each forum, and the reasons why obtaining some kinds of relief has become more difficult. Then, I will focus on the perspective adopted by attorneys who are successful in obtaining postconviction relief for capital defendants, attempting to explain the approaches these attorneys adopt in seeking relief in various types of cases. To illustrate the practices of these attorneys, I will provide several examples, including relatively full accounts of three cases.

1. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 11 (2002), at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

Postconviction Relief Possibilities

When a state capital defendant has been convicted and sentenced to death, three avenues of postconviction relief are potentially available: appellate relief from the state appellate courts, postconviction relief from the state courts, and habeas corpus relief from the federal courts. Barring very unusual circumstances, the defendant will be required to seek these types of relief in the proper sequence and to exhaust the possibility of obtaining one kind of relief before seeking the next. Specifically, the defendant must eliminate the possibility of obtaining appellate relief before seeking state postconviction relief,² and he must exhaust his state court remedies before seeking federal habeas corpus relief.³ With respect to each of these avenues of relief, moreover, the defendant can file a petition for certiorari to the U.S. Supreme Court, requesting it to consider any federal issues resolved against him by the highest state or federal court that had considered the issue.⁴ In view of the rarity with which the Supreme Court accepts cases for review, however, the likelihood that the Court will consider any particular death row defendant's case is very low.⁵

Assuming a death row defendant was represented by a competent trial attorney who properly preserved the defendant's claims at trial, the defendant's best chance of obtaining postconviction relief is likely to be on direct appeal.⁶ On appeal, the defense will be able to raise any error that occurred in the trial court, regardless of whether it relates to state or federal law. In reviewing a state trial judge's rulings, moreover, the highest state court will not necessarily apply a deferential standard of review. In fact, some of the highest state courts closely scrutinize issues that arise in death penalty

2. *See, e.g.*, *Duvall v. Ward*, 957 P.2d 1190, 1191-92 (Okla. Crim. App. 1998).

3. *See, e.g.*, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

4. When the state supreme court denies the defendant's appeal from his conviction and death sentence, the defendant can file a petition for certiorari requesting that the Supreme Court review federal issues decided against him. Assuming the Court denies the petition, the defendant can then proceed with his state postconviction claims and again seek certiorari from the Supreme Court if the state courts deny those claims. Assuming the Court again denies the certiorari petition, the defendant can then seek federal habeas relief and again file a certiorari petition if the applicable federal court of appeals denies or refuses to consider his federal claims.

5. Approximately 3,500 prisoners were on death row as of December 31, 2002. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment in the United States, 1973-2002* [Computer file]. Compiled by the U.S. Dept. of Commerce, Bureau of the Census. ICPSR ed. Ann Arbor, Mich.: Inter-university Consortium for Political and Social Research [producer and distributor], 2004. However, the Court accepts few petitions from capital defendants in any given year. For the 2003-2004 term, for example, the Court accepted only six certiorari petitions from capital defendants.

6. Telephone Interview with Stephen Bright (June 15, 2004) [hereinafter Bright Interview].

cases,⁷ with the result that in some jurisdictions capital defendants' death sentences are frequently reversed on appeal.

Obtaining state or federal postconviction relief is more difficult. In 1995, Congress cut off federal funding for Capital Punishment Resource Centers that provided support for indigent death row inmates challenging their convictions or death sentences, as well as technical expertise for the lawyers representing them.⁸ And in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which provided procedural and substantive restrictions that significantly narrowed the scope of relief available to death row defendants seeking federal writs of habeas corpus.⁹ Congress's actions have not only made it more difficult for capital defendants to attack their convictions or death sentences successfully but have also resulted in a depletion of resources for lawyers seeking postconviction relief for capital defendants.

For some death row defendants, the dearth of resources virtually eliminates the possibility of postconviction relief. In *Murray v. Giarratano*,¹⁰ the Supreme Court held that states are not required to provide lawyers for indigent capital defendants seeking state postconviction relief. Some states, including Georgia,¹¹ still do not provide such lawyers.¹² When the state fails to appoint a lawyer, a death row defendant will often find it difficult to obtain a lawyer who can provide even minimal postconviction representation.

Even when lawyers are appointed to represent defendants in state postconviction cases, the appointment of a lawyer does not guarantee adequate representation. In Texas, four death row defendants were executed without any state or federal postconviction review because their lawyers either missed their deadlines for filing an appeal or, despite conducting no investigation into the case, raised a defense in a manner that the capital defendant was "guaranteed [to] lose."¹³ In addition, lack of resources often poses

7. See, e.g., *State v. Koskovich*, 776 A.2d 144 (N.J. 2001).

8. See Eric Zorn, *Cutting Subsidy for Death Appeals to Cost Time, Funds*, Chi. Trib., Feb. 21, 1996, at 1.

9. See generally James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brook. L. Rev. 411 (2001).

10. 492 U.S. 1 (1989).

11. See Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 16, 31 (2002).

12. *Id.*

13. Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals 17-19* (2002), at <http://justice.policy.net/relatives/21081.pdf>.

a significant barrier to adequate representation. In many states, the lawyers appointed generally lack experience with capital cases and therefore lack knowledge as to how capital defendants' postconviction claims can be most effectively presented. Moreover, because the compensation they receive for representing these defendants is likely to be meager,¹⁴ these lawyers naturally find it difficult to spend sufficient time investigating the facts or law relating to potential postconviction issues. Inexperienced lawyers, in particular, need advice that might facilitate their efforts to grasp the relevant issues. However, this assistance became less available when Congress defunded the Capital Punishment Resource Centers.

The issues that a capital defendant's attorney can profitably raise in a state or federal postconviction proceeding are likely to be limited in any event. Since issues that either were or could have been raised on appeal may generally not be raised in a state postconviction petition,¹⁵ the only issues that have a realistic possibility of success relate to matters outside the trial record.¹⁶ These include, for example, *Brady* claims¹⁷ in which the defendant alleges the prosecutor violated his constitutional obligation to disclose exculpatory evidence to the defense,¹⁸ jury misconduct claims in which the defendant asserts that one or more jurors either failed to disclose information that should have precluded her selection¹⁹ or acted improperly during the jury deliberations,²⁰ and *Strickland* claims alleging ineffective assistance of the defendant's trial attorney. In practice, the *Strickland* claims are the ones that are most frequently raised and most likely to be successful.

In some jurisdictions, winning any postconviction claim is extremely difficult. Some lawyers assert that AEDPA, which instituted additional

14. See Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 *Buff. L. Rev.* 501, 519 (1996).

15. See, e.g., 42 Pa. Cons. Stat. § 9543 (2002).

16. Telephone Interview with John Blume (Feb. 2, 2003).

17. See *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

18. See, e.g., *Banks v. Dretke*, 124 S. Ct. 1256 (2003) (reversing defendant's death sentence on the basis of such a violation).

19. See, e.g., *State v. Dye*, 784 N.E.2d 469 (Ind. 2003) (holding that a juror's failure to disclose that her brother had committed two murders and was sentenced to death, that she believed someone who killed another should receive the death penalty, and that she had been raped by an uncle as a child amounted to gross misconduct that prevented the defendant from receiving a fair trial).

20. See, e.g., *State v. Hightower*, 680 A.2d 649, 653–54 (N.J. 1996) (reversing defendant's death sentence on the ground that a juror improperly introduced information during deliberations that the victim had three children).

restrictions on federal courts' ability to grant relief in federal habeas cases, not only made it more difficult for capital defendants to win in federal courts but also created a climate that led many state and federal judges to believe that carefully scrutinizing capital cases was unnecessary.²¹ A key provision of AEDPA provides that federal judges should grant federal habeas relief only when the state courts' decision denying relief to the defendant was an "unreasonable application of . . . clearly established Federal law."²² "Unreasonable" is, of course, a vague term that leaves considerable room for interpretation. For some federal judges, a ruling upholding the death penalty would rarely, if ever, seem unreasonable. State court judges' awareness of the standards federal judges will apply when reviewing their rulings sometimes affects the state judges' rulings, moreover, leading them to give short shrift to capital defendants' federal claims.

While AEDPA has increased the difficulty for lawyers seeking federal habeas relief in capital cases, for the most part AEDPA merely refined existing obstacles to obtaining relief. The Rehnquist Court established significant barriers to obtaining federal habeas relief during the 1970s and 1980s.²³ As a result of that Court's decisions, "procedural bars are so airtight" that with the exception of ineffective assistance of counsel claims, it is very difficult in practice for a capital defendant's postconviction attorney to raise an issue that was not raised by the defendant's trial attorney.²⁴ In addition, the Court's decisions relating to the effect of a failure to raise claims in state postconviction petitions limited the extent to which defendants could raise ineffective assistance of counsel claims in federal habeas petitions. In *Coleman v. Thompson*,²⁵ the Court held that, even when the

21. As the account of Ernest Willis's case in Chapter 3 indicates, there are also federal judges who will be extremely careful in scrutinizing a federal defendant's post-AEDPA's federal habeas claim. Willis's postconviction attorneys stated that Willis was "extremely fortunate" to have his postconviction claims reviewed by a judge who meticulously examined the evidence relating to each of his constitutional claims. Telephone Interview with Robert Owen on Oct. 20, 2004; Telephone Interview with Walter P. Loughran on Nov. 8, 2004; Telephone Interview with Noreen Kelly-Najah on Nov. 8, 2004.

22. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2000).

23. *See, e.g.,* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding a defendant who failed to present his federal claims to the state courts is barred from having them considered on federal habeas corpus unless he can show cause and prejudice for the failure to present them to the state courts). *See generally* James S. Liebman & Randy Hertz, 2 *Federal Habeas Corpus Practice & Procedure* 1133-1240 (4th ed. 2001).

24. Bright Interview, *supra* note 6.

25. 501 U.S. 722 (1991).

defendant's failure to raise state postconviction claims was due to his attorney's inexcusable negligence,²⁶ the defendant would not ordinarily be allowed to raise claims on federal habeas corpus that were not properly presented in his claim for state postconviction relief. A lawyer representing a capital defendant who did not have a good attorney at trial or in state postconviction proceedings thus has to face formidable obstacles when seeking federal habeas relief.

Postconviction lawyers agree that many capital defendants who obtained postconviction relief in the 1970s and 1980s would not be able to obtain such relief today.²⁷ Nevertheless, even in cases decided under AEDPA²⁸ and even in those with significant procedural barriers, postconviction lawyers have been successful. If there is one dominant theme that explains these cases, it is that the capital defendant's attorney must tell a powerful and coherent story of injustice in order to obtain postconviction relief.

Telling such a story, of course, has always been an important part of achieving success in capital cases. In contrast to a capital defendant's trial attorney, however, a capital defendant's postconviction attorney has to deal with the fact that the defendant has already been convicted of a capital crime. In order to craft a compelling narrative, the attorney has to take a set of facts that have been stamped true and reaggregate them so that the reviewing court will view them differently. When arguing on behalf of an individual defendant, the attorney will have to change the court's perception of the events relating to the defendant's case. When arguing on behalf of a class of defendants, she will frequently have to change the court's understanding of the way in which the world works. In either case, the attorney hopes to serve as a kaleidoscope, drastically altering the court's perception of the relevant circumstances.

Nevertheless, the stories used by skilled postconviction attorneys to obtain postconviction relief are analogous in important respects to the stories employed by skilled trial attorneys to obtain life sentences from juries

26. Coleman's attorney missed the deadline for filing the petition for appeal in the Virginia Supreme Court, and the Virginia Supreme Court dismissed the petition. *Id.* at 727. The U.S. Supreme Court held that "in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750.

27. Bright Interview, *supra* note 6.

28. For an account of a case decided under AEDPA in which a death row defendant obtained federal habeas relief relating to both his conviction and death sentence, see the account of Ernest Ray Willis's case in Chapter 3, *supra*.

in aggravated capital cases. As in an aggravated capital case, it is important for the attorney to present a postconviction argument that alters the decision maker's perception of the capital defendant or defendants who will be affected by the decision. In Lee Malvo's case, defense attorneys Craig Cooley and Michael Arif were able to reshape the jury's perception of Malvo; whereas the jury might have originally perceived Malvo as a methodical cold-blooded sniper, Cooley and Arif were able to present him as a vulnerable youth who was subjected to influences he was unable to resist. In seeking postconviction relief for a capital defendant, an attorney needs to present a story that will similarly alter a judge's view of either the defendant or some aspect of the case. By demonstrating that the defendant's trial attorney failed to introduce powerful mitigating evidence, for example, the postconviction attorney may be able to alter the reviewing court's view of the defendant. Instead of perceiving the defendant as simply the perpetrator of a brutal crime, the court may be led to empathize with the defendant and, as a result, to conclude that, if his trial attorney had competently represented him at his penalty trial, he would not have been sentenced to death.

As in arguing for the defendant's life at trial, telling a story that identifies a villain other than the defendant can be very effective. In William White's case, for example, the defense team was able to portray White's father as the villain by showing that his horrendous abuse was a major factor in producing his son's violent conduct. In seeking postconviction relief, a capital defendant's attorney can sometimes portray the prosecutor or the judge as a villain. In *Banks v. Dretke*, in which the defendant's attorneys obtained federal habeas relief from the U.S. Supreme Court,²⁹ for example, the defense was able to present a powerful story of injustice by showing that the Texas prosecutor's office not only failed to disclose exculpatory evidence to the defense but also neglected to reveal this failure during state postconviction proceedings.³⁰

The accumulating evidence relating to wrongful convictions in capital cases has enhanced the power of a postconviction story that involves a

29. See *Banks v. Dretke*, 124 S. Ct. 1256 (2003).

30. Specifically, prosecutors agreed to share all discovery with the defendant but failed to disclose that Farr, a critical penalty-phase witness, was a paid government informant. During the defendant's appeal and state postconviction proceedings, moreover, the government failed to disclose Farr's links with the police. The Court held that, due to the government's failure to disclose Farr's role, the defendant was able to establish cause for his failure to adequately allege the facts relating to the government's failure to disclose exculpatory evidence during the state postconviction proceedings. *Id.* at 1263.

death row defendant's probable innocence. A postconviction attorney who is able to present a coherent narrative relating to such a story will sometimes, but not always, be able to surmount seemingly impenetrable procedural barriers.

To provide a clearer picture of the narratives that skilled defense attorneys have presented when attempting to obtain postconviction relief for capital defendants, I will present one case in which attorneys sought relief for a class of defendants from the U.S. Supreme Court and two cases in which attorneys sought state and federal postconviction relief on behalf of individual defendants. In all three cases, skilled attorneys presented coherent narratives of injustice that directly or indirectly related to safeguarding innocent capital defendants from execution. After presenting these three cases, I will draw conclusions relating to the strategies employed by the attorneys and why they were successful or unsuccessful.

Darryl Atkins

As a result of his participation in crimes that culminated with a killing in York County, Virginia, Darryl Atkins was charged with capital murder in a Virginia state court. The government's evidence showed that Atkins and William Jones abducted Eric Nesbitt from a 7-Eleven store in Hampton, Virginia, took Nesbitt's money from his wallet, drove him in his own truck to an ATM, where they forced him to withdraw more money, and then drove him to a secluded area, where he died after being shot eight times with a semiautomatic handgun.³¹ Jones, who had made a plea bargain with the government, testified that Atkins had fired the fatal shots after Jones had tried to stop him "from killing Mr. Nesbitt."³² The jury convicted Atkins of capital murder.

At Atkins's penalty trial, Dr. Evan Nelson, a clinical psychologist who had extensively evaluated Atkins prior to trial, testified for the defense. Dr. Nelson testified that Atkins's IQ of fifty-nine placed him in the range of being "mildly mentally retarded."³³ He also testified to Atkins's background, showing that Atkins met the other criteria necessary to establish

31. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

32. *Id.* at 307-08 n.1.

33. Brief for Petitioner at 9, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), available at <http://www.internationaljusticeproject.org/pdfs/atkinsUSSCbriefRobLee.pdf> [hereinafter *Atkins Brief*].

that he was mentally retarded under accepted professional standards:³⁴ Atkins had “demonstrated [substantial] deficits in adaptive skills,”³⁵ and his cognitive and adaptive problems had been identified “as early as [when he was in] first grade.”³⁶ The jury sentenced Atkins to death. On appeal, the Virginia Supreme Court affirmed Atkins’s conviction but reversed for resentencing because of a misleading verdict form.³⁷ At the new sentencing, the defense again introduced evidence that Atkins was mentally retarded. The jury again sentenced Atkins to death.

The Supreme Court accepted the *Atkins* case in order to decide whether imposing the death penalty “on a mentally retarded criminal” violated the Eighth Amendment prohibition against cruel and unusual punishment.³⁸ In *Penry v. Lynaugh*,³⁹ the Court had rejected this claim. Lawyers arguing on behalf of Atkins thus had to convince the Court that its thirteen-year-old precedent should no longer be followed. In order to accomplish this difficult task, the attorneys needed to alter the Court’s perception of mentally retarded capital defendants.

In *Penry*, the Court had indicated that “objective evidence such as the judgments of legislatures and juries” could establish an “emerging national consensus” that would alter its view of the Eighth Amendment issue.⁴⁰ Between *Penry* and *Atkins*, sixteen states passed laws protecting mentally retarded individuals from the death penalty,⁴¹ thus providing the basis for an argument that executing mentally retarded defendants is no longer consistent with our “evolving standards of decency.”

In *Atkins*, the defendant’s counsel of record was James Ellis, a law professor at the University of New Mexico. In conjunction with other attorneys, Ellis had been seeking legislative and constitutional protection for

34. The American Association of Mental Retardation (AAMR) defines mental retardation as a “substantial limitation in present function” that is characterized by “significantly subaverage intellectual functioning existing concurrently with related limitations in at least two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.” *Atkins*, 536 U.S. at 308 n.3 (citing AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992)).

35. *Atkins*’s Brief, *supra* note 33, at 19.

36. *Id.* at 19–20.

37. *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999).

38. 536 U.S. 304, 307 (2002).

39. 492 U.S. 302, 335 (1989).

40. *Id.* at 329, 335.

41. *Atkins*, 536 U.S. at 314–15.

mentally retarded capital defendants for decades. In preparing the argument to be presented to the Court in *Atkins*, Ellis had assistance from a number of attorneys, including Stephen Hut, Mark Olive, Jonathan Braun, and George Kendall.

These attorneys believed that simply arguing that the new statutes reflected an evolving consensus with respect to executing mentally retarded defendants would not be enough to persuade the Court to overrule *Penry*.⁴² After all, there were still about twenty states that allowed the execution of mentally retarded defendants. In addition to identifying the legislative trend, the attorneys thus sought to present a story of mentally retarded defendants that would alter the Court's perception of the relationship between these defendants and our system of criminal justice.

The first part of the story was designed to show that “[m]ental retardation impairs understanding and functioning in ways that substantially reduce personal culpability.”⁴³ In developing this narrative, the attorneys pointed out mental retardation's devastating impact on not only a person's intellectual ability but also on his or her ability to “cope with and function in the everyday world.”⁴⁴ In addition, because mental retardation begins early, it reduces the individual's “ability to learn and gain an understanding of the world during life's formative years.”⁴⁵ As a result, mental retardation impairs not only basic decision-making skills (including the ability to weigh consequences), but “moral development as well.”⁴⁶

These data provided the foundation for the argument that imposing the death sentence on any mentally retarded individual is inconsistent with Supreme Court precedents designed “to guide the inquiry whether an individual's behavior is sufficiently culpable to warrant a death sentence.”⁴⁷ In prior cases, particularly *Thompson v. Oklahoma*,⁴⁸ which held that executing those who committed crimes before the age of sixteen violated the Eighth Amendment, the Supreme Court established principles restricting the death penalty's application to individuals with diminished culpability. For example, the Court had stated that the death penalty “takes as its predicate

42. Much of my following account of the case is based on a telephone interview with James Ellis (July 13, 2004) [hereinafter Ellis Interview]. In addition, I have examined several of the briefs submitted on behalf of *Atkins*.

43. *Atkins* Brief, *supra* note 33, at 20.

44. *Id.* at 21.

45. *Id.* at 22.

46. *Id.* at 23–24 (citing AAMR, *supra* note 34, at 9, 40).

47. *Id.* at 24.

48. 487 U.S. 815 (1988).

the existence of a fully rational, choosing agent”;⁴⁹ and the death penalty is “sufficiently related to an individual’s personal culpability only when he or she can fairly be expected to conform to the behavior of a responsible, mature citizen.”⁵⁰ Using the data relating to mental retardation’s impact on an individual’s capacity to make informed decisions and responsible moral choices, the attorneys argued that, because mentally retarded defendants lack sufficient personal responsibility for their crimes, imposing the death penalty on anyone within this class of defendants violates the Eighth Amendment.⁵¹

The government might be expected to respond, however, that even if death is a disproportionate punishment for most mentally retarded defendants, the Court should not impose a per se rule barring the death penalty for all mentally retarded individuals. While there are accepted criteria for determining whether an individual is mentally retarded,⁵² the government could point out that mental retardation will have a varying impact on an individual’s personal responsibility depending on myriad circumstances. Instead of imposing an absolute prohibition on executing mentally retarded defendants, the Court should thus allow juries to consider the circumstances of each case and make an individualized determination whether the defendant had a sufficient level of personal responsibility to be sentenced to death.

In anticipation of this argument, Atkins’s attorneys explained that mentally retarded defendants’ “cognitive and behavioral impairments” diminish the efficacy of these defendants’ procedural protections,⁵³ thereby increasing the extent to which guilt and penalty determinations in these cases are prone to error. In particular, the attorneys stressed that “[c]onfessions and inculpatory statements made by mentally disabled suspects are particularly problematic regarding not only their voluntariness, but also their reliability.”⁵⁴ To emphasize this point, the attorneys briefly recounted the cases of Earl Washington and Anthony Porter⁵⁵ and reminded the Court that these cases, “among others, provide sobering cautionary tales.”⁵⁶ In making this argument, the attorneys sought to remind the Court of the many cases in

49. Atkins Brief, *supra* note 33, at 24 (quoting Thompson, 487 U.S. at 825–26 n.23).

50. *Id.* at 25 (construing Thompson, 487 U.S. at 825, 835 n.42).

51. *Id.* at 18–19.

52. See *supra* note 34.

53. Atkins Brief, *supra* note 33, at 32.

54. *Id.*

55. For an account of these cases, see *supra* Chapter 3.

56. Atkins Brief, *supra* note 33, at 35.

which death row defendants have been exonerated and to point out that excluding mentally retarded defendants from those eligible to receive the death sentence would decrease the likelihood of executing innocent defendants.

In addition, Atkins's attorneys adverted to the difficulties encountered by lawyers representing mentally retarded defendants at their capital trials. A mentally retarded "defendant's inability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one—including defense counsel—discovers the extent of his or her impairment or even that s/he suffers from mental retardation."⁵⁷ The combination of these factors "thwarts counsel's ability to explain, and the jury's ability to consider, the significance of a defendant's mental retardation."⁵⁸ Through this argument, Atkins's attorneys focused the Court's attention on lawyers' representation in capital cases, another pervasive problem, and reminded the Court that these lawyers' difficulties are likely to be exacerbated—and the likelihood of erroneous death sentences increased—when they are representing mentally retarded defendants.

The lawyers' focus on the ways in which mentally retarded defendants' disabilities impair the accuracy of jury verdicts was important for another reason. One of the problems with arguing there was an evolving consensus against executing mentally retarded defendants was that, even in the twenty-first century, there were still a substantial number of cases in which juries sentenced mentally retarded defendants to death. If society was developing a consensus against imposing such sentences, why did so many juries continue to impose them? Through showing the various ways in which defendants' mental retardation thwarts adequate representation and accurate fact-finding in capital cases, the lawyers provided a basis for arguing that in these kinds of cases "juries can not adequately be relied on to reflect the societal consensus."⁵⁹

At the oral argument before the Supreme Court, it became clear that these arguments had resonated with some members of the Court. During the first part of his argument, Ellis emphasized the significance of the post-*Penry* statutes relating to mentally retarded capital defendants. Some members of the Court appeared skeptical as to whether sixteen post-*Penry* statutes and eighteen total statutes were sufficient to reflect a "consensus." At a critical point in the argument, however, Justice O'Connor, who had

57. *Id.* at 33.

58. *Id.* at 34.

59. Ellis Interview, *supra* note 42.

written the *Penry* decision, asked a question relating to the mentally retarded defendant who “smiles” inappropriately during the middle of his capital trial. In her follow-up to this question, Justice O’Connor made it clear that she was concerned that mentally retarded defendants’ impairments would at least sometimes prevent the jury from making an accurate assessment of the defendant’s moral culpability. Ellis and the other attorneys knew, of course, that if Justice O’Connor switched her vote, the Court’s decision in *Atkins* would almost certainly be in favor of the defendant.

As it turned out, both Justice O’Connor and Justice Kennedy voted differently in *Atkins* than they had in *Penry*. In *Atkins v. Virginia*,⁶⁰ the Court in a 6–3 decision concluded that the Eighth Amendment prohibits the state from executing mentally retarded defendants. Writing for the majority, Justice Stevens observed that legislative enactments since *Penry* reflected an evolving consensus against executing mentally retarded defendants.⁶¹ Nevertheless, the Court based its decision on its “own judgment” as to the “acceptability of the death penalty” as a punishment for these defendants.⁶²

In reaching its judgment, the Court appeared to accept and to give weight to *Atkins*’s attorneys’ analysis of mental retardation’s impact on capital defendants’ procedural protections. It discussed the “possibility of false confessions,”⁶³ referring in a footnote to newspaper accounts of the cases in which Washington and Porter were exonerated.⁶⁴ And, in explaining why penalty juries impose death sentences without giving adequate consideration to mentally retarded defendants’ mitigating evidence, it emphasized that “[m]entally retarded defendants may be less able to give assistance to their counsel.”⁶⁵

Richard Zeitvogel

Richard Zeitvogel, an inmate in the Missouri State Penitentiary, was charged with the murder of Gary Dew.⁶⁶ The events leading up to this

60. 536 U.S. 304 (2002).

61. *Id.* at 314–16.

62. *Id.* at 312 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

63. *Id.* at 320–21.

64. *Id.* at 320 n.25.

65. *Id.* at 320–21.

66. Much of the following accounts of the *Zeitvogel* and *Amrine* cases are based on telephone interviews with Sean O’Brien (Jan. 12, 2004, and Jan. 13, 2004) [hereinafter O’Brien Interview]. In addition, I have examined portions of the trial transcripts of both cases.

charge began when Dew and several other inmates burglarized the chapel in the Missouri State Penitentiary. Dew, who was nicknamed “Crazy,” also shaved off the top of another prisoner’s head. During the prison’s investigation of this incident, Zeitvogel became a confidential informant and provided the authorities with information implicating Dew. Dew was subsequently charged with various crimes and was appointed a public defender named Julian Ossman. While representing Dew, Ossman showed him copies of Zeitvogel’s confidential statement to the prison authorities.

Dew became incensed. In front of several witnesses, he repeatedly threatened to kill Zeitvogel. Prison guards heard him promise to “do [him] like [he] did that mother-fucker in the chapel.”⁶⁷ On March 25, 1984, Dew managed to get himself transferred into the same cell with Zeitvogel. During that day, the two inmates fought constantly. The fighting ended only after Zeitvogel strangled Dew. At about 4:30 P.M., Zeitvogel informed a guard that he had killed his cellmate in self-defense.

The state charged Zeitvogel with capital murder. Eventually, Julian Ossman, the same attorney who had represented Dew, was appointed to represent Zeitvogel. In preparation for his trial, Zeitvogel gave Ossman a list of witnesses whom he believed would support his claim of self-defense. The list included witnesses who knew of the chapel incident and thus could explain Dew’s motive for seeking to kill Zeitvogel.

At Zeitvogel’s trial, the government showed that Zeitvogel had killed Dew by strangling him from behind. After the prosecution concluded its case, Ossman presented Zeitvogel’s defense. He called none of the witnesses Zeitvogel had requested. Instead, he presented two witnesses who testified only that Dew had threatened to kill Zeitvogel. On rebuttal, the state called prison officials who testified that they had no knowledge of Dew’s “desire to [murder] Zeitvogel” or that he had made any threats to do so. Ossman made no attempt to impeach these witnesses, even though he could have shown that some of them participated “in the investigation of the chapel incident” and thus knew Dew had a motive to attack Zeitvogel. The jury convicted Zeitvogel of capital murder. Following a penalty trial in which Ossman presented no mitigating evidence, the jury sentenced him to death. Zeitvogel’s conviction and death sentence were affirmed by the Missouri Supreme Court.

Zeitvogel sought state postconviction relief from the Missouri state courts. His new attorney, an overworked public defender who had never

67. *Zeitvogel v. Bowersox*, 519 U.S. 1036 (1996).

before represented a defendant in a postconviction hearing, alleged that Ossman had provided ineffective assistance of counsel at both the guilt and penalty phases of Zeitvogel's trial. As to the self-defense claim, the attorney alleged that Ossman should have called more witnesses. However, he did not allege that Ossman was ineffective because he failed to introduce evidence relating to Dew's and Zeitvogel's roles in the chapel incident or that Ossman's earlier representation of Dew created a conflict of interest that should have precluded him from representing Zeitvogel. The Missouri courts denied Zeitvogel's petition.

Zeitvogel next filed a petition for a writ of federal habeas corpus. Another new attorney presented a fuller claim relating to Ossman's ineffective performance at trial. Among other things, she asserted that Ossman was ineffective because he failed to call any of the witnesses Zeitvogel had suggested and thus did not develop the circumstances surrounding the chapel incident that established Dew's motive for attacking Zeitvogel. As in any self-defense case, defense evidence establishing that the victim was the initial aggressor would provide critical support for the self-defense claim.⁶⁸ The evidence relating to the chapel incident provided compelling support for Zeitvogel's claim that Dew was the first aggressor when they fought in their cell.

Although Zeitvogel's ineffective assistance claim now appeared strong, his state postconviction attorney's failure to allege the facts supporting this claim in the state courts created a significant procedural obstacle. When a defendant seeks to have a federal court consider evidence in support of a claim that was not presented in the state court, the defendant must establish cause and prejudice for the failure to present the evidence in the earlier proceeding.⁶⁹ Moreover, as I have indicated, the Supreme Court held in 1990 that mistakes or ineffectiveness of a defendant's state postconviction lawyer cannot establish cause.

In *Murray v. Carrier*,⁷⁰ the Supreme Court had established the so-called miscarriage of justice exception to the cause and prejudice rule. If the defendant alleged and proved sufficient evidence of his "actual innocence," then he would be allowed to raise a claim that would otherwise be barred

68. Under Missouri law, a person may use deadly force if he "reasonably believes . . . such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson." Mo. Rev. Stat. § 563.031(2) (1993 & West Supp. 1999). If Dew initially attacked Zeitvogel, Zeitvogel might certainly reasonably believe that the use of deadly force would be necessary to prevent serious physical injury.

69. *Zeitvogel v. Delo*, 84 F.3d 276, 282-83 (1996).

70. 477 U.S. 478, 496 (1986).

by the cause and prejudice rule. In *Zeitvogel's* case, however, his federal habeas attorney did not allege that *Zeitvogel* was innocent of the capital charge. As a result, the Eighth Circuit denied *Zeitvogel's* petition without considering whether this exception could apply.⁷¹

By this time, it was May 1996. As *Zeitvogel's* execution date drew near, Sean O'Brien of Kansas City, Missouri, one of the most skilled postconviction capital defense attorneys in the country, made a last-ditch effort to save his life. He filed a new federal habeas petition that again raised the claim that Ossman had provided ineffective assistance of counsel. In this petition, O'Brien for the first time alleged that Ossman had informed Dew that *Zeitvogel* was the confidential informer who had revealed Dew's role in the chapel incident. Based on this information, O'Brien claimed that Ossman should not have represented *Zeitvogel* but rather should have been a witness in support of his self-defense claim. As a defense witness, Ossman could have established that Dew knew that *Zeitvogel* had informed the authorities of Dew's criminal conduct and that, as a result, Dew was enraged. His testimony would have clarified the relationship between Dew and *Zeitvogel*, clearly explaining Dew's motive for seeking to kill *Zeitvogel*.

Although *Zeitvogel's* ineffective assistance of counsel claim now seemed even stronger than before, O'Brien had to surmount the procedural barrier of showing cause and prejudice for the previous failure to raise this claim fully in the state courts. O'Brien alleged that, based on the evidence relating to *Zeitvogel's* self-defense claim that Ossman should have introduced, *Zeitvogel* was innocent of the capital offense of which he had been convicted.

The Eighth Circuit's response was that O'Brien's allegations relating to *Zeitvogel's* innocence were too late and too little. After observing that the claim should have been made in *Zeitvogel's* earlier federal habeas petition, the Eighth Circuit said that, given the physical evidence that *Zeitvogel* "strangled [Dew] from behind with a wire, [and] then waited for three hours before summoning help,"⁷² the defense had not made a sufficient showing that *Zeitvogel* was innocent of the capital murder charge. O'Brien and other attorneys then tried to present *Zeitvogel's* innocence claim to the state courts, but this also failed.⁷³ *Zeitvogel* was executed on December 11, 1996.

71. *Zeitvogel*, 84 F.3d at 279.

72. *Zeitvogel v. Bowersox*, 103 F.3d 54, 55-56 (1996).

73. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court observed that a defendant making a claim of "actual innocence" during a federal habeas proceeding comes before a court as one who has been convicted in accordance with due process of law. The Court denied the defendant's claim for federal habeas corpus relief in that case but left open the question of whether a defendant could

Joseph Amrine

Joe Amrine was also an inmate in the Missouri State Penitentiary. On October 18, 1985, Amrine and a large number of other prisoners were released from their cells to go to lunch and spend time in a recreation room. Later, Officer Noble, a guard on duty, heard a commotion in the recreation room. He looked up and saw a prisoner named Gary Barber pull a knife from his back and start chasing another inmate. Noble identified the inmate being chased as Terry Russell. Barber collapsed and eventually died from his knife wounds. The sheriffs investigating the case questioned Russell about the crime. In response, Russell said, "I didn't kill him. Joe Amrine did." Russell added that he was out of the room when the stabbing occurred. But, after the stabbing, he came back in and asked Joe, "Man, why did you do it?" Joe answered, "Because I had to."⁷⁴

The sheriffs took Amrine into custody. Joe claimed he was playing cards with other inmates when the killing occurred. Other inmates supported his alibi. Nevertheless, based on their preliminary investigation of the case, the prison officials decided Amrine was guilty.

Subsequently, Jerry Poe and Randall Ferguson, two inmates who were being sexually abused by other prisoners, agreed to make statements incriminating Amrine. In both cases, the prison officials promised these inmates protective custody in exchange for their statements and also later dismissed charges against them. There were important inconsistencies in Poe's and Ferguson's statements. For example, Poe said he had seen Amrine throw the knife out the window after the stabbing, which was inconsistent with every other witness's statement that, after Barber was stabbed, he pulled the knife out of his body.

At trial, Amrine was represented by Julian Ossman. Russell, Ferguson, and Poe were the only government witnesses who connected him to the killing. Russell testified that Joe admitted to him that he had stabbed Barber; Ferguson and Poe testified they saw Joe do the stabbing. In cross-examining Russell, Ossman did bring out that he was originally accused of

ever succeed with an "actual innocence" claim absent an independent constitutional violation. In dicta, the Court stated: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* at 417.

74. O'Brien Interview, *supra* note 66.

the crime and that his possible motive for accusing Joe was to avoid the blame himself. However, Ossman's cross-examination of the other two inmates was weak. He failed to bring out the inconsistencies in their original stories or to cross-examine them fully about the pressures exerted to induce their testimony. He did not bring out, for example, that Ferguson had to be questioned more than thirty times before he finally incriminated Amrine or that both Poe and Ferguson were given protective custody in exchange for their testimony.

Ossman's presentation of Joe's alibi was also weak. Ossman had not talked to all of the alibi witnesses before trial. Although the alibi witnesses testified they had played cards with Joe when they were in the recreation room on October 18, the prosecutor's cross-examination was effective. Based on their answers to the prosecutor's questions, the witnesses left open the possibility that Joe had not been with them at the time when Barber was stabbed.

The jury convicted Amrine of first-degree murder. After a brief penalty trial in which Joe testified to his innocence but admitted that he had been violent in prison on other occasions, the jury sentenced him to death. On appeal, the Missouri Supreme Court affirmed Amrine's conviction and death sentence.

Amrine filed a state postconviction petition. As in Zeitvogel's case, the postconviction attorney raised an ineffective assistance of counsel claim but did not allege all of the facts relating to what Ossman had failed to do at Joe's trial. The lawyer did, however, interview Ferguson and Russell, two of the three prisoners who had testified against Amrine. They both admitted that their testimony at his trial had been false. Jerry Poe, the third prisoner who testified against Amrine, did not testify at the state postconviction hearing. Poe had been released from prison and Amrine's postconviction attorney was unable to locate him.

The state court rejected Amrine's petition. As to the new evidence claim, the court said in effect: Jerry Poe has not recanted; the two prisoners' recantations were not credible because the prisoners were unreliable; the new evidence was thus not enough to meet the required standard for reversing a conviction on the basis of newly discovered evidence.⁷⁵ The Missouri Supreme Court affirmed.

75. *State v. Amrine*, 741 S.W.2d 665, 674-75 (Mo. 1987). Under Missouri law, a defendant receives a new trial on the basis of newly discovered evidence only when the defendant becomes aware of the evidence after the first trial; the defendant's delayed awareness did not stem from a lack of "due diligence"; the newly discovered "evidence is so material that it would probably pro-

Amrine then filed a federal habeas petition. His new attorney raised a fuller ineffective assistance of counsel claim, specifying all the things that Ossman failed to do at Joe's trial. As in Zeitvogel's case, however, the court refused to consider the new ineffective assistance claim because Amrine's attorney could not establish cause for the failure to raise the claim in the state courts.

After Amrine's petition had been denied by the federal district court, Sean O'Brien was appointed to represent Joe. O'Brien was able to find Jerry Poe, who filed an affidavit stating that he had also lied at Amrine's trial. His affidavit stated, "I lied to get protection from sexual predators." Based on this affidavit, O'Brien now claimed that the "miscarriage of justice" exception should apply. The Eighth Circuit ordered the district court to hold a hearing to determine whether Amrine had presented sufficient evidence of his innocence to have his federal claims considered.⁷⁶ It provided, however, that the district court should consider only new evidence "that was not discoverable by due diligence at the time of the earlier proceedings."⁷⁷

At the hearing, O'Brien got the attorney who had prosecuted Amrine to admit that without the three prison inmates the government had no case. He then called Officer Noble, who testified that, based on what he had observed at the time of the incident, Terry Russell appeared to be the killer. He had the three inmates testify as hostile witnesses. He cross-examined them in the way the original defense attorney should have cross-examined them, showing that their testimony incriminating Amrine was inherently unreliable. In addition, all three now admitted they had lied at Amrine's trial. O'Brien's evidence seemed to establish Amrine's innocence.

The federal judge, however, ruled that because the state court judge had already considered and rejected Russell's and Ferguson's testimony, the only new evidence that could properly be considered was Jerry Poe's recanting testimony. The judge concluded that Poe's new evidence would not be enough to change the jury's verdict because Poe was not a reliable witness. The District Court judge thus denied the writ. On appeal, the Eighth Circuit affirmed⁷⁸ and the Supreme Court declined to hear the case.

At this point, Amrine's execution date was set. In November 2002, as part of a final effort to save Joe, O'Brien and his partner Kent Gipson peti-

duce a different result on a new trial"; and the newly discovered evidence "is not cumulative only" or does not serve the sole purpose of impeaching a witness's credibility. *Id.* at 674 (citing *State v. Williams*, 652 S.W.2d 102, 114 (Mo. 1983)).

76. *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997).

77. *Id.*

78. *Amrine v. Bowersox*, 238 F.3d 1023, 1033 (8th Cir. 2001).

tioned for state habeas corpus relief in the Missouri Supreme Court on the ground that Amrine was innocent. In presenting this claim, O'Brien and Gipson were able to draw from nineteenth-century Missouri state cases. They understood, however, that there is scant modern authority for granting state defendants postconviction relief solely on the basis of an innocence claim. As in federal cases, the defendant's showing of innocence is more commonly viewed as a "gateway" that allows him to raise constitutional claims that would otherwise be barred.

When Amrine's case came before the Missouri Supreme Court, O'Brien presented a very strong argument that Amrine was innocent. The Missouri Attorney General responded by asserting that evidence showing Joe was probably innocent should not be sufficient to prevent his execution because that evidence could only be a gateway to another constitutional claim, and the state and federal courts had already rejected Amrine's other constitutional claims. The following exchange then took place.

JUDGE STITH: Are you suggesting if we don't find there's a constitutional violation and if even we find that Mr. Amrine is actually innocent, he should be executed? . . . I'm asking is that what you are arguing for the State?

ATTORNEY GENERAL: That's correct, Your Honor.

The same judge returned to this point:

JUDGE STITH: But you are saying it's not a matter of manifest injustice . . . to execute an innocent man?

ATTORNEY GENERAL: As you interpreted the manifest injustice standard in *Clay*, Your Honor, it is a fact that you have to have the coupling of a constitutional violation with it.

Then another judge asked:

JUDGE WOLFF: To make sure we are clear on this, if we find in a case DNA absolutely excludes somebody as the murderer, then we must execute [him] anyway if we can't find an underlying constitutional violation at [his] trial?

ATTORNEY GENERAL: Yes, Your Honor.⁷⁹

79. Audio Recording: Missouri Oral Arguments Archive, *State ex rel. Amrine v. Luebbers*, 102 S.W.3d 541 (Mo. Feb. 4, 2003) (No. SC84656), at <http://www.missourinet.com/>

Fortunately for Amrine, the Missouri Supreme Court did not agree with the state attorney general. The court held that, based on Amrine's strong showing of actual innocence, he was entitled to a new trial even though he had lost the opportunity to show an underlying constitutional violation such as ineffective assistance of counsel.⁸⁰ Since the state had no evidence against Amrine, the state did not seek to try him again. After serving the remainder of his original prison sentence, Amrine was released and is now free.⁸¹

Reflections on the Cases

In all three cases, the defendant's postconviction lawyers were able to present powerful narratives of injustice. In the *Atkins* case, the narrative related to a class of defendants. Atkins's attorneys presented extensive data showing that mentally retarded defendants' impairments render them incapable of having sufficient culpability for their crimes to warrant the imposition of the death penalty. The attorneys then identified specific ways in which mentally retarded defendants' deeply ingrained coping mechanisms subvert the normal criminal justice process. By crafting the narrative so that it built upon itself, one step at a time, the attorneys told a compelling story that provided the Court with sound reasons to overturn precedent and enunciate a new constitutional restriction on the circumstances under which defendants can be sentenced to death.

In the *Zeitvogel* and *Amrine* cases, the lawyers' narratives related to individual defendants who were improperly convicted of capital crimes because of their lawyers' inadequate trial representation. In *Zeitvogel's* case, Sean O'Brien was able to demonstrate glaring problems with Ossman's representation. In particular, Ossman's trial representation of *Zeitvogel* prevented him from testifying to critical defense evidence. Through fully presenting that evidence, O'Brien drastically altered the perception of *Zeitvogel's* killing of Dew. Instead of a case in which *Zeitvogel* simply strangled Dew from behind, it became one in which Dew's intense animosity toward *Zeitvogel* made it almost certain that Dew was the initial aggressor. This narrative indicated that if the facts relating to the killing had been properly presented, the jury would not have convicted *Zeitvogel*

gestalt/go.cfm?objectid=03A1CA5A-94A2-4ADD-866448549D08DD74&category=6%5EMissouri%20Supreme%20Court%20Arguments.

80. State *ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003).

81. O'Brien Interview, *supra* note 66.

of capital murder but would have acquitted him or, at most, convicted him of voluntary manslaughter.

In Amrine's case, O'Brien and Gipson's narrative provided a powerful story of a defendant who had been wrongfully convicted on the basis of inherently unreliable testimony. All of the witnesses who had testified to Amrine's guilt later admitted that they had lied. In addition, O'Brien and Gipson were able to bring out the reasons why the witnesses had lied and to introduce evidence indicating that the prison authorities should have known from the beginning that Russell rather than Amrine was probably guilty of the crime for which Amrine was convicted. The narrative thus demonstrated that executing Amrine would be a tragic miscarriage of justice because he was innocent and never should have been charged with the crime of which he was convicted.

The *Zeitvogel* and *Amrine* cases also illustrate some of the difficult obstacles attorneys encounter in seeking to obtain postconviction relief for capital defendants. In particular, both cases show why a capital defendant's state postconviction representation is so important. If a capital defendant has a knowledgeable state postconviction attorney who will fully and accurately allege his constitutional claims, the defendant will get two bites at the apple; his postconviction claims will be considered by both the state and federal courts. If the defendants' state postconviction attorney does not do a good job of presenting his claims, however, he is likely to get no bites at all; as *Zeitvogel's* case demonstrates, even if he has good constitutional claims, they will probably not be considered by either the state or federal courts.

In view of the impenetrable procedural barriers, why were O'Brien and Gipson eventually able to convince a court to grant Amrine postconviction relief? In a sense, Amrine's case was aberrational. Although the Missouri Attorney General's argument that evidence of the defendant's actual innocence is not sufficient to prevent his execution seems absurd and illogical, contrary authority is scant.⁸² In fact, Amrine's case was apparently the first in the modern era of capital punishment in which a court granted postconviction relief to a death row defendant solely on the ground that he was innocent.

The result in *Amrine* perhaps indicates that postconviction defense attorneys' efforts on behalf of capital defendants have caused a change in courts' views of the type of scrutiny that should be given to postconviction

82. See *supra* note 73.

claims in capital cases. During the 1990s, courts reviewing capital defendants' postconviction claims appeared to believe that considerations of federalism, as reflected in strictly enforcing state procedural rules, trumped concerns relating to protecting capital defendants.⁸³ Postconviction attorneys' demonstrations of the many cases in which death row defendants have been wrongfully convicted may be changing that perception. The result in *Amrine* perhaps reflects a trend toward providing safeguards that will decrease the possibility of an innocent defendant's execution.

83. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 726, 730–31 (1991): “[F]ederalism . . . concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus. . . . Without the rule, . . . habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of the Supreme Court’s jurisdiction and a means to undermine the state’s interest in enforcing its laws.” *Id.*