

Book Review

John Temple, *The Last Lawyer: The Fight to Save Death Row Inmates*. Jackson: University Press of Mississippi, 2009, pp. 224, \$25.00.

Reviewed by Kenneth Williams

During my career as a law professor, I have had the opportunity to represent seven Texas death row inmates in their post-conviction proceedings. Reading *The Last Lawyer: The Fight to Save Death Row Inmates*, by John Temple, I am struck by both the similarities and differences in our experiences. Temple, an associate professor of journalism and associate dean at West Virginia University, chronicles the experiences of Ken Rose, an attorney for the Center for Death Penalty Litigation, representing North Carolina death row inmates. Temple focuses on Rose's experiences representing Bo Jones, an African-American farmhand from North Carolina, who, in 1989, was convicted of entering the home of an elderly white bootlegger with two defendants, robbing and killing him.

The book takes the reader through the different stages of a capital case: the trial, the sentencing hearing, the direct appeal to the state supreme court, the state post-conviction proceeding (which in North Carolina is called a Motion for Appropriate Relief), and the federal *habeas* proceedings. Bo Jones's trial occurred six years after the murder. He maintained his innocence throughout. He was unable to prove his innocence at trial, however, because, like most death row inmates, he was not well represented. His lawyer was Graham Phillips, a small town lawyer and friend of the trial judge. Phillips never should have been appointed to represent Jones since his ex-wife was related to the victim. Phillips's practice was not confined to criminal law but included other matters such as contracts and estates. Death penalty cases are complex. An entire body of law applicable solely to capital cases has developed. Representing a death row inmate, therefore, requires expertise that many small town lawyers like Phillips lack the opportunity or inclination to develop.

The American Bar Association has promulgated Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.¹

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1. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf> (last visited Jan. 24, 2010).

Phillips' failed to comply with any of the Guidelines' recommendations. He found Jones to be aggravating because "all he did was claim he was innocent" (39). Phillips believed otherwise. As a result, Phillips failed to hire someone to investigate the circumstances of the crime, as is expected.² Had he done so, he would have learned that the state's star witness was seriously flawed, that Jones barely knew his alleged co-defendants, and that the police had investigated another suspect. Phillips told Rose that "mostly I was trying to get him to accept a plea." (39). According to the ABA Guidelines, the client should not be urged to accept a plea until the attorney has conducted an adequate investigation.³ Phillips also failed to retain a mental health expert. The Guidelines emphasize the importance of such expertise in preparing for the penalty phase of a death penalty case.⁴ A mental health expert's assistance would have uncovered Jones's history of mental health problems. Phillips also failed to obtain his client's medical and school records, as recommended by the Guidelines.⁵ Had he done so, Phillips would have learned that Jones had a borderline IQ, indicating that he was possibly mentally retarded and that, while in the sixth grade, he was assigned to a class for the "educable mentally retarded." This would have been important information to present to the jury. At the time of Jones's trial, North Carolina prohibited the execution of the mentally retarded, as did the U.S. Supreme Court subsequently.⁶ Had he adequately investigated and prepared for the sentencing phase, Phillips also would have learned that Jones had been taken to the Duplin County Mental Health Center numerous times during his teens, that his father abused his mother, and that there was a history of conflict in his family. What was unusual from my standpoint was Phillips's willingness to provide Rose with an affidavit detailing his failures. Based on my experiences, trial counsel almost never provide helpful affidavits to the defendant's post-conviction lawyers, and, in fact, uniformly have aligned themselves with the state and against their client whenever an allegation of ineffective assistance of counsel has been asserted.

Because Jones refused to accept his attorney's "advice" to plead guilty, the case proceeded to trial. No physical evidence linked Jones to the crime and since he asserted his innocence, the prosecution had no confession. The prosecution's case was based primarily on the testimony of Jones's bitter

2. Guideline 10.7 (A)(1) provides that "the investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt...."
3. See Guideline 10.9.2 and Commentary which provides, "The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible.... [A] client will, quite reasonably, not accept counsel's advice about the case if the attorney has failed to conduct a meaningful investigation."
4. See Guideline 4.1(A)(2) and Commentary, which provides that "a mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings."
5. The Commentary to Guideline 10.7 states that, "Counsel needs to explore: (1) medical history...(2) family and social history...(3) educational history...."
6. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

former girlfriend, Lovely Lorden. He had lived with Lorden for more than nine years and they had a child together. Lorden claimed to have driven with Jones and the two co-defendants to the victim's home on the night of the murder, saw him and the others leave the car with a gun, and, shortly thereafter, that she heard gunshots coming from the victim's home. Lorden claimed that after driving away, Jones stopped on a bridge and threw the pistol in a river. During cross-examination, Phillips focused on the fact that Lorden had given birth to ten children by eight different men. Because he never spoke to Lorden or investigated her background, Phillips never asked Lorden about the \$4,000 reward she received from the governor's office for turning in Jones, her misidentification of the car they supposedly rode in, or the contradictory statements she made about the number of gunshots she heard in the apartment. Phillips also did not bring out the history of enmity between her and Jones and her desire to see him incarcerated. Not surprisingly, Jones was convicted, and because Phillips failed to present the evidence regarding Jones's mental health history and family strife, the jury sentenced Jones to death. Many oppose capital punishment because of the arbitrary manner in which death sentences are meted out, and Jones's case is a perfect illustration. Although he was sentenced to death, his co-defendant received a life sentence.

Rose got involved in the case after Jones was convicted and sentenced to die. Rose is Jewish, and the Holocaust caused him to doubt whether governments could use their power to kill wisely. I am often asked why I represent murderers on death row. The following passage articulates better than I can why attorneys like Rose and I do what we do:

Capital cases felt meaningful, high-stakes. There was an obvious life-and-death urgency about fighting to prevent an execution. He [Rose] found himself attracted by the heavy responsibility of capital cases. In most, an entire family—usually a damaged family—was relying on him to save their son or father or brother. . . . or at least to help get him a fair trial or post-conviction appeal. And there were the inmates themselves, sweltering away on the prison farm. Despite what they'd done, they were human beings who'd been mostly discarded by the world. It was an enormous burden to be their advocate, their only friend on the outside. With regular visits and small gifts, Ken tried to make their lives marginally more pleasant (79).

Rose was strongly committed to his work. He was guided by Millard Farmer's old maxim: Represent your broke death row client like you're representing Coca-Cola.

Rose got involved in the case after Jones's previous post-conviction lawyers had filed an eight-page petition and the North Carolina Supreme Court determined that his case deserved further review. The post-conviction proceedings offer a chance to introduce evidence not previously presented and considered; this is unlike the direct appeal, which is based solely on the trial record. Thus, it is imperative that the post-conviction attorney investigate the case, which Rose and his assistants did.

Rose learned that there were several viable grounds for appeal. The most obvious was Phillips's lack of investigation. I was surprised to learn that in North Carolina, defense attorneys have access to the prosecutor's files. In contrast, defense lawyers in Texas do not. Rose took full advantage of this opportunity. After examining the prosecutor's file, he discovered that Lorden, the prosecution's star witness, had given inconsistent statements regarding the crime and that the police had investigated another suspect who had made a statement suggesting that he may have killed the victim. Of course this evidence should have been discovered by Phillips and presented to the jury. Phillips's failure to investigate provided Jones with a strong claim of ineffective assistance of counsel. Phillips's conflict of interest, his marriage to the victim's niece, was another claim worth pursuing. Rose also learned that a juror read a passage from the Bible to other jurors during deliberations. Jurors are prohibited from consulting outside sources during their deliberations.

There also was Jones's deteriorating mental state. The U.S. Supreme Court has held that an inmate who becomes insane while on death row cannot be executed.⁷ According to the Supreme Court, an inmate must have a rational understanding of why he is being executed, otherwise the execution serves no purpose. Two mental health experts who examined Jones found him to be psychotic and delusional. Their diagnosis was based on his belief that God would never allow the state to kill him. The state's expert, however, determined that Jones had antisocial personality disorder.

There also was significant evidence indicating that Jones was mentally retarded. Temple takes the reader through the efforts of Rose and his team to prove Jones's retardation. They were unable, however, to obtain the evidence the courts rely on most in determining retardation: an IQ test score below 70.

Missing from the petition was a claim that Jones was innocent. In *Herrera v. Collins*, the U.S. Supreme Court assumed, "for the sake of argument...that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional...."⁸ The high court, however, did not hold that an "actual innocence" claim is cognizable during post-conviction review. As a result, even though Jones had maintained his innocence throughout, and there was evidence in support of this claim, Rose was precluded from raising a claim that his client did not commit the crime.

Rose recognized that state court was a mere formality and that the likelihood of success there was minimal. Post-conviction lawyers in Texas also recognize that the chance for success in Texas state courts is also small. Rose knew that his chance for success was significantly greater in federal court. His goal, therefore, was to present as many viable claims as he possibly could in the state post-conviction petition so he would not be precluded from seeking relief in federal court. The Antiterrorism and Effective Death Penalty Act does not

7. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

8. 506 U.S. 390, 417 (1993).

permit federal courts to consider claims that were not first presented in state court.⁹ In Texas, state judges typically sign orders prepared by the prosecution without even altering them. Apparently the same practice occurs in North Carolina, as the judge signed the order submitted by the prosecution denying Jones's claims.

His case then proceeded to federal court. An inmate has one year from the date that the state court proceedings are completed to file a federal petition, which can only contain the claims pursued in state court. The case was assigned to Judge Terrence Boyle, whose nomination to the U.S. Court of Appeals for the Fourth Circuit was pending. Rose was uncertain how this development might affect his client's case. Months after the federal petition was filed, Boyle issued an order. He dismissed most of the claims, including the claim about Phillips's relationship to the victim and the claim that a juror read Bible quotations. Boyle granted an evidentiary hearing for Jones but it would be restricted to the issues of whether he was mentally retarded and whether Phillips was ineffective for failing to develop mitigation evidence. This meant that even if Rose prevailed on one of these claims, Jones would spend the rest of his life in prison for a crime that he was adamant he did not commit. Boyle's actions were not unusual. When death row inmates do succeed, it is often on claims that only grant relief from the sentence, not the conviction. Judges are probably reluctant to overturn convictions because of the enormous burden on the state to retry a case. The sentencing phase is much easier for the state to retry since prosecutors usually rely on prior convictions and victim impact statements in arguing that the defendant should be sentenced to death.

Temple's book provides a thorough review of Jones's federal evidentiary hearing. On the retardation issue, the two sides presented conflicting expert testimony. Rose knew that he would not prevail on this claim since he could not produce an IQ test in which Jones scored lower than 70. His only chance, therefore, was to prevail on the ineffective assistance claim.

To prevail on that claim, Rose would have to prove not only that Phillips performed deficiently but also that Jones was prejudiced as a result of his performance.¹⁰ The U.S. Supreme Court has stated that prejudice is proved by demonstrating a reasonable probability that the outcome of the case would be different had counsel performed adequately.¹¹ When Phillips and his co-counsel testified at the hearing, Boyle heard that they did not question the state's primary witness, tried to get Jones to take a plea, never spoke to their client about mitigation issues, and never spoke with him about his childhood,

9. See 28 U.S.C. § 2254(b)(1)(A) (2006) (precluding inmates from receiving federal habeas relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State").

10. See *Strickland v. Washington*, 466 U.S. 668 (1984).

11. *Id.* at 687.

schooling, and addiction problems. The ABA Guidelines recommend that a mitigation specialist be retained in capital cases.¹² The trial attorneys never sought funding for such a specialist.

Lorden, the prosecution's star witness at trial, also testified at the evidentiary hearing. The judge could see for himself that she would agree to anything the prosecutor suggested to her. At one point, Judge Boyle told the prosecutor that "you did all the testifying. She just said, 'Yes, that's right, yes, that's right'" (195). After hearing Lorden and the trial attorneys testify, Boyle reversed himself and agreed to hold an evidentiary hearing on a claim of ineffective assistance that also would reverse Jones's conviction if granted. This new hearing focused on the failure of the trial attorneys to review and pursue evidence in the prosecutor's file that could have been used to discredit Lorden as well as evidence that the police had another possible suspect. The hearing convinced Judge Boyle that Jones's representation at trial was inadequate. He reversed Jones's conviction and ordered the state to either retry him within 180 days or release him.

The final suspense was over whether the state would appeal Boyle's ruling to the U.S. Court of Appeals for the Fourth Circuit, which rarely granted relief to death row inmates. The prosecutor had previously told Rose that the state would not appeal if he prevailed; however, he initially reneged on this promise and intended to retry Jones for murder. However, Lorden then provided an affidavit in which she stated, "Much of what I testified to was simply not true. Dalton Jones [prosecutor] let me know what he wanted me to say in my testimony for both Bo Jones's trial and Larry Lamb's [co-defendant] trial." Soon after, the prosecutor decided to drop the charges and not retry Jones (223).¹³

After spending thirteen years on death row, Jones was a free man!

For those who like suspense novels, this book has plenty. It also is a worthwhile read for anyone interested in representing a death row inmate and is of interest to those who want to learn more about the death penalty and its many flaws.

12. See *supra* note 4.

13. Lorden's statements were taken directly from her affidavit, which is available at http://www.aclu.org/files/pdfs/capital/northcarolina_v_jones_lorden_recantation.pdf (last visited Jan. 24, 2010).