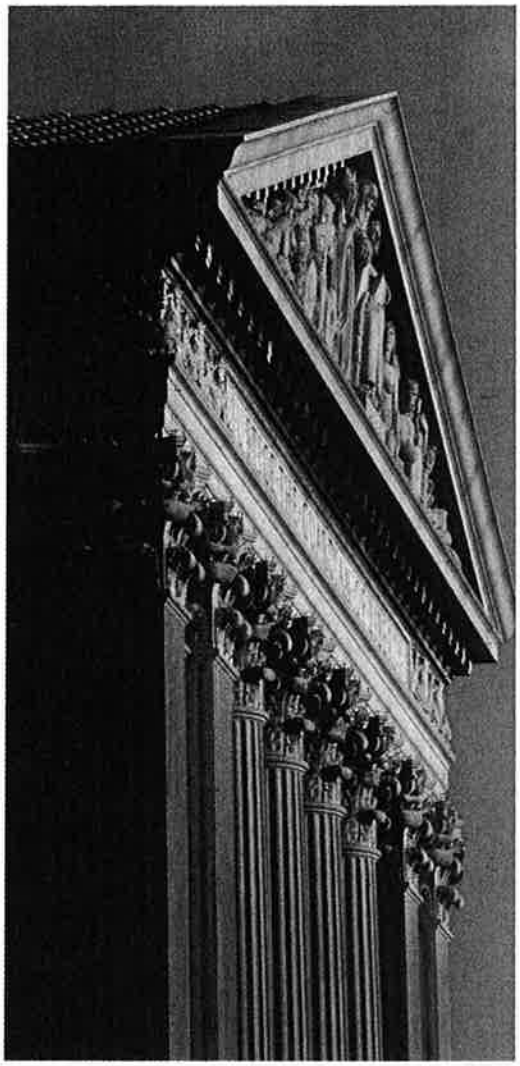
FRIEND OF THE COURT

BY LISA KEMLER



Whether Evidence from a Psychologist or Psychiatrist Is Necessary to Establish the Prejudicial Effect of Trial Counsel's Failure to Investigate and Present Mitigating Evidence?

In *Lovitt v. True*, No. 03-8751, the petitioner was convicted of capital murder and robbery and was sentenced to death. The victim was stabbed six times in the chest and back while working during the overnight shift at his job. The petitioner had worked as a cook at the same business but quit working there about two months prior to the killing. Two witnesses testified they saw a man stabbing the victim six or seven times and then kick the victim after he had fallen to the floor. Although they were unable to make a positive identification of the petitioner, one of the witnesses "testified at trial that he was about '80 percent certain' that Lovitt was the assailant." *Lovitt v. Warden*, 585 S.E.2d 801, 806 (Va. Sup. Ct. 2003). When police came on the scene, they found that the cash drawer to the register had been removed. They subsequently found a pair of scissors bearing blood lying in the woods about 15 yards behind the pool hall. The blood on the scissors was determined to be that of the victim. The petitioner's cousin testified that on the same night as the killing, the petitioner came to his home, which was only a quarter mile from the pool hall, and was carrying a large square, gray metal box.

The petitioner split the money in the register box with his cousin and then told his cousin to "get rid of it." *Id.* The cousin cut the box into pieces and subsequently gave the pieces to the police. During the penalty phase of the trial, the prosecution presented the petitioner's prior criminal record which was extensive. The petitioner presented testimony from his sister who testified that the petitioner "was the oldest of 12 children and that he helped take care of his younger siblings, although not 'gladly.'" *Id.* at 808. He also presented testimony from four deputies employed by the Arlington County Sheriff's Office, who stated that he had not been a disciplinary problem while in custody awaiting trial.

Subsequent to his conviction and sentence, the petitioner filed a *habeas corpus* petition claiming, *inter alia*, that he had received ineffective assistance of counsel at the penalty phase of the trial because his counsel failed to conduct an adequate investigation into his background and family history. At the hearing on his *habeas* petition, family members testified about the petitioner's family history. Some of the witnesses described in general terms physical, sexual and emotional abuse the petitioner endured while growing up. Also introduced at the hearing were various court records, as well as records from social services and juvenile corrections. In commenting on the usefulness of the records, the Virginia Supreme Court noted that the records "were equivocal in some respects and could have been viewed by a jury as either evidence in aggravation or in mitigation of the offense." *Id.* at 823.

For example, the records stated that the petitioner had an antisocial personality disorder and a "polysubstance" dependence. He was described as having a "serious problem with his anger." *Id.* Despite contrary testimony from his family members, in some of the records the petitioner described his family as "growing up close" and stated that he "had everything he needed." Juvenile court records described his mother and stepfather as "'strong individuals' who provided [the petitioner] with 'a stable home life.'" *Id.* at 824. His juvenile records "contained references to [his] lack of remorse for his behavior, lack of empathy for others, lack of respect for the law, and propensity to blame others for trouble that he instigated." *Id.* In addition, the petitioner was recorded as having been physically aggressive while he was at the juvenile correctional center.

The Virginia Supreme Court specifically noted that the petitioner "did not present testimony from a psychologist or a psychiatrist concerning his family history and any effect that such history may have had on his development." *Id.* at 823-24.

In holding that his lawyers had not provided ineffective assistance at the sentencing phase, the Virginia Supreme Court distinguished the case from both *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000). The court stated that "[t]he evidence concerning Lovitt's extensive drug abuse and antisocial personality disorder is evidence of a type that the Court in *Wiggins* termed "double edge." *Id.* at 824. Regarding the lack of evidence from a psychologist or a psychiatrist providing an evaluation of the petitioner's mental health, the court stated: "there is no evidence directly addressing the effect [the petitioner's] family life may have had on his development. The absence of such evidence represents a failure of proof regarding [the petitioner's] contention that he was prejudiced by trial counsel's failure to present extensive evidence of his family and social history at the penalty phase proceeding." *Id.* at 825.

NACDL filed an *amicus* brief, authored by Donald B. Verrilli, Jr., Jared O. Freedman and Robin M. Meriweather of Jenner & Block, LLP, in support of the petition for *certiorari*. The brief argues that the Virginia Supreme Court's conclusion that evidence from a psychologist or psychiatrist is necessary to establish the prejudicial effect of trial counsel's failure to investigate and present mitigating evidence relating to a defendant's nightmarish childhood conflicts with the Supreme Court's well-settled precedent. The brief points out that the Supreme

Minneapolis, Minnesota, suggests that the question "whether the ability of the Tribe to prosecute Mr. Lara derived from its inherent sovereignty, or whether it was exercising power delegated to it by Congress" may be resolved "as a matter of statutory construction without the necessity of reaching many of the constitutional questions raised." *Amicus* brief at 5. In support of the position of *Amicus*, the brief contains a comprehensive overview of the historical background of the ICRA, the Supreme Court's decisions "construi[ing] the limits of aboriginal Tribal sovereign authority to prosecute classes of people,"and the appellate courts' construction of the meaning and effect of the ICRA amendment. *Amicus* brief at 8, 11.

Whether Federal District Courts Have Jurisdiction to Hear Habeas Corpus Petition Filed by Aliens Captured Abroad and Now Detained at Guantánamo Bay Naval Base?

NACDL joined a consortium of organizations that filed a joint *amicus* brief in *Rasul, et al. v. Bush, et al.*, No. 03-334, which was written by Jonathan M. Freiman of Wiggin & Dana, LLP, of New Haven, Connecticut. According the U.S. Department of Defense, the Guantánamo Bay prisoners are "battlefield" detainees who were engaged in combat when arrested. In addition to claiming non-combatancy, the petitioners' claim that some of the detainees were apprehended far from battlefields. The *amicus* brief asserts that the "Executive appears to intend to use Guantánamo as a long-term offshore detention center free from judicial review. Two years after the first detainees arrived, the center has begun to show signs of permanence" in that permanent steel and concrete buildings capable of holing more than 1000 detainees have been or are under construction. The petitioner's filed petitions under 28 U.S.C. § 2241(c) which provides that habeas corpus extends to any person "in custody in violation of the Constitution or laws or treaties of the United States." They claim that their custody violates the Due Process Clause of the Fifth Amendment and a treaty ratified by the United States. The court of appeals held that extraterritorial aliens never have any constitutional rights and, therefore, there could be no jurisdiction to hear the detainees' claims. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The Supreme Court will decide whether the United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the U.S. Naval Base in Guantánamo Bay, Cuba.

Whether an Inadmissible Alien May be Detained Indefinitely When Government is Unable to Deport Him?

In *Benitez v. Mata*, No. 03-7434, NACDL joined with 14 other organizations in filing an *amicus* brief arguing that the constitutional concerns raised by the indefinite detention of admitted aliens convicted of aggravated felonies recognized by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), apply equally to nonadmitted aliens, such as the Mariel Cubans and others. In *Zadvydas*, the Supreme Court held that 8 U.S.C. § 1231(a)(6) does not authorize the indefinite detention of former legal permanent residents who were admitted to the United States but subsequently ordered removed.

The petitioner in *Benitez v. Mata* is a citizen of Cuba, who, in 1980, was stopped at the border when he attempted entry into the United States from the port of Mariel, Cuba. He was subsequently paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA").

In 1983, the petitioner was convicted in Florida of theft and sentenced to three years' probation. He later submitted an application to become a lawful permanent resident, but his application was denied because of his theft conviction. Then, in 1993, the petitioner pled guilty in state court in Florida to armed burglary, armed robbery, firearm offenses, and aggravated battery. He was sentenced to 20 years' imprisonment. The INS thereafter revoked his immigration parole and, in 1994, he was found excludable and deportable to Cuba because of his criminal convictions in Florida. On October 11, 2001, the petitioner was released into INS custody and his status was reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody. Although the panel determined that he was releaseable to a half-way house, when it was learned that he was planning a jail escape, the panel withdrew its recommendation.

On January 11, 2002, the petitioner filed § 2241 petition challenging his indefinite detention by the INS asserting that his indefinite detention was unconstitutional in light of the Supreme Court's decision in *Zadvydas*. The Eleventh Circuit affirmed the district court's ruling that the petitioner could be detained until removal to Cuba is possible. *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003). The appeals court held that, because the petitioner was a "non-admitted parolee," *Zadvydas* was not applicable.

The *amicus* brief was authored by Joseph Tringali and Mariya Treisman of Simpson, Thacher & Bartlett, LLP, in New York, and James Silk, Mary Hahn and Allard Lowenstein of the International Human Rights Clinic at Yale Law School. The brief points out that the indefinite detention policy affects more immigrants and asylum seekers than just the Mariel Cubans who cannot be returned to their countries of origin. The brief profiles a number of detainees, many of whom have never committed a crime and others who have been detained by the INS for periods far longer than the criminal sentences they served. Their stories of the harsh conditions of their indefinite detention are horrible and heartbreaking, and they demonstrate how indefinite detention results in extreme mental, physical and emotional hardship to the detainees as well as their families and communities.

About the Author

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