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PROBLEMS DEFENDING UNDER NEW YORK'S NEW DEATH PENALTY LAW

*Russell Neufeld**

I want to talk with you today about several problems that New York's new death penalty statute presents to defense attorneys. One of the few positive parts of an otherwise horrible law is the creation of a Capital Defender Office.¹ The capital defender will be responsible for overseeing the assignment of counsel for all indigent defendants facing the death penalty.²

What I am concerned about, tremendously concerned about, because I am a public defender, are the limits on the representation that office, or the Legal Aid Society and Public Defender Offices, or assigned counsel will be able to give under the statute.

A lot of you have probably seen articles such as the one that was in the *Law Journal* the other day, that basically minimized the possibility of executions in New York and said that this is sort of a ceremonial thing, a symbolic thing to pass this bill.³ [Some think] we are not really looking at a lot of capital prosecutions. We are not looking at a lot of executions.⁴ I don't think that prediction will be true, but the only way that it will be true is if we all make it true through litigation and fighting. But it's certainly not going to be true just by things taking their own course.

In addition to the murders of police, corrections officers, acts of terrorism, killings of witnesses and judges, the statute also

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¹ Death Penalty—Imposition and Procedures—Assignment of Counsel [hereinafter Death Penalty Act] § 29, 1995 N.Y. LAWS 1, 15-19 (amending Judiciary Law by adding a new § 35-b).

² *Id.*

³ *Executions in New York? Don't Bet on it*, N.Y.L.J., Feb. 27, 1995, at 2.

⁴ *Id.*

includes murders that occur during a long list of felonies: robbery, burglary, kidnapping, rape and sexual abuse are within its purview.⁵ That is, people who commit murders during any of those crimes could be subject to the death penalty. The District Attorney in Syracuse, New York estimates that two-thirds of the cases that he currently prosecutes as murders would be covered by this statute.⁶ And what that would mean, if that were true state wide, would be a pool of nine hundred cases a year that could potentially be prosecuted as death penalty cases. Now if only one-third of those are actually indicted as murder in the first degree, which is what our new death penalty statute is, the defense resources in this state as they now exist will be stretched well beyond the point of competent representation. The experience of other jurisdictions that have reinstituted the death penalty is instructive.

Around the country, district attorneys and assistant district attorneys love the death penalty, even if they don't want to use it to execute people. They love it for two reasons. One reason is plea bargaining. When someone has a death penalty hanging over their head, it's very easy to get them to plead guilty to a term of years: to twenty-five to life, to fifteen to life, to twenty to life. And from a defense point of view, as a defense lawyer, we will be pleading, cajoling, begging and beating up on our clients to get them to plead guilty, to not take the risk of going to trial where the result of that trial may be execution. So from a plea bargaining point of view, the death penalty is a wonderful gift to prosecutors.

And second, it's a wonderful gift to prosecutors because of what Eve Cary was just talking about, and that is the death qualifying process. To get on a jury in a capital case, you have to be able to say that you are not so opposed to the death penalty that it would get in the way of your sentencing somebody to death. And what that means is that it's not just a question that is asked of potential jurors after someone is convicted of a crime. It's a question that is asked of potential jurors before they get on the jury

⁵ Death Penalty Act § 7, 1995 N.Y. LAWS at 2-3 (amending N.Y. PENAL LAW § 125.27(1) (McKinney 1987)).

⁶ *Costly Vigil Starts; Will the State's New Death Penalty Bring Swift, Relentless, Economical Accounting for Violent Crime? No.*, THE POST-STANDARD (Syracuse), Mar. 9, 1995, at A12.

to deal with the initial question of guilt or innocence. And that creates juries that are very pro-prosecution, because what you get rid of, when you get rid of all those people who have qualms about executing people, you get rid of a tremendous amount of people who are more likely to vote not guilty in the first place. So it gives prosecutors juries that are going to convict. And that's another terrific gift they get from this.

Additionally, the political pressure on district attorneys to seek the death penalty, which has been tremendous all over the country, will be tremendous here.⁷ Our district attorneys, for the most part, are politicians. Only the Bronx D.A., Robert Johnson, has said that he will not seek the death penalty.⁸ The other D.A.s, including the D.A. in this county, Charles Hynes, and D.A. Robert Morgenthau in Manhattan, both of whom are against the death penalty, have said that they will follow the law.⁹ They are not saying that they will not seek to execute people. I believe that as soon as a police officer is murdered, as soon as we have cases that get a lot of media attention, where there's a lot of passion, where there are killings of children or other brutal killings, even the D.A.s who are themselves opposed to the death penalty will, in fact, seek it.

The D.A.s under this statute have 120 days from arraignment on the indictment to announce whether or not they will seek the death penalty.¹⁰ The defense bar, the people who are going to be representing people indicted on murder one, don't have 120 days to sit back and wait and see if this is going to be a capital case or not. We are going to have to treat these cases as if they are all death penalty cases. And that's because one of the things that's unique about a capital case is that there are two phases. There is

⁷ See Rayner Pike, *District Attorneys in N.Y.C. Not Embracing Death Penalty*, ASSOCIATED PRESS, Mar. 8, 1995, available in WESTLAW, ALLNEWSPLUS Database.

⁸ *Id.*

⁹ See Adam Nossiter, *In New York City, A Mixed Response to Law from Prosecutors*, N.Y. TIMES, Mar. 8, 1995, at B5; Daniel Wise, *Prosecutors Want Death Penalty, Qualms Voiced About Costs, Time, Training of Lawyers*, N.Y.L.J., Mar. 3, 1995, at 1.

¹⁰ Death Penalty Act § 13, 1995 N.Y. LAWS at 5 (amending the Criminal Procedure Law by adding a new § 250.40).

the guilt phase and then there is the sentencing phase. And you have juries, rather than judges, deciding whether or not someone's going to be sentenced to death. The statute lists all the things that you can bring out in mitigation, in the sentencing phase, to convince a jury not to kill your client, not to order the execution of your client.¹¹ So defense lawyers have to start right away trying to find any positive things we can about our clients that we'll be able to present to a jury if our clients are convicted, to convince them not to execute them. We have to assume that we are going to lose the trial, the guilt phase. We have to assume that we are going to go into a sentencing phase and that we are going to have to show mitigation. And to do that, we're going to have to be able to talk about the things that were discussed by Bryan Stevenson; [things like] the young man who was abused as a child when he was three and six or started using heroin when he was nine.

So we are going to have to talk to family members, and we are going to have to talk to teachers and psychologists, and counselors and friends of the family. Those of us who practice in New York City, and particularly in Brooklyn, know that we have people here who are parts of the most divergent diaspora in the world. We have clients who are originally from Fukien Province in China, who are from Haiti and from Israel and from Barbados, and we are going to have to track down people and family and backgrounds all over the world. And we're going to have to do that from jumpstreet. We are not going to be able to wait the 120 days until the D.A. makes up his mind whether or not this is a capital case. We're also going to do that right away because we are going to try to use the mitigation we find to convince the prosecutors that they shouldn't treat the case as a capital case. We are going to see that 120 days as a limit on trying to get enough information together to talk the D.A. out of treating it as a capital case.

Aside from spreading defense resources quite thin, I'm also concerned about the right to counsel aspects of the bill. The new law gives a defendant charged in a capital case the right to counsel for the trial, for a direct appeal of the trial and for one *quorum*

¹¹ Death Penalty Act § 20, 1995 N.Y. LAWS at 6-12 (amending the Criminal Procedure Law by adding a new § 400.27).

nobis petition (which is codified in article 440 of the criminal procedure law ("C.P.L.")) and appeals of denials of *quorum nobis* petitions.¹² It doesn't allow for a right to counsel on federal habeas challenges,¹³ which, as most of you probably know, take up a great deal of the post-conviction attacks on a death penalty case. And it doesn't allow for a right to counsel on second or third C.P.L. 440 petitions. And what I think we are going to wind up with, as a result of that, is a situation similar to California's, where, as of a year ago, there were 381 people on California's death row and 106 of them were without lawyers.¹⁴

I'm not talking about Georgia, and I'm not talking about Texas. I'm talking about California. I'm talking about a state which in many ways resembles New York. A third of the people on death row have no representation. Now in New York, I assume that the legislature and the governor were hoping that the federal government would pick up the cost of lawyers for federal habeas. But at this point, only one out of New York's four federal districts, the Southern District, has a rule that says you have a right to counsel in these cases.¹⁵ The other three districts don't.

In addition, if a person is sentenced to death and is mentally incompetent or becomes mentally incompetent, and wants to bring a petition to stay his execution at that point, he won't have a lawyer anymore. He will have used up his lawyer of right on his appeals. He will no longer have a lawyer to seek that stay. This is now somebody who is mentally incompetent and who is on death row. He will have to find himself a psychiatrist to fill out an affidavit saying that he's incompetent. And then the incompetent person, on his own, is going to have to file and serve those papers and only then can the court appoint counsel for that person.

¹² Death Penalty Act § 29, 1995 N.Y. LAWS at 15-19 (amending Judiciary Law by adding a new § 35-b).

¹³ *Id.*

¹⁴ *Death Sentences Down in '93*, SACRAMENTO BEE, Jan. 5, 1994, at B3 (noting that the number of death row inmates without lawyers continues to increase).

¹⁵ U.S. DIST. CT. RULES S. & E.D.N.Y., CRIM. RULES, APP. B (VIII)(c), (d).

So the likelihood of that happening is remote. The remoteness of mentally incompetent people, caught up in our system, being able to help themselves without counsel was brought home to me in a case we had in our office last month. A client's competency was being tested and he was in the Kirby Psychiatric Center where the court sent him to be evaluated, much as people would be evaluated under New York's new death penalty law. He was found by the psychiatrists there to be competent. They sent us a report, [and] they sent the court a report with their observations regarding fitness. Luckily, the client gave his attorney a copy of the crib sheet he was given two days before the examination by the psychiatric social worker who told him he should memorize the answers to these questions:

"What does your attorney, your defense attorney do?"

"Helps you, is on your side, defends you."

"What does the D.A., district attorney do?"

"He prosecutes you, he is against you. He is not for your side."

And then we have the doctor's report and they say they found him fit. He is competent.

"Do you know who your defense attorney is?" we asked him.

Answer: "I don't know his name."

"Well, what is the role of your defense attorney?"

"He helps you, they are on your side."

"What is the role of the D.A.?"

"The D.A. prosecutes me, he is not on my side."

As you know, but as some people, I think, didn't understand in the Colin Ferguson trial, sanity and intelligence are not the same thing.¹⁶ We have a lot of clients who are quite able to memorize crib sheets that they are given to pass a competency hearing and are not, in fact, competent enough to understand that they should try to fail them. So they pass them. Under this statute, once a trial judge finds that the person is competent, the statute says, any other

¹⁶ Colin Ferguson, convicted of the murder of six passengers on a Long Island Rail Road train on December 7, 1993, was found competent to serve as his own counsel despite his apparent insanity. See, e.g., Stanley S. Arkin, *Justice Mocked When Madman Defends Himself*, L.A. TIMES, Feb. 12, 1995, at pt.M (Opinion Desk); John T. McQuiston, *Jury Finds Ferguson Guilty of Slayings on the L.I.R.R.*, N.Y. TIMES, Feb. 18, 1995, at A1.

provision of law notwithstanding, no other review judicial or otherwise shall be available with respect to an order finding the inmate to be incompetent or competent.

That's the end of the line. We had a client who held on to this crib sheet and gave it to us, and we were then able to have the judge order a new competency hearing where new psychiatrists found that he was, in fact, incompetent. If we had gotten this later, if we had gotten this in a death case, after the first 440 had been filed, we would have been out of the ball park and he would have been killed under this statute.

These are some of my concerns. I think that at this point, if we were to make the predictions of no executions in this state for a real long time, it will only be because all of you join with us in litigating death penalty cases, in fighting against the imposition of the death penalty politically and in fighting to overturn the statute. I hope all of you will join us.

Thank you.

