BRENNAN CENTER FOR JUSTICE at New York University School of Law

When Prosecutors Write Opinions That Judges Sign Off On

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Earlier this week, the 11th U.S. Circuit Court of Appeals heard oral argument in the case of Doyle Lee Hamm, an Alabama death row inmate whose trial, conviction, death sentence, and appeal combine to highlight (in a way most cases don't) the vast gulf that exists in America between the justice system we teach our children about and the one we actually have. It is a story of deplorable work by appointed attorneys and the utter abdication of responsibility by judges from the very outset of the case, a classic example of how capital cases end up lingering unresolved for decades at great cost to the families of victims and taxpayers, too.

Hamm was convicted of murdering a man named Patrick Cunningham in Cullman, Alabama, in January 1987 in a robbery that netted about $350 dollars. The investigation was chaotic. Witnesses to the crime initially identified Hamm as the shooter, then recanted, then were charged as co-defendants and then made deals and turned into state witnesses. Hamm confessed to the crime, however, although the circumstances surrounding that confession remain as murky as most of the confessions that took place in the South during that era. In any event, Hamm did not testify in his own defense at his trial and his lawyer presented no witnesses on his behalf before he was convicted in September 1987.

It took just one day for the penalty phase of Hamm's case to be completed. Hamm's jury voted 11-1 to condemn him to death (a unanimous jury is not required in Alabama, ten jurors out of 12 can recommend a death sentence). And that was that. Except that it wasn't. Hamm's trial lawyer did not remotely provide him with adequate representation, especially during the trial's penalty phase. With a man's life on the line, defense counsel spent just 19 minutes presenting a case for mitigation. For example, even though there were thousands of pages of medical and educational records available, most of which indicated that Hamm may have brain damage, none of that information was ever presented to his jury because it was never investigated by Hamm's attorney.

There also was evidence that Hamm's mother drank during pregnancy, suggesting the possibility of fetal alcohol syndrome, but the jury was never told about that either. There was evidence that Hamm suffered from a mental disability — based upon a finding of an IQ of 66 when Hamm was in 6th grade—but that, too, went unexplored at trial. Each of these issues, alone, might have constituted viable "mitigating" factors for reviewing courts to evaluate or convinced two more jurors to vote for life instead of death in Hamm's case. Together they paint a portrait of a man who may not have constituted the evil intent that often animates capital cases.

And how did the courts deal with this appalling lack of effort by Hamm's lawyer? Both Alabama judges and a federal trial judge ruled that the defendant still had not been deprived of his constitutional right to adequate representation because the jury received approximately 15 minutes worth of monosyllabic testimony from Hamm's sister and, as a result, "was well aware of Hamm's piteous background, poor education, and mental and medical difficulties." This is the essentially the same dubious standard that courts have applied to conclude that lawyers who sleep through capital cases, or lawyers who are drunk during murder trials, are still somehow providing their clients with 'effective assistance."

There is more. During the penalty phase of the trial, the jury learned that Hamm had been charged and convicted of armed robbery in Tennessee and that this prior crime constituted an "aggravating factor" warranting the imposition of the death penalty. But that prior Tennessee conviction was even more flawed than the murder conviction that has placed Hamm on death row. In Tennessee, years earlier, Hamm erroneously was told, for example, that he had no right to review the guilty plea he made in those cases. And he was not told at the time that he had a right against self-incrimination and the right to confront his accusers. Hamm's trial lawyer never investigated the bases for these claims, either, instead relying upon a faulty description of the event contained in a police report.

But that's not even the worst of it. Twelve years after his conviction, Hamm got a post-conviction hearing in state court. The hearing took place in July, 1999. On December 3, 1999, a Friday, the Alabama Attorney General submitted to the presiding judge in the case an 89-page document styled "Proposed Memorandum Order." Now, it is not uncommon for lawyers for both sides in a case to submit a proposed order to a judge. But what happened next is both rare and disgraceful. The judge signed off on the prosecutor's proposed order the following Monday, just a few business hours after the document had been submitted, *without changing a word or even taking the time to strike the word "Proposed" from the original text of document*.

Imagine, for a second, how you'd feel about the reliability and integrity of a Supreme Court case you were following for which the justices in Washington issued a ruling that was *word-for-word* what the Solicitor General had suggested in a "proposed order." Imagine how

criminal justice would look if every prosecutor got to write every judicial ruling in every capital case. Now consider that it is this ruling — verbatim from the mouth of the Alabama Attorney General, endorsed by a judge who may or may not have read the whole thing over a weekend, without giving the defense attorney a chance to rebut its contents — that every court that has subsequently looked at Hamm's case has blindly deferred to.

This is a judicial ruling that deserves scorn, not respect, from reviewing courts, especially the federal courts. This is so even if Hamm is guilty of murder and would have been found so by an Alabama jury following a fair trial. The 11th Circuit thus has a stark choice before it now that oral arguments are completed. The federal appeals court can do the right thing and order a new penalty phase trial here to allow the defendant to be able to raise a reasonable mitigation defense. Or it can continue to countenance two decades worth of negligence on the part of key actors in the criminal justice system. The choice these judges make will say a great deal more about them than it will about Hamm.

The views expressed are the author's own and not necessarily those of the Brennan Center for Justice.

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