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Recommended Citation

Fredrick E. Vars, *Prosecutorial Misconduct: The Best Defense Is a Good Defense*, 73 Wash. & Lee L. Rev. Online 481 (2016).

Available at: https://scholarship.law.ua.edu/fac_articles/318

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Prosecutorial Misconduct: The Best Defense Is a Good Defense

Fredrick E. Vars*

In “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, Professor Michael L. Perlin persuasively argues that prosecutorial misconduct leads many people with mental disabilities to be sentenced to death and executed.¹ Toward the end of his article, he compiles over a dozen previously-proposed reforms aimed at improving prosecutorial practice.² As explained below, I am not optimistic about the prospects of these reforms, either to be adopted or to be highly effective.³ I think more could be accomplished by directing resources and training to the other side of the equation—public defenders. A smaller number of counties each year account for the majority of death sentences and executions.⁴ We need to better equip front-line public defenders in those counties to identify and counter prosecutorial misconduct, and, more broadly, to provide competent representation in capital cases, particularly those involving mental disabilities.

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1. See Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1502 (2016) (observing that “persons with severe psychosocial and intellectual disabilities continue to be given death sentences, in some cases leading to actual execution”).

2. *Id.* at 1537–39.

3. Perlin states a key reason for this: “There is typically great political incentive for prosecutors to seek the death penalty and for trial judges to impose it.” *Id.* at 1511.

4. See, e.g., *Executions by County*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-county> (last visited Dec. 12, 2016) (listing the fifteen counties that “accounted for 30% of the executions in the U.S. between 1976 and January 1, 2013”) (on file with the Washington and Lee Law Review).

Perlin is optimistic that recent death row exonerations will be a turning point in the battle against prosecutorial misconduct in capital cases involving defendants with mental disabilities.⁵ He hopes that one particularly egregious case, in which no one questioned the defendants' guilt, will be a watershed like the Birmingham church bombings,⁶ the most notorious of which took place just a few minutes from my home.⁷ I share Perlin's hope but not his optimism. The bombing helped push forward the civil rights movement because everyone could empathize with the four little girls dressed in their Sunday best.⁸ Dr. Martin Luther King, Jr. quite credibly described the bombing as "one of the most vicious and tragic crimes ever perpetrated against humanity."⁹ Mentally disabled death row inmates, even the innocent ones, live on the other side of a divide wider even than race in the 1960s. Few of us can identify closely with exonerated inmates. As a result, only the accumulation of exonerations, not one signature event, reveals the flaws in the process and shifts public opinion gradually against the death penalty.

As to my alternative focus on public defenders, I do not mean to suggest that Perlin would disagree. To the contrary, he quotes the longtime capital defense attorney (and my former professor) Stephen Bright: "The death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer."¹⁰ Twenty years ago, Perlin argued that ineffective

5. See Perlin, *supra* note 1, at 1543 ("I remain, however, an optimist, and hope that one of the most egregious of cases, the *McCullum* case, may signal a turn-around.").

6. See *id.* at 1544 (noting the "shock the conscience" role the bombings played in bringing about social change).

7. See generally Jon Meacham, *Fifty Years After Bombing, Birmingham is Resurrected*, TIME (Sept. 23, 2013), <http://content.time.com/time/magazine/article/0,9171,2151804,00.html> (last visited Nov. 13, 2016) (discussing the 16th Street Baptist Church bombing in Birmingham) (on file with the Washington and Lee Law Review).

8. The victims were Addie Mae Collins (age 14), Carol Denise McNair (age 11), Carole Robertson (age 14), and Cynthia Wesley (age 14). *Id.*

9. David J. Krajicek, *Justice Story: Birmingham Church Bombing Kills 4 Innocent Girls in Racially Motivated Attack*, N.Y. DAILY NEWS (Sept. 1, 2013), <http://www.nydailynews.com/news/justice-story/justice-story-birmingham-church-bombing-article-1.1441568> (last visited Dec. 12, 2016) (on file with the Washington and Lee Law Review).

10. Perlin, *supra* note 1, at 1522 (quoting Stephen Bright, *Death by*

assistance of counsel and mental disability was a deadly mix.¹¹ He suggested that death penalty specialization among public defenders could be a helpful counter-weight.¹² And in the present article, Perlin points out the extreme geographic concentration of death sentences.¹³ My argument here is not a critique of Perlin (though I offer one small qualification), but rather a suggestion to connect and re-deploy his ideas in light of the new, and shrinking, death penalty landscape. The key point is that it is much more affordable now than it was twenty years ago to adequately train and support defense counsel in places where death sentences are actually being imposed.

I would qualify only one of Perlin's arguments—and in a small way—so I will begin there. Perlin argues that “some prosecutors seek the imposition of the death penalty on defendants who are, by any objective standard, incompetent to be executed.”¹⁴ There is slippage here between the time a death sentence is imposed and the time the prisoner is executed. If a defendant obviously will never have the capacity to be executed because he lacks “rational understanding of the State's reason for his execution,”¹⁵ then I agree with Perlin that seeking the death penalty is misconduct. But I think such cases are rare because such a defendant will almost certainly be incompetent to stand trial. Competency to stand trial requires “a rational as well as factual understanding of the proceedings.”¹⁶ The same test applies for imposition of sentence. One scenario that might

Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants, 92 W. VA. L. REV. 679, 695 (1990)).

11. See Michael L. Perlin, “*The Executioner's Face Is Always Well-Hidden*”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 203 (1996) (arguing that “the most critical issue in determining whether a defendant lives or dies is the quality of counsel”).

12. See *id.* at 222–23, 235 (discussing with approval New York's “Capital Defender Office” model).

13. See Perlin, *supra* note 1, at 1512 (“In this context, is important to note how the imposition of the death penalty is basically a county-by-county issue, resulting in this anomaly: over a twenty-two year period, sixty-six American counties accounted for 2,569 of the 5,131 death sentences imposed.”).

14. *Id.* at 1534 (capitalization removed).

15. *Id.* at 1535 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 957–58 (2007)).

16. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*).

support Perlin's argument could be the defendant with moderate dementia who will likely lose competency between sentencing and execution. However, I am still not sure it is unethical for a prosecutor to seek the death penalty simply because a loss of competency is likely. Prosecutors cannot ignore the obvious, but they cannot generally be expected to know the future.¹⁷

My positive suggestion is simple: good defense counsel at trial is the most potent weapon against prosecutorial misconduct.¹⁸ And because death penalty cases are so concentrated geographically, training and resources provided to a small number of public defenders offices could make a huge difference.

Consider Perlin's other examples of prosecutorial misconduct: misusing mental disability evidence to appeal to bias, presenting bogus expert testimony, failing to disclose exculpatory psychiatric evidence, and sanctioning improper forced medication.¹⁹ Of course, it would be better if prosecutors did not do any of these things. But, to take one example, disqualification or even just blistering cross-examination of a bogus expert—perhaps even coupled with a more persuasive defense expert—may be the best solution reasonably achievable.²⁰ Trial counsel can also object to or counter appeals to bias and demand discontinuation of improper medication. *Brady* violations are perhaps the most difficult to detect, but even here good defense counsel can make a

17. Indeed, putting on experts who pretend they can predict future dangerousness is one of Perlin's examples of prosecutorial misconduct. See Perlin, *supra* note 1, at 1528 ("The worthless and baseless testimony of Dr. James Grigson on questions of future dangerousness, and how that testimony led inexorably to the improper executions of defendants with mental disabilities, is well known.").

18. Cf. Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 429 (2011) ("While 'a prosecutor must be doubly careful to stay within the bounds of proper conduct' in cases involving salacious allegations and little concrete evidence, the court emphasized that it is ultimately the responsibility of defense counsel to make sure that the prosecutor 'does not transgress these bounds.'" (quoting *Washington v. Hofbauer*, 228 F.3d 689, 709 (6th Cir. 2000))).

19. See Perlin, *supra* note 1, at 1526–35 (discussing these instances of prosecutorial misconduct).

20. See *Roberson v. Director, TDCJ-CID*, No. 2:09cv327, 2014 WL 5343198, at *23 (E.D. Tex. Sept. 30, 2014) ("Trial counsel presented a sound trial strategy on the issue of future dangerousness. He presented an expert to counter the State's experts and vigorously cross-examined the State's experts.").

difference by, for example, issuing targeted substantive requests, petitioning for *Brady* process details, or requesting in camera review of sensitive materials.²¹

It is easy to call for better and better-funded indigent criminal defense. But raising the public defense bar nationwide would be very expensive. On the other hand, jurisdictions actually imposing death sentences are a much smaller and shrinking target. In 1996, when Perlin wrote his article about ineffective assistance of counsel, death sentences reached a modern peak of 315.²² In contrast, there were only 49 death sentences in 2015.²³ The death penalty has also become increasingly localized. “Nearly two-thirds of the new death sentences in the U.S. in 2015 were imposed in the same 2% of American counties that have disproportionately accounted for more than half of all U.S. death sentences in the past.”²⁴ Riverside County, California, imposed 16% of all death sentences in 2015.²⁵

I agree with Perlin that “the right to counsel is . . . the core of therapeutic jurisprudence.”²⁶ Indeed, the goals of “voice, validation, and voluntariness” are only possible for most defendants, particularly those with mental disabilities, through the assistance of competent counsel.²⁷ Better training and support for defense counsel in death jurisdictions should therefore be a top priority. Therapeutic jurisprudence also suggests that one key component of support should be mitigation specialists, who can give fuller voice to a defendant’s humanity:

21. See JaneAnne Murray, *The Brady Battle*, 37 CHAMPION 72, 72–74 (May 2013) (discussing “ways in which defense lawyers can give meaning to Brady’s promise of fundamental fairness”); see also Bazelon, *supra* note 18, at 417 (“[T]here are proactive strategies trial counsel can employ to reduce the likelihood of . . . a [*Brady*] violation occurring.”).

22. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT 1 (2015), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf> (summarizing recent death penalty statistics).

23. *Id.*

24. *Id.* at 2.

25. *Id.* at 3.

26. Perlin, *supra* note 1, at 1543 (quoting Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. WESTERN L. REV. 103, 119 (2004)).

27. *Id.* at 1540.

To effectively collect and present meaningful [mitigation] evidence . . . requires an investigation that is not an appropriate or realistic function of defense counsel, psychologists, and psychiatrists. Rather, because the defendant's medical, psychological, sociological, and family background must all be thoroughly investigated, counsel must seek out assistance from mitigation specialists.²⁸

But who will pay for these suggested reforms? The jurisdictions still imposing death sentences are likely among the least interested in increasing funding for indigent criminal defense. However, some of these counties are in states that are now leaning against the death penalty overall, so targeted state resources may be available. But in many other places it will take private funding. Groups opposed to the death penalty could provide free or subsidized capital defense training and roving mitigation specialists.²⁹ The campaign against the death penalty has been successful enough that it is feasible now to plug leaks while continuing to build the dam. It would be great to stem the flow of prosecutorial misconduct at its source, but shoring up defense counsel in the remaining death jurisdictions is, I believe, more likely to be effective.

28. Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 52–53 (2005).

29. Cf. Karen Sloan, *Cornell Launches Center to Help Defeat Death Penalty Worldwide*, N.Y. L. J. (Oct. 26, 2016), <http://www.newyorklawjournal.com/this-weeks-news/id=1202770837326/Cornell-Launches-Center-to-Help-Defeat-Death-Penalty-Worldwide?mcode=1202615036097&curindex=3&slreturn=20161013195905> (last visited Dec. 12, 2016) (describing a new privately-funded initiative to include “a summer institute for capital defense lawyers around the world”) (on file with the Washington and Lee Law Review).