CIVIL LIBERTIES *By Harvey A. Silverglate*

Death Penalty Reprieve Still Hangs Up Prisoner

"OUT OF SIGHT, out of mind." The federal judiciary, aided by Congress and the president, has figured out how to avoid the occasional embarrassment that accompanies each new discovery that an innocent defendant has been convicted and sentenced to a long prison term or even death. It has made it nearly impossible for inmates to gain access to the courts, much less subpoena power and other legal process, to re-open their cases. What the legal system and the public don't know won't hurt them, according to this approach. Finality trumps justice.

A dramatic example of this trend toward using procedural mechanisms to cut off explorations into possibly unjust convictions occurred late last year, when, according to a Nov. 10, 1996, report in the New York Times, Virginia Gov. George F. Allen commuted the death sentence of Joseph P. Payne Sr. The prisoner had already been given his final meal when he learned, from a news broadcast, that his execution—only three hours away—had been canceled by the governor. There was one catch: In order to get a commutation, Mr. Payne had to agree never to seek a new trial.

Mr. Silverglate is a bimonthly NLJ columnist and a partner at the Boston firm of Silverglate & Good.

Mr. Payne's lawyer, Paul F. Khoury, of Washington, D.C., told the Times he had advised his client that life in prison was the best he could hope for. The governor was willing to spare Mr. Payne's life, but only if the case would end. Governor Allen said he decided to do this because of doubts raised when Virginia State Police administered a polygraph test to the state's chief witness, another inmate, as well as other evidence discovered after the trial. (Mr. Payne was already serving a life sentence for the 1981 murder and robbery of a merchant when he was convicted of the 1985 murder of a fellow inmate, doused with flammable liquid and set afire.)

Governor Allen's decision to split the difference was in keeping with the trend severely limiting collateral attacks on convictions, particularly (but hardly exclusively) in death penalty cases. Indeed, while Chief Justice William H. Rehnquist criticized Congress in his 1996 year-end message for failing to create additional judgeships to deal with the rising federal caseload, he praised the passage of legislation, signed by the president, that drastically limits the scope of federal habeas corpus jurisdiction.

Give Credit Where It's Due

It is true that Congress deserved some credit for evisceration of habeas, accomplished in the Antiterrorism and Effective Death Penalty Act of 1996, but the bulk of the credit goes to the Supreme Court. *McCleskey v. Zant*, 499 U.S. 467 (1991), erected procedural barriers that eradicated all but a minuscule number of second or subsequent petitions.

While *McCleskey* made a theoretical exception where "actual innocence" could be shown before the hearing, in practice it has become next to impossible even for an innocent inmate to get access to the courts. Given the disturbing frequency with which suppression of exculpatory evidence by state and federal prosecutors is discovered years after a trial, this development has kept the judicial system from having to tangle with troubling questions about imprisonment or execution of the innocent.

Governor Allen's solution was perhaps ingenious. He saved the life of a prisoner whom he suspected was innocent, while extracting a pledge that all efforts to attack the conviction judicially would cease. Experience demonstrates that once there is nothing to be gained by proving a convict's innocence, pro bono legal and investigatory resources are immediately turned to trying to save another life where there is still hope.

This was made dramatically clear by Justice Felix Frankfurter in his 1953 dissent in the case of convicted atomic spies Julius and Ethel Rosenberg. Earlier, Justice Frankfurter had voted to uphold a last-minute stay of execution granted by Justice William O. Douglas, who had concluded that the death penalty was not legally available in the case. When the majority vacated the stay the next day without full briefing and argument, Justice Frankfurter published his dissent—after the Rosenbergs were dead. "To be writing an opinion in a case affecting two lives after the curtain has been rung down," he wrote, "has the appearance of pathetic futility. But history also has its claims."

The *Rosenberg* case proved to be the exception. The rule is that after an inmate has been executed, efforts to prove innocence promptly cease. The potential for embarrassment to the legal system becomes nil. Governor Allen has figured out a way to save a possibly innocent life while avoiding such embarrassment. For this innovation, he is presumably entitled to our grudging and uneasy respect.

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