Ken Rose and Bo Jones, part 1: what’s it like to be a capital defender?

Reading: Beginning of *Last Lawyer*, NYT article from class web site

October 20, 2014
Catching up

• Two more exonerations since last Wednesday’s class, no kidding

• Law School event tomorrow evening at 5:30pm, room 5048 Law, re: McCollum and Brown

• Speaker Wed: LaMonte Armstrong and Theresa Newman (Duke Innocence Project)
Conviction Integrity Units

- Read on class web site about Dallas, TX and Brooklyn, NY
- Consider McCollum and Brown

- Sometimes the new DA thinks the old DA made mistakes

- This is very unusual, for many reasons
Huge predictor of exonerations

• Faced with evidence such as that in McCollum’s case, the DA may:
  – Put up a fight, refuse to cooperate
    • Joe Freeman Britt: “apparently the district attorney just threw up his hands and capitulated.”
  – Or, cooperate, drop the charges, and apologize

• Apologizing is extremely rare...

• Creating a conviction integrity unit brings the DA’s office out of the dynamic of confrontation, pride, and self-defense
Death Row Attorneys

• Many of the best ones nationally are right here in NC. Jack Boger argued McCleskey.

• CDPL, in Durham, is the only organization of its kind, nationally
  – They organize defense for all capital defendants, state-wide, assigning lawyers
  – They train lawyers
  – They have a lot of experience, doing nothing else but capital law.
Two historical periods

• NYT article is from 1988.
  – Laws were expanding the use of DP
  – Inmates were reaching the end of their appeals
  – Executions were accelerating
  – Defense attorneys very commonly losing their cases, clients being put to death
  – Hard work...
  – Public opinion strongly against you
  – Especially in the towns and counties where you are doing the work: Mississippi, Texas, SC, GA, NC
The US has executed 1320 inmates from 1977 to 2012.
More recent period

• Tide changed in 1990s
• More optimism
• More successes
• One success leads to another: concern about exonerations leads, naturally, to reforms that may lead to more exonerations...
  – Example: DA’s creating Conviction Integrity Units...
Conditions of work

• NYT story from 1988: not uncommon for attorneys to be paid $1,000 to $2,500 as a flat fee for a capital defense
  – This no longer so common, but it was at the time
  – Many people currently on death row are from that time
• Pro-bono law firms take the cases
• CDPL not such a thing; it is result of reform
People hate what you do

• How to defend a murderer?
• Public opinion always on the other side...
• Most clients are guilty, many did awful things...

• But:
• Death is different
• The system does not work when one side simply folds its hands... Adversarial nature of the system requires a defense just as vigorous as the prosecution will be. Interesting paradox.
Takes an iron stomach

- People hate you
- You may well not like your client
- Your client may want to die
- Your client may be out of his / her mind
- The state is coming at your client with intent to kill him/her, and quite likely they will succeed (at least up until the 1990s)
Save your client on a technicality?

• Sweeping arguments that could end the death penalty:
  – Race (McCleskey): Nope.
  – Geography: Nope.
  – Arbitrary: Nope. (Furman said this, but not since then)

• So, “hand-to-hand combat” – each case its own details, look for flaws, overlooked elements in the earlier trial
Denigrate the work of your colleagues?

• Appeals often rely on “Ineffective Assistance of Counsel”
  – Original lawyer was incompetent or worse

• Easy to do when the person was asleep or called no witnesses, or was drunk, etc.
• But what about when they did a good job but just missed a detail?
• To save your client, you may have to argue that this was an unconstitutional failure, basically one of incompetence. You have to argue it, the court can turn you down.
• Not a great way to make friends, or keep them.
Wednesday

• Read the stories on the class web site
• We start in on the Bo Jones case