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INCORPORATING INTO A SEMINAR OR CLINICAL COURSE THE REPRESENTATION OF AN INDIGENT DEATH ROW INMATE SEEKING CERTIORARI IN THE UNITED STATES SUPREME COURT

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BRINGING REALITY INTO THE CLASSROOM

It appeared at the last AALS Criminal Justice Section Annual Meeting workshops and at the Justice Mission Conference in Cleveland that there was general consensus on several matters. First, there seemed to be considerable support for "bringing more doses of reality into the classroom." Second, many faculty wished to encourage a greater sense of professional service among their students. Third, a good number of criminal justice section members observed that capital case decisions of the United States Supreme Court were fine vehicles for class discussion of essential issues.

In keeping with these views, I have concluded that I will once again include in my upcoming seminar course an opportunity for students to assist a death row inmate petitioning for writ of certiorari to the United States Supreme Court, under my supervision as counsel of record. I am writing to encourage other faculty teaching seminar or clinical courses to consider incorporating into their classes such an opportunity.

From a pedagogical standpoint, giving students the opportunity to research cutting-edge legal issues, to assist in preparing a petition seeking review in the nation's highest court on behalf of a death-sentenced client, and to participate in a pro bono legal experience, would appear to satisfy many of the goals which we, as professors, espoused in our sessions. From a professional and individual standpoint, taking on the responsibility to serve as counsel for an unrepresented death row inmate, even if only at one stage of review, allows us the opportunity to serve our profession and community, and to personally participate in the justice mission.

Some of us currently teach, or will be teaching, Capital Punishment Seminars. This opportunity is clearly well-suited to such a course. Those of us teaching criminal process seminars, or clinical courses with an in-house criminal courts bent, would also find these cases useful, interesting, and fitting to the pro bono program. Even if no specific course of this type is included in the curriculum, capital cases appear to generate very helpful discussions in more generalized criminal procedure course offerings, and this experience could thus fit within a generalized course as well. Finally, even if no course offering could accommodate such an experience, it is quite possible that law

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student organizations or informal groups would wish to consider such a project to fulfill a public interest or substantive criminal justice interest, and that a group of students would welcome the opportunity to work with one or more faculty members on such a non-credit project. Giving law students the opportunity to work on a petition for certiorari under the supervision of a law professor who would serve as counsel of record, would satisfy many of our pedagogical goals and provide a desperately needed legal service. The certiorari process is well-suited to such a project. There is a rather short-time period for preparation and filing. The petition itself is rather short in length and generally limited to but a few issues. From the inmate's standpoint, the highlighting and selection of a few issues is advantageous and will not foreclose or jeopardize litigation of these or other issues in post-conviction proceedings if certiorari is denied. More importantly from an instructional standpoint, selection allows greater flexibility in fitting the exercise into a course offering. Finally, if certiorari is granted, law students would have the opportunity to observe and participate in litigation at the highest level of our appellate system.

ASSISTING THE UNREPRESENTED

Although interested faculty in states with capital punishment might consider providing assistance to death row inmates within their own state, there is a desperate need for services for the death row inmates in Texas because of the lack of available counsel in that state. I intend to have the class assist in the petition process for one or two Texas death row inmates this year, and will be happy to hear from any other faculty interested in doing so.

A bit of background on Texas' death row may be helpful. Texas has the largest death row population in the country (over 350). Texas has already executed more persons than any other state in the country since 1974. Texas courts refuse to consider claims of innocence based on newly discovered evidence unless the claim is made within thirty days after conviction; only the Texas clemency authority exists to spare an innocent in the months or years thereafter.² You may also have read of the fast pace of review, of how one Texas inmate completed both the state post-conviction and federal habeas corpus review process within 36 hours. Texas death row inmates need representation. There is no centralized indigent defense system. There is no state or federal funding for attorneys to take cases into the United States Supreme Court or into state post-conviction proceedings, although a federally-funded Capital Case Resource Center does assist in recruiting attorneys for the federal habeas corpus level. Attempts to find volunteer counsel are also undermined by the

²The United States Supreme Court recently upheld this practice, finding that the state's clemency proceedings could provide a constitutionally adequate forum to litigate questions of innocence. *Herrera v. Collins*, 113 S. Ct. 853 (1993).

death warrant practice in Texas.³ The ABA Post-Conviction Representation Project and other efforts to recruit counsel for post-conviction proceedings are underway, but presently, due to time limits and the unavailability of volunteer attorneys, many Texas inmates are simply unrepresented and do not seek review in the United States Supreme Court on certiorari. What little resources are available are pressed into service for the state post-conviction process but it is still very difficult to find attorneys. Many of these inmates have important constitutional claims respecting their conviction or death sentence, yet no certiorari review may even be sought due to the unavailability of counsel.

HOW INTERESTED FACULTY CAN PROCEED

If you are interested in including a component of assisting Texas death row inmates in your courses, or wish to supervise such a non-credit project for your law students, or simply wish to individually provide such representation, please contact me. I am in contact with defense attorneys and others working to find counsel for unrepresented Texas death row inmates. They have suggested, and I have agreed, that a centralized certiorari project will be most likely to succeed in meeting the multiple aims law professors may wish to achieve. I have agreed to coordinate such an ad hoc Certiorari Representation Project For Texas Death Row. There could be as many as twenty unrepresented death row inmates in need of assistance in this coming academic year period. Please contact me if you are interested. I will hopefully be able to match your availability to the inmate's needs, and both will benefit.

As you consider participating in this project, please note the following important points. One interested law faculty member from your school should be admitted to practice before the United States Supreme Court. A faculty member who decides to undertake representation will receive a copy of the briefs filed before the Texas Court of Criminal Appeals and the opinion of that court, an affidavit of indigence from the client, a copy of relevant portions of the trial transcript, and background information on the issues presented in the case. The following papers would be prepared and filed in accordance with the Supreme Court Rules by the faculty member serving as counsel of record: a notice of appearance, a motion to proceed in forma pauperis with accompanying affidavit, and a petition for certiorari and appendix. It may well be necessary to prepare and file a motion for stay of execution with the United States Supreme Court if this has not already been granted in the state court.

³The trial judge sets no date for execution until after the case is affirmed by the Texas Court of Criminal Appeals. TEX CRIM. PROC. CODE ANN. art. 42.04 (West 1993). By caselaw, the judge cannot enter sentence until after the expiration of time allowed for making a motion for new trial (thirty days). See *Duke v. State*, 462 S.W.2d 596 (Tex. Ct. App. 1971). Some trial judges schedule executions within a few months after affirmance, while others do not. See *Madden v. State*, 498 U.S. 1301 (1991) (Opinion of Justice Scalia On Application For Stay Of Execution).

Such stays are routinely granted by the Supreme Court if requested when seeking certiorari from the Texas Court of Criminal Appeals on direct appeal.

The petition for certiorari must be rather promptly prepared. By rule, the petition is due ninety days after the entry of judgment in the Texas Court of Criminal Appeals, and while an extension of time of up to sixty days may be requested, faculty should expect that such requests may well be denied. As the inmate is indigent, there will be no filing fee, a type-written petition (not printed) will suffice, and but a few copies of the petition need be filed. Only limited expenses would be incurred: those associated with the typing, copying, and mailing of the certiorari petition, and possibly some incidental telephone charges. If certiorari is granted, the law faculty member may seek appointment in the United States Supreme Court and attorney fees.

Due to the timing of both Texas court decisions and academic calendars, it is possible that the best intentions may not result in a matching of an inmate and a law faculty member. The best we can do is to try to give our students this invaluable opportunity.