

DEATH PENALTY INTERNSHIPS IN THE AMERICAN SOUTH*

Introduction

In 2000, the University of San Francisco School of Law established the Keta Taylor Colby Death Penalty Project (“KTC Project”) to involve students in work aimed at the interim reform, and ultimate abolition, of the death penalty in the United States.¹ In the twelve years since its creation, the KTC Project has conducted educational programs, sponsored empirical research and consulted with capital defense attorneys on cases, but its principal activity has been the Southern Internship Program, which each summer has sent 6-10 law students from the San Francisco Bay Area to spend 10 weeks in the South working with capital defense attorneys.

The Southern Internship Program

The Southern Internship Program was created in 2001 to respond to the crisis in capital representation in the South.² Since its inception, 76 students have participated in the program, including three who participated twice. In its first year, the program sent U.S.F. students to the newly established state post-conviction offices in Louisiana and Mississippi, offices whose funding and staffing were far too low to handle the number of cases assigned by the courts. The following summer, the program also sent students to the statewide capital trial office in Mississippi, and, in succeeding summers, students were sent, at various times, to capital defense

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¹ The project is named for a 1987 *magna cum laude* graduate of the U.S.F. School of Law, who, prior to her untimely death in 1990, undertook a *pro bono* death penalty case with her firm and played a leading role in getting other firms in San Francisco to undertake *pro bono* death penalty cases.

² In the modern era, since the reinstatement of the death penalty after the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), approximately 75% of the executions in the country have been carried out by the 11 states of the South.

offices in Alabama, Arkansas and Texas. During four of the summers, students from Berkeley Law were included in the program. In preparation for the internship, during the spring semester preceding the internship, students attend four training sessions covering death penalty law and practice, with particular emphasis on conditions in the South. Students receive a stipend to cover their travel and living expenses for the summer, and the Project provides each pair of students with a rental car.

All the interns work on state death penalty cases.³ By way of background, a state death penalty case proceeds through four stages: trial, direct appeal, state post-conviction, and federal habeas corpus. At trial, the prosecution must prove that the defendant is guilty of capital murder (as defined by the particular state's statute), in which case the trial proceeds to a penalty phase where additional aggravating or mitigating evidence may be introduced and the sentencer (usually a jury) decides whether to impose the death penalty. If a defendant is convicted and sentenced to death, the defendant appeals to the supreme court of the state raising any issues which appear in the trial record. If unsuccessful on appeal, the defendant may file a petition in state court for post-conviction relief raising issues based on evidence outside the trial record, *e.g.*, evidence that the defendant's counsel was ineffective for failing to adequately investigate and present the defense case. If unsuccessful in state court, the defendant may then petition for habeas corpus in federal court claiming that his/her federal constitutional rights were violated in the state proceedings. At each stage of the case after the trial stage, the defendant will be confronted with elaborate default rules that may bar claims not properly raised at the prior stage.

³ Although the federal government may impose the death penalty for particular federal crimes or crimes in the military, in the last forty years, the overwhelming majority of death sentences have been imposed by the states.

Each year one pair of interns is assigned to the Mississippi trial office, where they work on trial level cases and occasionally on appeals. The remaining interns work on state post-conviction, or federal habeas corpus, cases, with the majority working on cases in state post-conviction, the one stage where the defendant has no federal constitutional right to appointed counsel.⁴ The work of the interns and the range of their experiences vary according to the needs of the offices and the procedural posture of the cases when the interns arrive. In general, each intern's experience includes meeting with the client; performing in-office legal work such as reviewing files and transcripts, researching legal issues and drafting claims; and engaging in out-of-office investigative work, including interviewing witnesses and gathering documents from courts, hospitals and schools. The interns write a mid-summer report on their work and a final "wrap-up" at the end of the internship, and many write or call at other times to discuss issues in their cases. The supervising attorneys also write brief evaluations of the interns' work at the end of the summer. These are some of the interns' stories.⁵

*Working with Clients*⁶

Most interns report that the most powerful and most memorable experiences of the internship come from meeting and working with the clients. Leslie (Louisiana, 2003) put it this way: "After this experience [visiting the client on death row], I cried and cried – it is quite

⁴ See *Murray v. Giarratano*, 492 U.S. 1 (1989).

⁵ In the interests of confidentiality, the capital defendants and death-sentenced prisoners whose cases are described here are not named, and the interns are identified by pseudonyms. Quotes from the interns are taken from their "wrap-ups."

⁶ The clients, who may be "defendants," "appellants" or "petitioners," depending on the stage of the case, are referred to throughout as "clients." Of course, the clients are clients of the capital defense office and its attorneys, not the KTC Project or its interns.

something to speak to someone for three hours in a row, looking into his eyes through a layer of mesh, knowing the state may well execute this soul.” The relationship goes two ways. In 2002, Miriam wrote from Mississippi: “When I was visiting [the client] for the last time, and I was leaving, he said to me: ‘Thank you so much for all of your work. Thank you for everything. You have worked harder in these two months than any of my lawyers have the entire time I have been on death row. Whatever happens to me, you can know that you did your best. Thank you.’”

In 2008, Amelia and Lori interned with the Mississippi trial office and primarily worked on one case that was set for trial seven weeks after their arrival. The client was an African-American man in his forties with a long criminal history involving drugs, weapons and a prior homicide (occurring at about the same time as the charged capital murder), for which he was serving time in a Tennessee prison while he was awaiting trial in Mississippi. He was charged with murdering a young white woman in a virtually all-white county. Everything about the case pointed to the likelihood of a death sentence. The interns were assigned to work with the client to develop a mitigation case. Discovering and presenting mitigation evidence – evidence about the background and character of the defendant – in the penalty phase of a capital trial is often the primary defense focus in a capital case and the difference between life and death for the defendant. Most capital defendants are the products of poor, highly dysfunctional families where physical and sexual abuse of the children are common and where often there is a history of mental illness and substance abuse, sometimes spanning several generations. The defense presents the defendant’s story to the jury – the mitigation evidence -- to explain the defendant’s actions and to evoke sympathy.

Although a mitigation investigation should be conducted by a trained mitigation specialist or investigator, offices with limited resources may be forced to rely on interns to do much of the legwork. During the seven weeks leading up to the trial date, Amelia and Lori visited the client regularly and worked tirelessly to develop a mitigation case, seeking out and interviewing family members and other potential witnesses who knew the client and gathering documentary evidence. Since the prosecutor's decision to pursue the death penalty is often greatly influenced by the position taken by the victim's family members (and the likely impact of their testimony at the penalty phase), recently some capital defenders, inspired by Sr. Helen Prejean (*Dead Man Walking*), have attempted to reach out to those family members. With the approval of their supervising attorney, Amelia and Lori decided to visit the victim's mother. They were unsure what to expect, but the mother invited them in, offered them tea and talked with them for three hours. In Amelia's words, "We talked and cried and hugged. She told us about the person her daughter was and about how much she missed her." The mother said she had been against the death penalty all her life and was relieved that she was not the one to decide the sentence.

Perhaps, in part, because of the mitigation case that Amelia and Lori were able to build or because of their visit to the victim's mother and her response, three days before the trial was to begin, the District Attorney offered to take a plea to life without the possibility of parole. When the attorney and the interns told the client of the offer, he did not immediately accept it. Eventually, on the day before trial was to begin, the client called Amelia, and, after discussing his situation further, he agreed to take the plea. Capital defense attorneys consider any result other than an execution a victory, and, given the circumstances of this particular case, the plea deal was an unexpected victory. However, Amelia was deeply troubled by the result because she

would remember that she had played a role in ensuring that her client would spend the rest of his life, and die, in prison.

Visiting Prisons and Jails

All of the clients are incarcerated, either in prison on death row or in jail awaiting trial. Most of the interns have never been inside a prison or jail prior to their internship and are deeply affected by their encounter with life behind bars. As a rule, the clients, particularly those on death row, have few visitors, so the clients are particularly grateful for the visits by the interns for reasons going beyond what the visits contribute to the litigation of their cases. Consequently, the offices often have the interns visit multiple clients on the same day. In 2006, Stacey actually spent three days in Angola Prison (Louisiana) visiting more than a dozen death row prisoners to gather declarations concerning a prison disturbance affecting her client.

Sometimes the reality of life in prison is brought home in a dramatic fashion. In 2010, Norman and Jody, on the fourth day of their internship in Mississippi, went with their supervising attorney to visit clients in Parchman Farm, the legendary prison farm housing Mississippi's death row. While the attorney was talking with one client and the interns were talking with another client, an inmate approached their client from behind and stabbed him. The guards responded by entering the visiting room and macing all the inmates. The prison was locked down, and the attorneys and interns, eyes stinging from the mace in the air, were ordered out. Norman later had the following to say about the incident:

It was a surreal experience and one that I will never forget. It also gave me a small glimpse of the brutality and ultra-violence associated with life on death-row. Parchman is one of the most depressing places I have ever been. After speaking with many of the

inmates, I realize the conditions in which they live are really unimaginable to outsiders.

Witnessing the psychological toll on the inmates left a lasting impression with me.

Undaunted, Norman and Jody returned to Parchman with their supervising attorney three days later to continue their interviews and made subsequent trips by themselves to the prison.

Investigation

As in the trial office, resource limitations in the post-conviction offices mean that much of the interns' time may be devoted to field investigation, usually reinvestigating trial attorneys' preparation for, and conduct of, the penalty phase of the trial, where trial attorneys have often been found to have been ineffective. In the scores of post-conviction cases on which the interns have worked over the years, there have not been more than a few where the client got a reasonable penalty defense.

Reinvestigation of the penalty phase defense is perhaps most critical in cases where the client might be mentally retarded. In June, 2002, the United States Supreme Court handed down its decision in *Atkins v. Virginia*,⁷ holding that the death penalty could not be imposed on mentally retarded defendants. The Court did not define mental retardation, but seemed generally to endorse the definitions adopted by professional associations requiring: (1) significant subaverage intellectual functioning; (2) limitations in two or more adaptive skill areas; and (3) onset before age 18. Since the *Atkins* decision, mitigation investigation has had as one of its principal goals discovering evidence of possible mental retardation. In Texas, the Court of Criminal Appeals ordered that any death row inmate claiming mental retardation had one year from the date of the *Atkins* decision to petition for relief. The Texas Defender Service ("TDS") immediately began an attempt to determine who, on Texas's large death row, might be mentally

⁷ 536 U.S. 304 (2002).

retarded and to investigate all possible claims. Nonetheless, when Linda and Anita arrived at the TDS Houston office in 2003, three weeks before the expiration of the time for filing *Atkins* claims, there remained many cases that had not yet been fully investigated. The interns were handed three files and sent to South Texas to investigate the possibility of the clients' mental retardation. Operating with minimal supervision, and often separately, they managed to gather sufficient documentary and testimonial evidence to file petitions for relief in all three cases and obtain hearings, thus forestalling the clients' pending executions.

Encountering the Clients' Communities

In all but a few cases, the KTC interns have not been from the South, nor have they had many encounters with Southern culture. In addition, the interns usually do not share the racial or class background of their clients. These differences can pose a significant challenge for interns doing field investigations, and learning how to bridge these differences is an invaluable lesson for law students. None did it better than Jerry and Celia in 2004. For the most part they worked for the Mississippi trial office, although they also participated in the briefing of some post-conviction cases. Their work for the trial office consisted of mitigation investigations for two clients from Greenville, Mississippi, in the heart of the Mississippi delta, the poorest region in one of the poorest states in the country. The two clients were African-American, and a majority of the residents of the delta are African-American. When Jerry and Celia, two white "Yankees," arrived in Greenville attempting to locate and talk with the clients' families and acquaintances, initially they were met with suspicion and hostility. They persisted, and ended up spending two days a week in Greenville for the rest of the summer. Little by little they gained the trust of the community. They were asked to dinner by some of the clients' family members. Then the real breakthrough came when they were invited to attend church with the families. There, the

minister introduced them to the African-American community as two law students who were trying to save the lives of members of the community. The service concluded with Jerry and Celia being invited to join hands with all of the congregants in the final prayer. From that point, all doors were opened to the interns.

Researching Claims

All of the students spend a significant amount of time engaged in legal research. For the most part, they research claims for particular cases, for pre-trial motions in the trial office, or for post-conviction petitions in state or federal court in the other offices. The research may relate to common substantive claims such as trial court challenges to the admissibility of evidence or post-conviction claims based on prosecutorial misconduct or ineffective assistance of trial counsel or the research may relate to the complex procedural rules that are often employed to bar a death row inmate from presenting some or all of his or her substantive claims in post-conviction proceedings. For example, in 2002, in Mississippi, Doug was assigned to the case of a death row client who had completed his direct appeal and who had not filed his petition for post-conviction relief in the state court within the newly-enacted one year statute of limitations. The client was in danger of losing all right to further review of his claims in state court and, because of the procedural default rules enforced in federal habeas corpus cases, all right to review of his claims (except as to those raised on appeal) in federal court as well. Doug wrote the brief that persuaded the Mississippi Supreme Court to find that equitable tolling applied to extend the statute of limitations and to permit the filing of the client's post-conviction petition.

In addition to their work on claims for individual cases, many interns spend time researching broader claims that could be used for multiple clients. For example, Marianne (Louisiana 2001) researched the possible impact of international treaties and norms on the

particular aspects of the United States death penalty and the use of international treaties and norms by United States courts, all with an eye to drafting a series of “international” claims to be used in all post-conviction petitions. In 2003, a series of newspaper articles and reports revealed the scandalous condition of the Houston (Texas) Police Department Crime Laboratory. Evidence was being improperly stored, damaged by the weather or simply lost; laboratory employees were untrained and under qualified; and laboratory officials frequently misrepresented test results at trials. That summer, Linda researched and drafted a claim to be used to challenge all convictions resulting from crime lab evidence, arguing that the prosecution’s failure to disclose to the defendants the numerous deficiencies of the crime lab amounted to an unconstitutional suppression of material evidence. A year later in Texas, Andrea delved deeply into the psychological literature to draft a claim challenging one of the tests regularly used by the state’s experts in evaluating a defendant’s possible mental retardation and their refusal to take account of factors shown to inflate IQ scores.

Finally, some students have conducted empirical research to support legal challenges the attorneys were hoping to make. The offices generally lack the resources to conduct empirical research, so, without the help of interns, the research would never be done. For example, in 2001, Martin spent a portion of his internship in Louisiana, going through the files of murder trials in Jefferson Parish to determine whether, during jury selection, prosecutors were using their peremptory strikes to exclude African-American potential jurors. Although prosecutors (and defense counsel) are permitted a certain number of peremptory strikes (excusing particular jurors without explanation), the United States Supreme Court held, in *Batson v. Kentucky*⁸ and subsequent cases, that it is unconstitutional to exercise peremptory challenges on the basis of

⁸ 476 U.S. 79 (1986).

race. Although Martin was not able to complete the study during the summer, the data which he and subsequent researchers collected was used to support “*Batson* challenges” to cases coming out of Jefferson Parish, and the study became a model for similar studies in other parishes.

Interviewing Jurors

Most of the students working in post-conviction offices are, at one time or another, given the task of locating and interviewing the jurors who sat on their client’s case. Jurors are interviewed for several reasons: (1) because they may have information of juror misconduct during jury selection or deliberations; (2) because their observations of the trial may suggest legal challenges to the verdict not apparent from the trial transcript; and (3) because they may be induced, on the basis of facts coming to light since the trial or their own change of heart since the trial, to support the client’s clemency petition. Interviewing jurors is generally the most difficult task the students undertake. Jurors who have voted to condemn a person to death have undergone a profound emotional experience, and their response to interns’ requests to talk with them can be highly unpredictable. Some simply shut the door in the interns’ faces. Others become angry when they learn that the interns are working to set aside the death verdict. And, even when the jurors themselves might have been willing to talk with the students, sometimes their husbands have not allowed it, as Jack and Susan (Arkansas, 2004) found out in a small town in western Arkansas when a juror’s husband ordered them off his property at the point of a shotgun.

Of course, many jurors do talk to the interns, perhaps simply to be courteous to the young students who have come a long way to meet them. Occasionally, the interns encounter a juror who welcomes the chance to talk with them because he or she has lived for many years with the feelings evoked by the experience with no one to talk to about it. In 2004, in Texas, Andrea

found such a juror, although at first her husband, too, attempted to block the interview. The juror told Andrea that she regretted voting to sentence the client to death and that her feelings of guilt had led her to become a deeply religious person. She offered to do anything she could to save the client from execution. Andrea spent many hours over several days talking to the juror, and, ultimately, Andrea's supervising attorney decided to videotape an interview with the juror. The interview was included in a video submitted with the client's clemency petition.⁹

Dealing with an Execution

The possibility of an execution casts a shadow over all that the interns do and gives their work its emotional intensity. For some of the interns, however, an execution was not just a possibility, but a reality. In 2003, Ron and Maeve arrived at the Federal Defender Office in Arkansas and were assigned to the case of a client facing execution in five weeks. Because the newly formed Capital Habeas Unit had only one full-time attorney, much of last minute work on the client's case fell to Ron and Maeve. The principal claim in the eleventh hour briefing was that the client was mentally retarded and could not be executed in light of the *Atkins* case. Ron and Maeve were heavily involved in the briefing in the Federal Court of Appeals and in the simultaneous petition filed in the state courts. On the weekend before the scheduled execution, after the federal court ruled against the client and the Arkansas Supreme Court, in a 4-3 decision, also denied relief, Ron and Maeve drafted the petitions to the United States Supreme Court challenging both decisions. Meanwhile, they also took it upon themselves to help the client's wife arrange for the client's funeral. The petitions were denied, and the client was executed. The day after the execution, Ron and Maeve bought the clothes that the client was buried in.

⁹ The clemency petition was denied, and the client's execution was one of the record-setting number of executions presided over by Texas governor Rick Perry.

When Ron and Maeve returned to San Francisco, they decided to set up an educational trust fund for the client's young son in the hope that it would help him avoid the path taken by his father.

Witnessing an execution is a traumatic event, even for seasoned capital defense attorneys, let alone for students with only weeks of experience dealing with the death penalty.

Consequently, it has always been the policy of the KTC Project that supervising attorneys should not permit students to attend executions. Despite the policy, in 2011, Doran and Justin did attend the execution of their client in Texas. The Office of Capital Writs, where Doran and Justin interned, took on the client's case during the summer. It was very late in the process because the client had already lost his post-conviction petitions in state court and federal court, and he was facing a September execution date. The interns spent much of the summer preparing a state court successor petition (a petition after denial of a prior petition), which was unsuccessful. Because the interns had spent so much time with the client, he requested that they attend the execution. Moved by the client's request and thinking that they might serve some purpose in bringing comfort to the client and his family, they accepted.¹⁰ They left school and returned to Texas several days before the execution date to work with the attorneys on the efforts to block the execution, and, when those failed, they witnessed the execution. When they returned to school, they gave a presentation to my Death Penalty Law class describing their experience, the first time I had ever discussed an actual execution in class. Justin reported being most struck by the client's gratitude for their work, the devastating impact of the execution on the client's family and the clinical and sanitized nature of the execution procedure.

¹⁰ I attempted to dissuade them from going, and, when they determined to go, I suggested that they prepare themselves by talking with attorneys who had attended executions.

The Impact of the Internships

The University of San Francisco School of Law describes its mission as “Educating for Justice.” Service learning is a vehicle for reaching this goal, and the KTC internship embodies the best of service learning. All 76 students who have passed through the internship program made a meaningful contribution to the struggle against the death penalty because the work they did on the various cases and larger projects quite simply would not have been done but for their presence. And all of the students – even those whose clients were executed – were satisfied that the work they did mattered to the attorneys and that their summer was well spent. A number of the interns continued to work on cases and other projects for their offices after they returned to school. Four interns, Stacey (Louisiana 2006), Lily (Louisiana 2009) and Doran and Justin (Texas 2011) returned to the South during the school year to continue their work. Others worked from law school on legal research or, in one case, on California-based investigation for a Mississippi case. Four interns published law review comments about legal issues they encountered during their internships, and defense attorneys were able to use the arguments developed by the interns in subsequent litigation.

In addition, the internships had a significant effect on the interns’ career choices and career opportunities. Of the 67 KTC interns who have graduated law school, eleven joined offices doing capital post-conviction work, seven of the eleven returning to the South. Many of the others became public defenders or private criminal defense lawyers.

Whether or not the interns go on to pursue careers as criminal defense lawyers, the internships have a profound effect on the interns. They receive an education in the criminal justice system, about the forces causing crime and shaping punishment -- an education that, because of its unpredictability and intensity, cannot be replicated in the classroom. The interns

confront the profound moral, political and humanitarian questions surrounding the death penalty and learn about the broader social and cultural issues in which the law is set. And, like any meaningful educational program, the internship teaches the interns about themselves. For many of the students, struggling with the death penalty first-hand proved to be a life-changing experience, so the students should have the final word on the meaning of the internship.

Miriam (Mississippi 2002), described her experience in these words: “If I could take one thing I did this summer— traveling to Parchman, working on writing a [post-conviction] petition ..., going on juror interviews, researching such varied claims, working with other like-minded, compassionate and hard-working people— it would be worthwhile. However, all of them together is life-changing.” Jack and Susan (Arkansas 2004) wrote this about their experience: “The education we received included important lessons about cultural differences that divide and all-encompassing human similarities that bind, like the value of human life and the dedication to make the world a better, more just place.” Brandon (Mississippi 2008) summed up his summer in these words:

This experience has been one of the most enlightening, challenging and, overall, best experiences in my short life. Working in this office has shown me the realities of our judiciary, the realities of being a lawyer and the realities of the social heritage which has formed the cultural background of America. Eye-opening does not even begin to describe the effect this experience has had on me.

Finally, Amelia (Mississippi, 2008) wrote:

I have now seen first-hand how the issues raised by the death penalty are inextricably linked to problems embedded in poverty, race discrimination, education, mental health, the prison system and the criminal justice system in general. Ending the death penalty

won't solve any of these problems, but it is a critical step in stopping the cycle of violence, rather than perpetuating it.