

THE LAWYERS OF DEATH ROW

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DAVID BRUCK leaves his law office in Columbia, S.C., one cool, bright December morning and drives by the Civil War-era courthouse just around the corner. A few minutes later, he parks in front of the sprawling brick and granite state penitentiary, parts of which are as old as the courthouse.

The greetings from corrections officials and guards are cordial, even friendly, as he is checked through security and let into a long concrete corridor known as the Tunnel, the main artery that runs through the prison, officially called the Central Correctional Institution. Convicts roam more or less freely, but never far from guards, and never far from gates that can be slammed shut. Finally, Bruck, a slender and prematurely graying 38-year-old, climbs steel stairs, passes through more steel doors, and becomes a visitor in the world of the damned: Death Row.

"Da-VID!" one of the condemned calls through the bars of his tiny cell. The lawyer stops to trade smiles and a few quiet words, and to grasp the hands that reach out between the bars.

Bruck is one of a handful of lawyers who devote nearly all of their time to defending prisoners who face death sentences. Most of their work is in the Deep South - "the Death Belt," as they call it.

South Carolina's Death Row is at once less ugly and more terrible than an outsider might imagine. It is not a row at all, but three tiers of cells, each facing a metal catwalk. A visitor is surprised to see that some of the 46 inmates - those who have someone on the outside who cares enough to buy one - have television sets. They are squeezed between bunks and open toilets, their screens flickering among socks and letters and pictures of Jesus. The sets are tuned to game shows and soap operas. Their sound is hopelessly drowned out by the clang of gates and the echo of voices.

At first, the noise, banging off concrete and metal and rolling back on itself, is threatening. But listen more closely, and you pick up a friendly rowdiness, not just among the inmates but between captives and jailers. Later, a corrections officer explains that the boisterousness is tolerated because it blows off steam.

David Bruck has come here to talk to Dale Robert Yates, whose case he had argued two days previously before the United States Supreme Court in an attempt to win a new trial. Yates is brought to him by burly guards.

"Hi," Dale Yates says. He has a friendly smile and a warm handshake. There is nothing cold or reptilian in his eyes. He is wearing jeans and a sweatshirt, and looks younger than his 30 years.

In 1981, a woman was stabbed to death when Yates and an accomplice held up a store in Tigerville, in the northwestern corner of South Carolina. Though the other man was the actual killer, Yates was also convicted of murder by a jury in Greenville County and sentenced to die in the electric chair.

FOR MORE THAN A decade, major Supreme Court rulings on capital punishment have been in favor of the death penalty. Since executions resumed following the watershed 1976 Supreme Court decision, in a Georgia murder case, that capital punishment is not in itself unconstitutional, the number of executions has risen, from one in 1977 to 21 in 1984, 18 each in 1985 and 1986 and 25 in 1987. Some experts on capital punishment believe there soon may be 50 or more executions a year in the United States.

Through January, 94 convicts had been put to death since the 1976 ruling. All but six of the executions have been in the South. There are now close to 2,000 prisoners waiting to be executed in 34 of the 37 states that have capital punishment; two-thirds of the condemned are in the South. Nearly half the death-row inmates are black.

A 1986 Gallup Poll found that 70 percent of those surveyed favored capital punishment for murder cases. Sixty-one percent polled believed that executing killers can deter others. Seven percent had no opinion, and 32 percent said executions do not deter.

Prof. Michael Radelet, a sociologist and criminologist at the University of Florida who is widely recognized as an authority on capital punishment, believes that the 32 percent are right. "There are no criminologists that I know of who argue that the death penalty has a deterrent effect over and above life in prison," he said in a recent interview.

But the question of deterrence is only one part of the capital punishment debate. Those who favored the death penalty in the 1986 Gallup Poll were asked if they would still feel that way if it were not a deterrent. Seventy-three percent said yes.

Despite the public support for capital punishment - or perhaps because of it - the issue is divisive and deeply emotional. At some executions, opponents and advocates of the death penalty have stood a few yards apart outside prisons, uttering prayers and taunts into the night.

Occasionally, a death-row inmate will attract wide attention, as in the case of Willie Jasper Darden. Now 54 years old, he has been on Florida's death row for 14 years, condemned for the September 1973 murder of a furniture store owner. His execution has been scheduled -and stayed - six times. Amnesty International, the Nobel laureate Andrei Sakharov and several other prominent public figures in the United States and abroad have asked Gov. Bob Martinez to grant clemency. Darden's supporters say there is real doubt about his guilt; they cite affidavits from two people who say the defendant could not have been at the scene of the murder.

There is little or no doubt about the guilt of most death-row inmates; even their lawyers acknowledge that. But many of these lawyers believe that killing murderers is wrong, despite what the Supreme Court says, despite what the public feels.

In that belief, most death-row lawyers work long hours for low pay. A typical fee for an assigned counsel is \$1,000; David Bruck gets a maximum of \$2,500 from the state of South Carolina when he defends an indigent charged with murder. A survey completed last year for the American Bar Association showed that in 114 death-penalty cases in 24 states, defense lawyers documented an average of 2,000 uncompensated hours over a 2-year period.

The American Bar Association and several other national organizations, such as the American Civil Liberties Union and the National Association for the Advancement of Colored People, help match clients with lawyers willing to defend them.

But most active are a couple dozen lawyers scattered across the South who devote most or all of their time to capital punishment cases. David Bruck and his partner, John H. Blume, handle as many cases as they can in South Carolina, and two of the busiest groups are the Southern Prisoners' Defense Committee and Team Defense, both based in Atlanta.

Stephen Bright, who came to the Defense Committee six years ago from the public defender's office in the nation's capital, is its current director. The committee's original purpose, when it was organized about a decade ago, was to monitor prison conditions. The organization has seven lawyers, a couple of secretaries and volunteers to help with clerical duties. Two lawyers still concentrate on suits involving prison conditions, and the organization occasionally collects money when it wins a case, though most of its funds, Bright says, come from contributions. The other five lawyers, including one stationed full-time in Texas, do capital punishment work. They are paid \$14,000 to \$16,000 a year, depending on their individual needs. "This is what I do, seven days a week, 10 to 12 hours a day," Bright says. "I live just fine."

THESE LAWYERS try to create, rather than resolve, doubt or ambiguity in order to win time for their clients. They search for overlooked, and sometimes obscure, points of law to amplify in a 50- or 60-page brief, try to learn things about the defendant - signs of a previously undetected brain disorder or mental illness, or particularly brutal childhood abuse - that might make a court, or a governor, grant mercy.

There is an intensity about death-row lawyers. Perhaps it comes from doing the kind of work that will take something away from them if they give it all they have. Some of it may come from answering the occasional questions that boil down to one question: How can you defend people like that?

Their first answer is usually that somebody has to defend people who are poor and despised. They say that most of the condemned are not as different from you and me as we would like to imagine.

They argue, passionately, that capital punishment is wrong because it doesn't deter potential murderers; because it can't bring back the victims, but only creates new victims - the condemned and their relatives; and because it is racist and elitist.

"There's no such thing as a system that can meaningfully cull from some 20,000 homicides a year in this country the 200 or so who deserve the death penalty," says Joseph Nursey, a Team Defense lawyer for nine years.

As Steve Bright relaxes in his cluttered office, in an old film warehouse a block from Atlanta's glittering Omni Hotel, he talks about a picture on the wall. It is a photograph of J. C. Shaw as a crew-cut, young white boy dressed in Sunday slacks and white shirt and holding a Bible.

Shaw changed a lot in the years after that picture was taken, turning to violence and drugs. In 1977, he and a companion, James Terry Roach, raped a Columbia-area teen-ager and then murdered her and her boyfriend. Bright was in South Carolina on Jan. 11, 1985, for Shaw's execution (Roach was executed the next year).

Death-penalty lawyers adhere to an unwritten code: if their client requests it, they are there for the execution. Shaw wanted Bright with him the night he died. The lawyer watched the guards come in and shave Shaw, taking care not to nick him; watched him eat his last meal (pizza with everything), watched him die at age 29 in the electric chair.

Not many months later, Bright saw an execution in Florida. With the memory still fresh, he had to rush to Mississippi for a hearing. "You can't call up and say, 'I had an execution a couple of nights ago and I need time to get myself together . . .'" Bright says. Bright and other death-penalty lawyers suffered a crushing setback last April when the United States Supreme Court ruled, 5-4, that, even though Georgia has imposed death sentences on those who kill whites - especially blacks who kill whites - far more often than on those who kill blacks, the disparity was not unconstitutional.

Opponents of capital punishment had relied heavily on a study of some 2,000 Georgia homicides in the 1970's, which showed that blacks who kill whites were four times more likely to be sentenced to death than whites who kill blacks. Nevertheless, to show unconstitutional racial discrimination in death sentencing, the Court said, a defendant "must prove that the decision makers in his case acted with a discriminatory purpose" and produce evidence specific to his case. The capital punishment opponents had hoped to overturn the death sentences of hundreds of defendants across the country.

Bright calls that decision, in *McCleskey v. Georgia*, "an everlasting blight on the Supreme Court and a badge of shame for the state of Georgia."

Russell Parker, an assistant district attorney in Georgia's Fulton County, has a different perspective. To him, Warren McCleskey, a black, is simply the man he prosecuted for shooting to death an Atlanta policeman, who happened to be white, during a 1978 holdup. The prosecutor recalled in a telephone interview that there was a black on the jury, and another sitting as an alternate, and he said that Warren McCleskey was defended by a skilled black lawyer who had once been a prosecutor.

An irony in the case of Warren McCleskey is that, having lost before the Supreme Court on the symbolic issue of race, he may yet get another trial on a much more mundane point. A Federal

District Court judge has ordered his conviction overturned on the ground that the defendant's rights were violated by the prosecution's use of a "plant," a jailhouse witness.

Prosecutors are appealing that ruling to a United States Circuit Court of Appeals, and Russell Parker says he is ready to prosecute McCleskey again, if he has to.

McCleskey's story neatly illustrates how defense lawyers are having to change their tactics. The ruling on the race issue ended what may well have been the last sweeping challenge to the death penalty in our time. So defense lawyers must hunt for more routine points to argue - and perhaps before an increasingly skeptical judiciary. Chief Justice William H. Rehnquist, at a Jan. 27 meeting of the National Conference of Chief Justices, called on the nation's courts to limit last-minute appeals by death-row inmates so as to reduce the "chaotic conditions" surrounding executions.

"We're into hand-to-hand combat now," Bright says. "There is no great issue that's going to save people on death row."

DAVID BRUCK AND Dale Yates huddle in the cheerless pale blue room that sometimes serves as a chapel in the penitentiary. The criminal and his lawyer don't seem to have much in common. Bruck was born in Montreal; he came to South Carolina after graduating from Harvard because, as an antiwar activist, he wanted to be near Fort Jackson, a big Army training post a few miles from Columbia. Bruck stayed in Columbia, attended law school at the University of South Carolina, married (he and his wife, Beverly, will become parents this spring) and found a new cause, on which he is a prolific writer as well as courtroom advocate.

On Feb. 13, 1981, Dale Yates and Henry Davis held up the grocery store in Tigerville. Yates testified, and has insisted since, that he had planned to flee rather than shoot if anything went wrong, but it didn't turn out that way. Willie Wood, a member of the family that owned the store, balked at an order to lean over the counter. There was a struggle, and Yates fired twice, putting a bullet through one of Wood's hands, which he had put up in front of his chest.

After Yates fled with the money, Wood's mother, Helen, came in from the post office that she ran next to the store, and was stabbed by Henry Davis. Then Davis was shot dead by Wood, who had drawn his own pistol.

At the trial two months later, a jury found Dale Yates as guilty as if he had wielded the knife that killed Helen Wood. The prosecution relied on the principle, as old as common law, that "the hand of one is the hand of all."

David Bruck is trying to save Yates on a technicality. After coming into the case late, Bruck has contended that the trial judge erred in instructing the jury. The judge, Bruck says, improperly shifted to the defendant a burden to prove that the killing was not accompanied by any malice. The South Carolina Supreme Court agreed that Bruck had a point. But it nevertheless refused to reconsider the verdict - a refusal that was improper, Bruck said in his argument before the United States Supreme Court. Bruck contended that a 1985 Supreme Court decision stating that the burden of proof of intent must be on the state, applied retroactively to the Yates case.

Two days after taking his case to the Supreme Court, Bruck is describing the proceedings to Yates: "They don't say what they're thinking, but they ask a lot of questions."

Yates wants a new trial, and a jury that would give him a long prison term instead of a death sentence, and maybe the chance someday to resume the life he had botched, even before the robbery, by dropping out of high school, using drugs and stealing.

Yates says he has turned to prayer and that, if he has to die soon, "I'll go to the kingdom of God instead of the lake of fire. . . ."

Willie Wood, now 52, with a hand that still gets sore, doesn't care about Dale Yates's religious conversion. A bullet fired by Yates just missed his heart, and there is no room there now for forgiveness, not after he watched his mother die and watched his father grow old alone. "I'd pull the switch right now, free of charge," Wood said.

BRYAN STEVENSON, whose office is across the hall from Steve Bright's, in Atlanta, grew up in Delaware. He is a soft-spoken bachelor of 28. He went to Harvard Law School, but while there thought that the law might be too dull. Then he spent part of a semester working for the Southern Prisoners' Defense Committee in Atlanta, and he was hooked.

"I don't think my being black has affected my feeling on the immorality of it," he says of capital punishment, though he knows that 9 of the 12 people Georgia has put to death in the last decade have been black.

Stevenson grew up steeped in the teachings of the African Methodist Church, and it shows in his speech. In one breath, he speaks quietly about the horror of his clients' crimes - "the pure evil that flows out of these situations." In the next breath he says: "It's spiritually gratifying, contacting and connecting with the people on death row. It's more meaningful than anything I do. These are people I love and care about."

Just down the hall, Clive A. Stafford Smith packs for a long bus trip to Mississippi, where he will argue a capital punishment case before that state's high court. He says he is nearly obsessed with the death penalty. Asked why, he says no explanation is needed: "It's very like a religion."

A gangling and gregarious 28-year-old Englishman from Columbia Law School, Stafford Smith would love to linger and talk - about almost anything, it seems, but especially about a recent courtroom triumph. In November, the Georgia Supreme Court reversed the conviction and death sentence of one of his clients, Jerome Holloway, who had robbed and slain an elderly neighbor woman. Stafford Smith says Holloway is 30 going on 7. Holloway has an I.Q. of 49, the lowest of any death-row prisoner in the country, Stafford Smith says.

Down the street from the Defense Committee is an old insurance-office building that is now headquarters for Team Defense. Millard Farmer, a 53-year-old Georgian, was one of the founders of Team Defense, in 1976. His organization devotes nearly all of its time to capital punishment cases, though its lawyers will occasionally take on other work - especially if the clients have money, Farmer says unabashedly.

Farmer and other foes of capital punishment say murders that result in death sentences often occur in rural areas in which the emphasis is less on scientific law enforcement than on hunches and cronyism. In settings like these, they say, a suspect is likely to be represented by a lawyer who is young and inexperienced, or old and tired. Most defense lawyers say this cannot help but spawn injustice, especially since a 1977 United States Supreme Court ruling limited the extent to which lawyers can raise on later appeals errors that may have occurred during the initial trial but were not raised in early appeal.

For Millard Farmer, the night of May 22, 1987, will always be a terrible memory. That night, Georgia executed Richard Tucker, a 44-year-old black who grew up in a home ruled by alcohol and violence. In Macon, in 1978, six months after he had finished a 14-year prison term for killing his aunt, Tucker abducted and killed a white woman.

Joseph Nursey, another team lawyer, represented Tucker and watched his execution. Millard Farmer was outside the prison in Jackson, Ga., that night. The people who had gathered at the gate had been shepherded into two groups: for and against the execution. The word that the execution had been carried out touched off a celebration. A man in a Ku Klux Klan costume came close to Farmer, taunting him. Farmer recognized the man as a boyhood friend and schoolmate, a person not so different from himself, except that the man had been raised on a diet of hatred instead of the more genteel strain of racism Farmer had learned - paternalism, which at least allowed for charity, and change.

"The man could have been me," Farmer says. "And I don't mind telling you, I was heartbroken."

The original plan for Team Defense, Farmer explains, was to become involved in cases at the trial level, to keep people off death row in the first place. But as the years have gone by, a terrible dilemma has taken shape: Do defense lawyers pour their energies into those cases in which an execution is imminent, or do they concentrate on trial-level work, where the caseload is apt to be hopelessly heavy? By early this year, Farmer said, the team's four lawyers were involved as chief counsel or advisers in about 10 cases that will go to trial, and were representing about 20 convicted prisoners.

How does Team Defense choose its cases? "There is no methodology, and indeed, little fairness," Farmer says. He concedes that Team Defense might take some cases, and refuse others, if one defendant seems to have a better chance than another because of subjective factors - including race.

Thus the cruel irony: In picking whom to defend and whom to sacrifice, Team Defense could be contributing to the same unfairness it sees on the other side.

"Do we throw people overboard?" Farmer says. "Yes, we do. But it's not right." In fact, Farmer says, it bothers him so much that Team Defense may try to cover more defendants, from trial onward, "even if the sharks eat everybody in the boat."

DAVID BRUCK SAYS GOOD-bye to Dale Yates. Then the lawyer passes the cells of two death row inmates who are housed just a few yards apart. One is Alvin Owens, a brooding white man in his 50's who was convicted of kidnapping a South Carolina businessman.

The other inmate Bruck talks to is Limmie Arthur, a 28-year-old black, the 17th of 18 children born to an impoverished sharecropper couple in rural Horry, S.C., not far from Myrtle Beach. Limmie Arthur has a soft voice, bright eyes and an I.Q. of 65. On New Year's Eve 1984, he drank a bottle of whisky with a neighbor, stole the man's Social Security payment, then killed him with an ax. Limmie Arthur fled to his parents' shack and hid in the attic, but his feet stuck out beneath the rafters, so he was easily found.

The prosecution noted that Limmie Arthur had earlier stabbed to death a brother, who had attacked him with a two-by-four, and had been arrested for several break-ins. The prosecution argued, too, that he showed his criminal intent when he fled.

For years, Limmie Arthur, who is represented by Bruck's firm, could not write his own name without leaving letters out. Even now, Bruck says, Arthur has only "the dimmest" understanding of where he is and what is happening to him.

David Bruck is back outside the penitentiary in the late-morning sun. But he will return soon to death row, bringing Dale Yates the good news that the United States Supreme Court, though stopping short of overturning Yates's conviction, has voted, 8-0, to instruct the South Carolina Supreme Court to review the case yet again.