St. Mary's Law Journal

Volume 29 | Number 4 Article 6

1-1-1998

Litigating State Capital Cases While Preserving Federal Questions: Can It Be Done Successfully Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.

Daniel Givelber

LITIGATING STATE CAPITAL CASES WHILE PRESERVING FEDERAL QUESTIONS: CAN IT BE DONE SUCCESSFULLY?

DANIEL GIVELBER*

I. INTRODUCTION

The role of federal courts has shifted dramatically in the twenty-five years since *Furman v. Georgia*.[1] Although originally federal courts were the sources of the new rights available to those accused of capital crimes and the fora most likely to accord the defendant those rights, federal courts have become extremely difficult to access and unlikely to provide relief. It has been estimated that federal courts provided habeas relief in nearly half of all capital cases brought before them between 1976 and 1985.[2] I would imagine that the figure for this decade is closer to 5 percent than 50 percent. One reason for this is that the Supreme Court shows a marked lack of interest in developing new constitutional doctrine

* Professor of Law and Interim Dean, Northeastern University School of Law; A.B., Harvard; J.D., Harvard School of Law.

1. 408 U.S. 238 (1973).

2. *See* JAMES S. LIEBMAN, FEDERAL HABEAS PRACTICE AND PROCEDURE 23-24 n.97 (Michie Co. 1988) (declaring that failure to offer jury option of granting life imprisonment without parole instead of death penalty violates due process).

helpful to the accused.[3] Another reason that federal courts play such a diminished role is that access to those courts is so difficult. Frequently, access is difficult because the issues lawyers want federal courts to address have never been adequately presented in state courts.

Federal venues remain essential to capital punishment litigation. This is true even though in many instances today state law is more favorable than federal law and the Antiterrorism and Effective Death Penalty Act of 1996[4] has made trips to federal court a much more hurried and considerably less legally promising activity than in the past. Perhaps we would not care about the loss of a federal forum if capital litigation proceeded logically and courts responded to all cases and all claims in an entirely predictable fashion. If that were the case, one could dismiss the failure to raise any but the clearest of unresolved federal issues as irrelevant because no relief would be forthcoming in any event. But logic does not reign in any part of the capital punishment phenomenon, much less in the protracted process of turning a sentence into an execution. Moreover, even the rationalist can find value in maintaining access to a federal forum.

The very phenomenon which makes raising federal issues so problematic—the temporal succession of lawyers spanning the years, each focusing upon the needs of the forum and issues before her—also means that a case is continually re-examined through fresh eyes. What may appear to be a fruitless claim because it lacks legal or, more likely, factual foundation at an early stage in the litigation may turn out, due to later developments or a more determined or creative effort at advocacy, to be a winning issue. It may well be the lawyer who arrives on the scene for federal litigation who finally puts together the factual and legal case needed to bring a federal claim to life. In addition, the passage of time may lead to changes in the defendant, the victim's family and/or the prosecutor, which may improve the defendant's chance of securing commutation. The very inability to get a hearing on an apparently meritorious legal claim may provide the commuting authority with a justification for granting mercy in the rare case where it is so disposed. Finally, death penalty litigation generates the occasional surprise, and the loss of any forum—no matter how hopeless it may appear—is something to be deeply regretted and vigorously opposed.

---

3. *But see* Simmons v. South Carolina, 512 U.S. 154, 161–62 (1994) and Morgan v. Illinois, 504 U.S. 719, 719–39 (1992) (expanding the rights of capital defendants during jury selection). These cases represent two notable recent exceptions.

4. Pub. L. No. 104-132, 110 Stat. 1214 (codified in part at 28 U.S.C.A. §§ 2244, 2253–55, 2261–66 (West Supp. 1997)).

This discussion arises out of my experience in supervising the preparation of more than forty certiorari petitions in capital cases. A certiorari petition asks the Supreme Court to exercise its discretionary power to review a decision of a lower court (here the supreme court of a state), which the petitioner avers rests upon a questionable interpretation of federal statutory or constitutional law. Since the United States Supreme Court insists that it is without jurisdiction to review judgments resting upon the application of state law, a petitioner must demonstrate that the decision of the lower court turned upon an interpretation of federal law in the sense that, had the lower court interpreted federal law differently, the outcome of the case might have been different.[5] This does not mean that the petitioner would have prevailed necessarily but only that the lower court would have had to treat the federal issue in a different manner, leaving open the possibility of a different result. Essentially the same requirement, dressed in slightly different doctrinal garb, determines whether a federal court will entertain a claim in a habeas corpus petition.[6]

There should be nothing mysterious about this requirement. Students are first introduced to the concept of a federal question jurisdiction in civil procedure and to Supreme Court jurisdiction in Constitutional law and Federal Courts. While the details of it may seem elusive, it is likely

---

5. *See* SUP. CT. R. 14(g)(i) (requiring that a petitioner for certiorari specify in considerable detail how the federal issue was raised and resolved in the trial court and on appeal). For a general discussion of the requirement, consult CHARLES WRIGHT ET AL., 16B FEDERAL PRACTICE AND PROCEDURE § 4022 (1996).

6. *See* Duncan v. Henry, 513 U.S. 364, 366 (1995). A habeas corpus court will not review an issue of the interpretation or application of federal law unless that question has first been presented for resolution to the state courts. If the federal question has not been presented, then the defendant must return to state court and seek its resolution. If the state court refuses to consider the federal question because the defendant neglected the opportunities the state presented for raising such a question, e.g. at trial, then the state court's disposition of the federal question rests upon the application of a uniform state procedural rule serving vital state needs (e.g. the orderly presentation of issues in litigation). Therefore, the federal court will not consider the federal question because the state's ruling is based upon state law not federal law. The defendant can now only get around this obstacle if the defendant can demonstrate adequate cause for his failure to secure a ruling in state court. *See* Larry W. Yackle, *Developments in Habeas Corpus (Part 2)*, CHAMPION, Nov. 1997, at 17. This requires more than that his lawyer either neglected or chose not to raise the issue in state court. It requires a showing that the lawyer's representation was so deficient as to amount to a denial of the defendant's Sixth and Fourteenth Amendment rights. *See* Murray v. Carrier, 477 U.S. 478, 497 (1986).

Of course, even if the defendant can show this, the defendant also needs to establish that the federal claim which was not raised was the law at the time that the defendant originally failed to raise the claims. The defendant must also show under the Antiterrorism and Effective Death Penalty Act of 1996 that the state court ruling involved an unreasonable application of federal law. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382, 402–11 (1996).

that most practicing lawyers learned, and could repeat if asked, the basic principle that the Supreme Court on certiorari and federal courts in habeas corpus deal with questions of federal law, not state law.

The second thing that most practicing criminal lawyers learned in law school was that the United States Constitution has a great deal to say about how criminal investigations and criminal trials are to be conducted. Criminal trials take place in the shadow of the Bill of Rights. While states are responsible for the rules of criminal procedure, claims that those rules have been violated frequently involve interpretations of the United States Constitution as well as state law.

The third thing that every criminal lawyer involved in a capital case knows is that he or she is engaged in what can be quite literally considered a struggle unto death. Every trial lawyer knows with certainty that a death sentence will be appealed (typically to the highest court in the state) and that virtually every defendant whose death sentence is affirmed will pursue post-conviction remedies in both state and federal court. While the trial presents the best hope for protecting the defendant from capital punishment, it is not the only hope. Assuming (and it is a very large assumption) the availability of lawyers, every defendant carrying a death sentence will eventually seek relief in federal court.

Given these certainties, one might assume that lawyers representing capital defendants in state courts would be careful to frame their objections to trial court rulings in terms of the United States Constitution as well as state law. Even if this did not occur, one would assume that appellate lawyers would do so, assuming that state law permitted it. After all, the failure to secure a state court ruling on a federal constitutional issue means that the issue can never be raised in federal court. Although logic suggests that this is what should occur, the reality is otherwise. My impression from years of searching for federal issues in a broad range of state capital cases is that trial and even appellate lawyers routinely refrain from casting their objections or arguments in federal constitutional terms. While it may seem fashionable or even plausible to attribute these failures to either ignorance or incompetence, the practice is too persistent and too pervasive to arrive easily at that conclusion. There are reasons other than a simple lack of professional competence for the failure to make federal constitutional objections at state criminal trials. That is the subject of the remainder of this discussion.

The inevitability of attacks upon the competence of lawyers contributes to the apparently widespread belief that the problems habeas lawyers encounter would be solved if capital defendants only had better trial and appellate lawyers. Better trial and appellate lawyers would certainly help because there would almost certainly be fewer sustained capital sentences. They would not, however, necessarily cure the problem of get-

ting inside the federal courthouse door, should that be necessary. There are structural issues which make that a difficult undertaking.

II. Raising Federal Issues

To raise a federal claim successfully, a lawyer must: (a) recognize that the claim exists; (b) determine that it advantages his client to raise the claim; and (c) successfully raise and preserve the claim in the state system. These requirements are simple to state but apparently quite difficult to put into practice.

There are four primary sources of this difficulty. First, capital litigation is unique in that it involves a very high likelihood of federal trial level review of state criminal proceedings. There is nothing else like it in the law. Second, capital litigation is unique in that it almost invariably involves successive representation by different lawyers in a variety of different fora over an extended period of time. The lawyers who come later in the process will almost invariably attack the professional competence of the lawyers who represented the defendant at trial and on appeal. Third, federal law is frequently unhelpful at trial or on direct appeal, because it is either no different from or less helpful than state law. Moreover, even when it might be helpful, the federal argument is likely to be quite obscure. Fourth, there may be a conflict between raising federal issues and basic principles of effective advocacy.

III. The Uniqueness of Litigating In State Court and Preserving Issues for Federal Court

A. *The Inevitability of Federal Review*

Criminal trials differ from all civil cases tried in state court in that the defendant in a criminal case will be entitled to seek federal trial court review on habeas corpus of the state's disposition of federal constitutional issues. There is no comparable entitlement in civil cases. While the federal constitution may come into play in civil litigation, the state court's resolution of the federal constitutional issue will be the final word on that subject, save the extraordinarily rare event that the Supreme Court grants review on certiorari. Capital trials differ from regular criminal trials in that the possibility of federal review is more than simply theoretical; if lawyers can be found, capital defendants will have their day (more like their quarter-hour) in federal court. Trial lawyers in capital cases, then, have an obligation that simply is not routinely present in any other state court litigation in which they ever participate—the obligation to raise objections to the trial judge's rulings that will preserve issues for review in federal as well as state court.

B. *Responsibility for Consequences: The Problem of Successive Representation*

Criminal trials also differ from civil cases in the duration of involvement of the lawyers in charge of the case and their level of commitment to the representation of the client. Civil lawyers usually represent a client throughout the litigation of a case, but criminal lawyers typically do not. The vast majority of criminal defendants, including capital defendants, are represented by appointed counsel at trial and on appeal. While the practice varies from state to state, the customary arrangement is that lawyers representing the defendant on appeal are different from the lawyers who represented the defendant at trial. In addition, the lawyers who undertake post-conviction review are almost never the lawyers who represented the client either at trial or on appeal. Quite often, there are even separate lawyers for state and federal post-conviction proceedings. This arrangement has serious implications for the ability of the capital defendant to successfully raise federal claims.

First, it generates the same diffusion of responsibility that plagues decisions for death generally. Just as we can be concerned about whether the jury takes full responsibility for the gravity of its decision in light of the apparently endless review that decision will receive,[7] so we should be concerned that those who try or even appeal capital cases—the lawyers mandated by the Sixth Amendment and due process clause—fully understand the significance of the decisions they make. Since they are almost never the lawyers who struggle in federal court to show that a claim has been preserved, the state trial and appellate lawyers may never come to appreciate how precise they need to be in articulating objections. The very existence of post-conviction litigation and the reluctance by prosecutors in most states to push for speedy resolutions of post-conviction proceedings might mislead constitutionally mandated lawyers, as it does the public at large, into thinking that the defendant received every possible consideration over a very long period of time and truly deserves the punishment which he will now receive. Unfortunately, however, the lawyers with the greatest opportunity to advance federal claims are the very attorneys with the least incentive to do so.

Foolish consistency, Emerson tells us, is the hobgoblin of small minds. On the subject of mandatory counsel, the Supreme Court is exceptionally large minded. Indeed, when it comes to the role of lawyers, the Supreme Court appears to have embraced the view that any consistency is foolish,

---

7. *Cf.* Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985) (stating "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of a defendant's death rests elsewhere.").

and none, therefore, exists. In the Court's view, they are two kinds of lawyers in capital cases: the trial and direct appeal lawyers for whom the state is responsible and all other lawyers for whom the defendant is responsible. The Court's expectations regarding how these different groups of lawyers should function are so disparate that one might think the Court considers them different species rather than lawyers who only differ with respect to the proceeding in which they represent a capital defendant.

Constitutionally required lawyers are obliged to assure that a trial is adversarial. It would appear that an adversarial trial could be achieved by the lawyer showing up at trial each day and staying awake for most of it.[8] The lawyer can make virtually any blunder as long as the lawyer or the reviewing courts can provide a rationalization for it. Collateral lawyers, on the other hand, are expected to operate at a level which none of us can realistically expect to achieve. A collateral lawyer, according to the Supreme Court, must have near superhuman powers. For instance, a collateral lawyer should know that the state's repeated denials that it had certain information were false and should have advanced claims on habeas corpus which appeared, in light of the state's repeated denials, to be groundless.[9]

The disparity between the treatment of the constitutionally mandated and collateral lawyers serves the goal of shielding capital convictions from federal review substantively and procedurally. Since the state is responsible for the effectiveness of the Sixth Amendment lawyers, they are held to a very low level of competence in terms of what they do at trial and on appeal and in terms of raising federal issues. Since the defendant is charged with all of the errors of the collateral lawyers, those lawyers are held to an exceptionally high level of competence in terms of raising claims in a timely and effective manner.

Trial and appellate lawyers who represent clients pursuant to the constitutional guarantee of the right to counsel frequently, if not inevitably, end up being attacked by the post-conviction lawyers for their failure to have done a better job preserving claims at the trial and appellate levels. Since these claims of ineffectiveness are ubiquitous and rarely successful, however, it is not at all likely that the message heard by constitutionally mandated lawyers is that they should have done a better job preserving

8. McFarland v. Texas, 928 S.W.2d 482, 499–507 (Tex. 1996), *cert. denied* 117 S. Ct. 966 (1997) (identifying a multitude of burdens required for a defendant to establish ineffective assistance of counsel at various stages of trial).

9. *See* McCleskey v. Kemp, 499 U.S. 467, 501 (1991) (concluding that even if state withheld documents which would have supported petitioner's constitutional claim, it would not be cause for failing to raise the claim in the initial habeas corpus petition).

claims. The message, rather, is that they did a professionally reasonable job and the attacks from post-conviction lawyers are simply another unpleasant feature of a difficult job. These post-conviction challenges may also tend to make the constitutionally mandated lawyers defensive about what they did rather than making them amenable to learning what they need to do the next time around.[10]

C. *Recognizing the Federal Issue*

While criminal lawyers certainly recognize capital cases as unique, the uniqueness flows from the severity of the sentence and the existence of separate trials for guilt and innocence. Thus, it seems reasonable for a lawyer to believe that if there are distinctive constitutional claims to be made in these cases, such claims will apply to the sentencing phase of the case. Because most of the claims that one can raise in connection with sentencing are likely to have been resolved at the state court level, the reasonably conscientious trial lawyer will be making objections which he or she knows to be futile because the highest court of the state has already rejected exactly the same claim.

Yet there is no *a priori* reason to expect the reasonable competent trial lawyer to look for other, apparently fruitless, federal constitutional claims to advance. The trial lawyer may tell him or herself that the guilt phase of the case is like the guilt phase of any other serious criminal case, and the objections which one would normally make in such a case are the objections to make here. Thus, while the reasonable trial lawyer may well raise specific Eighth Amendment objections at the sentencing phase of the trial, that lawyer is less likely to believe it is also his obligation to attempt to raise a federal claim with respect to every objection he makes under state law. Indeed, to the extent that there is a relationship between the customary and the reasonable, reasonable lawyers do not attempt to make a "federal case" out of every objection.

---

10. I will not enter into an extended discussion of the perverse effects of contemporary habeas doctrine, not the least of which is that it creates a mindless adversariness between lawyers who, in a better world, would be working together on behalf of the client whom they share temporally. When the post-conviction lawyer calls, the Constitutional lawyers have every reason to be apprehensive, because they know that the best route to the client's success is by successfully demonstrating the inadequacy of the Constitutional lawyers. Many courts now feel free to make up justifications for the strategic choices of the Sixth Amendment lawyers which bear no discernible relationship to the reasons actually given by those lawyers. Thus, much of the hostility generated by the post-conviction lawyers' search for incompetence is generated fruitlessly.

IV. The Obscurity/Invisibility of Federal Questions

A trial and appellate counsel's lack of incentives to raise federal constitutional claims may be compounded by that counsel's failure to recognize and characterize them appropriately. If any feature of the trial is likely to result in properly preserved constitutional objections, it is the penalty phase. Sixth Amendment lawyers understand that the unique features of capital trials represent a legislative and judicial response to a constitutional imperative and the sentencing phase is necessarily constrained by federal constitutional requirements. They also understand that the jury selection process in a capital case involves specific constitutional requirements concerning impartiality vis-á-vis the willingness to impose a death sentence. If constitutional objections are raised by trial counsel, the objections are likely to involve either jury selection or error in the sentencing phase of the trial.

These objections will be most clearly raised as federal constitutional objections when counsel for the defendant is asking for something which state law clearly prohibits, for example, the unqualified right to attempt to rehabilitate a potential juror struck for cause based solely upon the prosecutor's questioning. If state law gives the judge discretion to permit or deny such rehabilitation and the defendant is contending that the Sixth and Fourteenth Amendments create an unconditional right, then the objection is necessarily going to be phrased in federal constitutional terms, if it is made at all.

V. Audience, Effective Advocacy, and the Curse of *Jones v. Barnes*

We teach that the first rule of effective advocacy is that the advocate should know her audience. This principle is undoubtedly sound, but it raises the question: Who is the audience? The traditional answer is the court before whom the advocate is appearing. When the court is an appellate court, the message that emerges about what the audience wants to hear is uniform and, in capital cases, disastrous.[11] As Justice Burger put it in *Jones v. Barnes*,[12] which held that an appellate advocate was not obligated to raise all meritorious claims requested by his client, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues."[13]

---

11. *See* William Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right To Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 100 n.44 (1995).

12. 463 U.S. 745 (1983).

13. *Jones*, 463 U.S. at 751–52.

Suppose that a state supreme court has ruled that trial courts should be sensitive to the defendant's opportunity to rehabilitate a juror who is challenged for cause on the grounds that she is opposed to capital punishment. Suppose further that the same court has reversed a case in which defense counsel was flatly denied the opportunity to attempt to rehabilitate witnesses who said that they would be unwilling to impose the death penalty.[14] What objection would a reasonable trial lawyer make in this situation? Certainly she would cite the state case to the state trial judge and say "Your honor, you have to let me do this because the supreme court of our state has said that I have this right." Would a reasonable trial lawyer then go on and say, "Moreover, your honor, I have a federal constitutional right to interrogate this witness," particularly when there is no federal precedent nearly as good as the state precedent she has already cited? Should she potentially undercut a good claim under state law by insisting upon a much more contingent claim under federal law? Most of us would agree, I believe, that if the question were simply one of winning the point at trial or on appeal in the state system, it would be questionable at best and foolish at worst to undermine a strong state precedent by citing to a weak federal precedent.

Consider further the problem faced by the trial lawyer when the state courts have fully incorporated existing federal doctrine into state law. Consider the state of Pennsylvania, which takes the position that the state doctrine relating to ineffective assistance is identical to the position taken in *Strickland*.[15] If the doctrines are identical it is hard to see what possible advantage accrues in terms of prevailing at trial or on direct appeal from making an ineffectiveness claim under the heading of federal as well as state law. It is pure surplusage unless there are federal cases which are more helpful than existing state cases. If there are no such cases, a reasonable advocate would rely on relevant and helpful state cases. Thus, in the two examples provided, the best precedent was probably state law even though the issues, as counsel was aware, were also federal in nature.

The largest set of federal questions which are never raised, however, are those whose constitutional nature has never been recognized by counsel. Evidentiary issues lead the parade. Capital defendants will object to the admission of evidence of other crimes to prove motive or intent, to the admission of unadjudicated crimes at the penalty phase, to the use of highly inflammatory photographs of the deceased, or to the admission of previously recorded testimony from a now unavailable witness. They will object time and again when the prosecutor oversteps the bounds of pro-

14. *E.g.* State v. Brogden, 430 S.E.2d 905 (N.C. 1993).

15. *See* Commonwealth v. Pierce, 527 A.2d 973, 976 (Pa. 1987) (citing Strickland v. Washington, 466 U.S. 668 (1984).

priety in his closing argument. Appellate lawyers will cite reams of state cases in support of their claims that the unadjudicated crimes were inadmissible, that the prejudice from the photographs outweighed their relevance, or that the unadjudicated crimes introduced at the sentencing phase compromised their ability to present a meaningful defense. What most state trial and appellate lawyers do not do, however, is to frame these claims in terms of the due process clause of the Fourteenth Amendment to the United States Constitution.

The most obvious reason that lawyers do not characterize these cases in due process terms is that there is very little clear constitutional doctrine defining when state evidentiary rulings violate a defendant's right to due process of law. We can all agree that due process implicates fundamental fairness and that historical practice is a reliable guide to what due process requires, but the average criminal lawyer would be hard pressed to present Supreme Court cases or doctrine specifying when evidentiary rulings or prosecutors arguments offend due process. The holding of *Chambers v. Mississippi*[16] is difficult to state and even harder to generalize. Prosecutors should not overreach, and it must be agreed that at some point a prosecutor's argument may be so outrageous as to deny due process. The question is, what Supreme Court case does one cite for that proposition?[17] For that matter, what case would one cite for the proposition that it offends due process to permit the introduction of "other crimes" evidence that does not permit a rational inference with respect to intent or mode of operation? What case says that it offends due process to instruct a jury that it is permitted to infer guilt from the defendant's propensity to commit crime?

A couple of hypothetical examples can illustrate how the most intriguing issues frequently go unrecognized or unarticulated. Suppose the claim on appeal was ineffective assistance of counsel; among the shortcomings which appellate counsel identified were the trial lawyer's failure to introduce more witnesses at the sentencing hearing and his failure to introduce evidence of the defendant's fine record in a high school for youths in trouble. Suppose the appellate lawyer does not, however, make any argument at all regarding the trial counsel's reasons for these decisions. The trial counsel did not call additional witnesses because they were young black men and would not, in counsel's view, have helped the jury. The trial counsel did not introduce the high school record on the grounds that young black men were all good at running and jumping and

16. 410 U.S. 284 (1973).

17. *See* Louis Natali & Stephen Stigall, "*Are You Going to Arraign His Whole Life?*", LOY. U. CHI. L.J. 1 *passim* (1996) (developing the argument that unrelated crimes evidence used to show propensity violates the due process clause).

so the defendant's record of achievement in athletics as well as in school would not be impressive, because the jury would have assumed he could run fast and jump high.

There is no direct precedent for the proposition that strategic decisions based upon counsel's own racial attitudes violate a defendant's constitutional rights. But in a world of *Batson v. Kentucky*[18] and *Turner v. Murray*,[19] one would imagine that there is at least a reasonable argument that racially motivated rationalizations for questionable strategic choices do not meet the standards of reasonably competent representation.

For another example, suppose that the prosecution can prove that a defendant was present with another man in the second man's home when the victim was killed there. It can also establish that both men were engaging in sexual activity with the victim. Finally, the prosecution can show that one of the men claimed to have passed out during the night and to have awakened to find the other man gone and the woman dead. This second man, the source of the testimony placing the defendant at the scene, had died by the time of the trial so his preliminary hearing testimony was admitted. The witness had given three statements to the police prior to the preliminary hearing; defense counsel knew of only two of them but did not ask for them to be produced for purposes of cross-examination at the preliminary hearing.

To bolster its case, the state introduced evidence of three separate prior incidents in which the defendant was claimed to have either harassed or assaulted a woman. The key fact the prosecutor emphasized was that all of the women including the murder victim were white, whereas the defendant was black. This was evidence, the prosecutor insisted, that the defendant hated white women and this hate provided him with the motive and intent to kill.

Suppose that the trial lawyer objected to the use of preliminary hearing testimony and to the use of the prior crimes evidence because the prosecutor had withheld his intent to use it, and because the prejudicial impact of the evidence outweighed its probative value. The appellate lawyer cited considerable state law precedent for the notion that the evidence was improperly admitted and that the prosecutor breached his discovery obligations by not revealing his intent to use the prior crimes evidence. The appellate lawyer also argued vigorously against the admissibility of the preliminary hearing testimony and complained about the prosecutor's failure to make the prior statements available. The appellate lawyer suggested that it was ineffective assistance under state law for the lawyer to fail to object to going forward with the preliminary hearing in the absence

18. 476 U.S. 79 (1986).
19. 476 U.S. 28 (1976).

of statements the witness had made to the police. This lawyer never mentioned the prosecutor's claims that the defendant was black man with a particular desire to harm white women which therefore made it more likely that he killed the decedent.

After the fact, one can see some potential federal issues in this case ranging from confrontation clause to equal protection issues. Can the state argue for racial animus based on this or any other kind of prior crime evidence? Does the prosecutor have any due process obligation to give the defendant notice of the evidence he intends to use? Did a defendant whose lawyer failed to request prior statements of a witness actually have the opportunity to engage in full and fair cross-examination at the preliminary hearing? If there are apparently reasonable state law grounds for all three of these claims and no clear Supreme Court precedent which is superior to the state law rules, it is perhaps not surprising that none of the federal claims were raised.

While the lack of precedent probably accounts for many failures to raise due process claims at trial, the availability of precedent may not result in federal law objections either. When the Court articulates reasonably clear rules, they become part of the warp and woof of state criminal procedure. Whatever the gap between state law and federal requirements in the 1960s and early 1970s as the Warren Court revolution played itself out in state criminal trials, here at the end of the 1990s there is no discernible wide-spread resistance to federal precedent among state courts.[20] It is difficult to think of very many areas of criminal procedure in which it can reasonably be argued that most states lag behind the federal courts in terms of solicitude for the accused. It is easier to think of areas such as pre-trial discovery where states are more committed to fairness than the federal system. This phenomenon, if it is accurately described, means that counsel can do a competent job of guaranteeing whatever fundamental fairness the federal due process clause affords by insisting upon the rigorous application of state procedural rules and existing state judicial precedent. Other than preserving the point for federal court litigation, there is frequently no need to invoke federal precedent and even some reason not to when, as is often the case, the federal precedent is weaker than state law.

20. While there have been pockets of apparent resistance to what some might think is the clear implication of existing Supreme Court precedent in the capital punishment area, it can turn out that the resisting court had it right all along as happened this term in Buchanan v. Angelone, 117 S. Ct. 1423 (1997).

VI. SOLUTIONS

It is considerably easier to define the challenge of successfully raising federal issues in state court than it is to suggest a cure for the problem. This conclusion assumes that we are talking about a problem which requires a solution. One could take the position that the chances that a federal claim will ultimately prevail are so slim that they are not worth whatever problems repeated assertion may create for counsel and client. It is a mistake to assume that one incurs no costs whatsoever from repeatedly raising issues which are guaranteed losers or from adding a weak federal claim to a considerably stronger state claim. Conventional wisdom is not wrong simply because it is conventional, and there is much to be said for concentrating the attention of a court on the arguments with the best chance of success. The problem would disappear if the Supreme Court would acknowledge the extent to which federal constitutional doctrine has permeated state criminal procedure and hold that any claim under state law founded on the fundamental unfairness of the state procedure necessarily implicates the due process clause of the United States Constitution. This would obviate the need to turn every failure to add a due process claim to an existing state law claim into an allegation that counsel was ineffective. Having struggled for a decade to make federal courts virtually inaccessible to capital defendants the current Supreme Court is unlikely to undo its handiwork in this manner.

If one assumes, as I do, that the "audience" for any particular lawyer in a capital case is both the judge before whom she appears and all other relevant audiences—state and federal courts, commutation boards, media—who will play some role, then the task becomes one of changing the lawyer's perception of what constitutes competent representation. As a practical matter, this means either educating trial and appellate lawyers to make federal claims even when it is not readily apparent that they will succeed. It also means persuading habeas courts that the failure to raise federal claims in the context of capital cases represents ineffective assistance, which constitutes the cause necessary to qualify the claim to be heard in federal court. The two proposals complement one another in that they call for recognizing that capital representation is a distinctive enterprise with unique demands upon counsel.

I have already suggested that capital litigation is characterized by successive lawyers representing the defendant in different proceedings in different courts. It also has no end point other than the execution of the sentence. It inevitably involves appeals to administrative as well as judicial bodies. The ultimate question is not one which admits of a correct answer, for the issue is not "what happened" but rather "what should happen." The test of whether a lawyer succeeded in making a given proceeding "adversarial," whatever its adequacy when applied to traditional

trials, ignores the point that the person whom the state is trying to execute five or ten years after the trial is frequently not the same person whom the jury sentenced to death. Often much more is known about the circumstances of the crime and about the reliability of the state's evidence than was known at trial. Effective representation requires that each lawyer in the process understands that her conduct will have important consequences for what occurs throughout the process as well as at the outcome of the proceeding in which she is then engaged.

Educating lawyers towards this goal is particularly difficult in light of the closure of resource centers and their training programs. Even those programs might not have been able to overcome the habits into which criminal lawyers have been educated. Legal education divorces substance from procedure; we spend a great deal of time in law schools talking about the constitution and its application in various situations but we spend very little time talking about how the issue was raised and preserved below. To the extent that is covered at all, it is covered in a different course altogether. While lawyers have to integrate the two worlds in practice, they tend to do so by mastering the procedure which they will most frequently employ. While we all know that we live in a federal system, the habits we form in dealing with the state system can begin to color our understanding of what the federal system might require.

A more intriguing problem is whether the ineffectiveness route is likely to be meaningful in the area of capital representation. That is, should we recognize that capital representation is unique and that lawyers who engage in it have an obligation to their client which extends well beyond the proceedings they are conducting personally? Might the ABA consider creating a distinct set of guidelines for the representation of capital defendants? There is very little in existing precedent to provide much hope that ineffective assistance doctrine will prompt lawyers to take a more expanded view of their obligations in capital cases.

Courts have not favored claims that appellate lawyers are ineffective because they fail to raise particular arguments.[21] Indeed, in *Smith v. Murray*,[22] the Supreme Court dismissed the notion that a lawyer was ineffective for failing to raise what would have been a winning argument on appeal by invoking the image of the able lawyer carefully winnowing the wheat from the chaff as he prepares his appellate brief. The Court has also made exclusion from federal court the price of failing to raise a fed-

21. *See* Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 25–30 (1994).

22. 477 U.S. 527 (1986).

eral claim in state court.[23] Effective representation, then, apparently does not include preserving a defendant's right to a federal adjudication of a federal claim.

So far, the Supreme Court has had it both ways. It has constructed high entry barriers to federal courts *and* has determined that competent trial and appellate lawyers need not concern themselves with insuring that their clients will be in a position to surmount those barriers. It has painted a view of professional competence which bears no likeness to the reality of capital punishment litigation, and it has insisted that lawyers who mirror this image are lawyers who provide the representation their clients deserve. Ultimately, the Court's position in this area is too unstable to prevail in the very long term. For now, however, it does prevail, and capital defendants pay the price.

23. Carrier v. Murray, 477 U.S. 478, 487 (1986) (holding that counsel's failure to perfect a claim did not constitute the cause needed to excuse a procedural default under state law).