

LEARNING THE LEGAL ROPES WITH THE DEATH PENALTY

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THE day I joined Drinker Biddle & Reath LLP, April 6, 1998, I was asked if I wanted to be part of a team representing Tommy Lee Waldrip, who was sitting on Death Row in Jackson, Georgia. I enthusiastically said yes. Little did I realize that within months I would be the “senior” associate on this matter and the lead lawyer in Tommy’s fight for a new trial.¹ It was even less apparent that now, more than five years later, I would be working ever more enthusiastically than the day I started. But that is the way it turned out. Much to my surprise, I have been Tommy’s primary lawyer almost from the beginning.

I have grown up as a lawyer with Tommy’s case and, in the process, I have led a double life. In one, I am a general litigator specializing in patent, copyright, and complex litigation. These cases have several common characteristics. I represent a variety of paying clients with teams of other litigators. For these clients, we win and we lose. But, generally we settle before the end. I like to win, and I hate to lose. The clients generally provide us with the resources to advocate zealously on their behalf. While my opponents frustrate me, they usually play fair, and I have felt generally that no matter how difficult the venue or forum, our client’s cases would be heard on the merits.

In my other life, I am a habeas corpus specialist by virtue of true on-the-job training. I represent one client *pro bono* with an ever-shifting team of litigators. These cases also have several common characteristics, but are otherwise distinct from those encountered in my other life. Here too, we may win and we may lose.

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1. The citations to the *Waldrip* case are as follows. Waldrip’s original competency hearing and criminal trial is at *State v. Waldrip*, No. 91-CR-300 C (Dawson County Super. Ct. Oct. 26, 1994) [hereinafter *Waldrip I*]. Waldrip was convicted on October 26, 1994 and sentenced to death on October 28, 1994. The Georgia Supreme Court affirmed the trial court’s pre-trial orders denying Tommy’s motion to suppress the discovery of the victim’s body on June 27, 1994. See *Livingston v. State*, 444 S.E.2d 748 (Ga. 1994) [hereinafter *Waldrip II*]. The Georgia Supreme Court affirmed Waldrip’s conviction and sentence on March 10, 1997. *Waldrip v. State*, 482 S.E.2d 299 (Ga. 1997) [hereinafter *Waldrip III*]. The United States Supreme Court denied certiorari. *Waldrip v. Georgia*, 522 U.S. 917 (1997) [hereinafter *Waldrip IV*]. With the help of the author’s firm, Waldrip filed his original writ of habeas corpus on March 17, 1998 and amended his petition on June 28, 1999, both under the caption *Waldrip v. Turpin*, No. 98-V-139 (Butts County Super. Ct. Mar. 17, 1998) [hereinafter *Waldrip V*]. On interlocutory appeal from *Waldrip V*, the Georgia Supreme Court reversed the habeas court and found that Waldrip had not made a blanket waiver of his attorney-client privilege because he claimed ineffective assistance of counsel and he had a right to a protective order. *Waldrip v. Head*, 532 S.E.2d 380 (Ga. 2000) [hereinafter *Waldrip VI*].

But, this case will never settle. In Tommy's case, I win much less often and everything—each mistake, each success, and each decision—lingers in my psyche much longer. Tommy has no resources, and Georgia provides no money for habeas counsel, much less the talented investigators and experts it takes to prepare and present a habeas case. I am thankful to report, however, that Drinker Biddle & Reath has been more than generous to this case. It has allowed me, and several other litigators, to work the necessary hours to represent Tommy. Moreover, we have benefitted from the generosity and friendship of people throughout the death penalty community, including the Georgia Resource Center and the Federal Defenders in Atlanta and Philadelphia.² Finally, I have never felt that any case I have worked on was factually or legally stronger than Tommy's and, paradoxically, that my opponent, in order to succeed, had to do less work.

How I Started

It was through my work as a summer associate that I learned about Drinker Biddle & Reath's commitment to *pro bono* work—the firm has a very long history of doing work for the public good. The firm represented Communists during the McCarthy era and the Schempp family in the school prayer cases.³ In addition to these high profile cases, it represented Baby Neal in the case brought to challenge the Philadelphia foster care system in which the adequacy of funding and care for children placed in the system was contested.⁴ And, in fact, the firm has represented five death row inmates at various stages of their appeals, including the Bo Cochran case in Alabama, where the firm's Lawrence J. Fox, Kenneth Frazier, and Seamus Duffy secured Mr. Cochran a new trial and ultimately an acquittal of the capital crime.⁵ Although I was aware of this commitment, I came to Drinker Biddle & Reath with no interest in doing death penalty work. In fact, I entered law school to become a prosecutor.

Being more than slightly naive, however, I agreed to work on Tommy's case as soon as I started at Drinker. After I received my offer to join, Luke, a good friend from law school already working at Drinker for two years, asked me if I wanted to help. He explained that he and Larry were working on the case and that I would have the opportunity to take on responsibility almost immediately.

I did not know how right he was. Luke left Drinker in August, shortly after I joined. Ever since, the laboring oar has been in my hands. In fact, although numerous other lawyers and associates have helped Larry and me over the last five and a half years, I have been the only lawyer working the case on a day to day basis since 1998. In this time, I have developed as an attorney. Indeed, I do not think I could have learned complex litigation so quickly doing anything else.⁶

2. It would be wrong to write about the representation of Tommy without thanking Laura Hill Patton, Rebecca Cohen, Beth Wells, and Christina Swarms, all of whom have provided exceptional help and guidance to me.

3. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

4. *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994).

5. *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995).

6. This development is partly attributable to Drinker Biddle's decision to allow hours spent on Tommy's behalf to be treated the same as hours spent for any billable client.

This, however, only scratches the surface. Before you can understand exactly what Tommy's case has meant to me, both personally and as a lawyer, you need to understand a little about the matter. When we started working for Tommy, we were told that this was not a "sexy" death penalty case—it was your standard, average capital habeas case (if those words even make any sense under these circumstances).

The murder for which Tommy had been convicted was grisly and tragic. He is on Death Row for allegedly helping his son and retarded brother-in-law kill a popular young man in rural Georgia. The victim, in fact, was the star witness in the armed-robbery trial of Tommy's son.⁷ During the trial, Tommy and his former counsel argued that Tommy was innocent. The fact remained, however, that Tommy had confessed to the murder not once, but three times.

Moreover, even though Tommy was suffering from some form of mental illness, he had been found competent to stand trial after a hearing before a jury. In addition, race did not even seem to be a factor. Tommy was white, the victim was white, the judge and district attorney were white, and the jury was white. In light of these facts, for someone who did not morally oppose the death penalty, Tommy's case did not scream out as an injustice. But these few sentences are only a "sound bite" of Tommy's trial and our case. It is the prosecution's story (and a successful one, given that Tommy is sitting on Death Row). It is only a surface snapshot, it is not the truth!

As a result of the apparent hurdles explained above, we undertook Tommy's case with great determination but little hope. To make things worse, we had only a limited understanding of state habeas procedure, mainly because we had never litigated a Georgia case before. In Georgia, as elsewhere, state habeas is a civil remedy⁸ in which the petitioner is granted the right to undertake discovery⁹ and present evidence at a hearing before the judge assigned to the case.¹⁰ Our approach, therefore, was just like any complex civil litigation, with two minor exceptions. First, we understood that we could not waive any potentially meritorious argument, no matter how slim its chance of success. Second, we would need to consider not only our current audience (the trial judge assigned to Tommy's case), but all the other potential audiences, including the Georgia Supreme Court and the Federal courts.

Taking the First Steps for Tommy

With this in mind, as in normal civil litigation, we began with discovery. We talked to our client. We read the voluminous record.¹¹ We spoke to the three former counsel and reviewed their files.¹² And then we began probing the prosecution and

7. The Georgia Supreme Court, on Tommy's direct appeal, adopted the prosecution's facts of the case. See *Waldrip III*, 482 S.E.2d at 299.

8. *Fullwood v. Sivley*, 517 S.E.2d 511, 515 (Ga. 1999).

9. GA. CODE ANN. § 9-14-48(a) (Supp. 2003).

10. GA. CODE ANN. § 9-14-47 (Supp. 2003).

11. It exceeds 40 volumes and more than 30,000 pages, not including the co-defendant's trials and all of the appeals.

12. These files consisted of more than 6,000 pages.

their files. It was only after we started doing all of this that we began, slowly, to learn the truth about Tommy, the murder, and his prosecution.

In addition to the unsympathetic facts and the demands of discovery, there is the issue of Tommy. Tommy is not an easy client. Tommy has been in jail for more than a decade and on Death Row since 1994. He is emotionally disturbed and mentally ill—not an uncommon trait among those convicted of capital crimes. One thing that quickly became apparent—and has been a useful lesson in all my other cases—is that you cannot learn everything about your client from your client. Obviously, Tommy is a particularly stark example, given his clear mental illness. But even without his impairments, Tommy is neither impartial, nor informed, nor sophisticated enough to understand what the most important facts are for the case or what their effect would be on the litigation. Nor does it help that Tommy's mental illness makes him instinctively distrustful of lawyers. Winning his trust was a slow and unending process. Only by performing our own independent due diligence, by investigating his background, and by obtaining multiple sources of information were we able to formulate an accurate picture of Tommy. This habit of performing due diligence on every aspect of the case (whether the opposition's or my client's) was one of the first things I learned as a lawyer. I have incorporated it into both of my "lives."

You Have to Read All of the Fine Print

As mentioned earlier, the record of Tommy's underlying trial is massive, but, as it turns out, every part of it matters. If there was a part of the transcript that I had skimmed over or had only read once, that part turned out to be crucial for a motion, deposition, or claim. Nor could I guess what was important, thus preventing me from reading only select bits. More importantly, without understanding the whole picture and deeply understanding the factual foundation, I could not understand the effect of an omission by Tommy's former counsel or the willful misconduct of the prosecution. I had to be thorough.

Adherence to this mantra produced one of my favorite moments in the case—and has influenced every other case on which I have ever worked. It occurred in our discovery of the files from the district attorney's office that had prosecuted Tommy. Now, as I said, Tommy had confessed three times to being involved in the death of the victim. Each confession was mutually inconsistent. Even more troubling, each confession was inconsistent with the evidence at the crime scene. The prosecution had no physical evidence that tied Tommy to the crime scene or any direct evidence, other than the confessions, that linked him to the murder. Moreover, Tommy had every reason to provide a false confession, in addition to being mentally ill, his son was the prime suspect. It is thus no surprise that the admissibility of the confessions was one of the fiercest battles fought at the underlying trial. In the end, however, despite finding numerous violations of *Miranda*¹³ in contacts between law enforcement and Tommy before he made his first confession, the court admitted the

13. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the presumption may not use statements obtained while questioning a defendant unless procedural safeguards secured the privilege against self-incrimination).

three confessions. Finally, because the court believed the state's witnesses that Tommy had never requested an attorney, the court held that Tommy's right to counsel had not been violated.¹⁴

In spite of these findings, we pressed on, making an Open Records Act¹⁵ request (the Georgia equivalent of a FOIA request) to the district attorney's office in the summer of 1998. This is where I began to learn the importance of persistence and follow-up, because the District Attorney, even though he was clearly required to cooperate, ignored our request. The DA's hope, I guess, was that we would get frustrated and quit. It took three months, and letters on a weekly, and then almost a daily, basis, but eventually the DA's office let us have access to the requested information. Even then, it did not let us see everything.

We then took the DA's office's deposition, in part to gain further access to the documents. The documents we were given access to were "stored" in the basement of an old courthouse. Boxes and boxes of files and evidence were strewn across the basement. Boxes and file folders were empty, papers were damp and smeared from floods. Clearly, the DA's office was not giving us access to everything. As it turned out, the DA's office refused to produce more than 4000 pages, claiming privilege and work product.

We then moved to compel access to those withheld documents, but the court denied our motion, claiming that it did not have jurisdiction to review the DA's files or compel it to produce documents. Following this ruling, we went back to the judge who presided over the underlying criminal trial with a similar request. This move paid off. More than two years after we first requested the documents, a court finally held that the DA's office had waived its protections, compelling it to produce the documents.¹⁶

Subsequently, the DA's office produced more than 10,000 pages. In the end, we reviewed every one. Although extremely taxing, it was worth it. In one sentence, on one page, in the primary memo summarizing the investigation written by the Assistant District Attorney in charge of the case, I found the following:

Tommy was initially interviewed by [the Sheriff], however, he asked for an attorney and the interview was terminated.

Nothing demonstrated the importance of thoroughness and perseverance more than those eighteen words. They changed the case. Not only are those words an admission of classic *Edwards* violations,¹⁷ not only did the prosecution fail to disclose this document and this information to the defense in violation of *Brady*,¹⁸

14. The three witnesses included an assistant district attorney, the sheriff, and a special agent of the Georgia Bureau of Investigations.

15. GA. CODE ANN. §§ 50-18-70 to -77 (2003).

16. In actuality, the trial court compelled the DA's office to produce the files to the Court and then granted us access to the files.

17. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once an accused has invoked his right to counsel, the accused cannot be subject to further interrogation until counsel has been made available to him or the accused initiates further communications with authorities).

18. *Brady v. United States*, 397 U.S. 742, 755 (1970) (requiring prosecutors to disclose exculpatory evidence to the defense).

but three law enforcement agents proffered false testimony to the Court *and* the DA's office knew about it, a classic violation of *Napue v. Illinois*.¹⁹ If I had not continued to push the DA for every document, and if I had not read every page, I would never have found this admission. It is my hope this discovery will save Tommy's life—since the law and these uncovered, uncontradicted facts demand that it does.

Our Journey to the Georgia Supreme Court

Another one of my favorite moments representing Tommy was, not surprisingly, one of our clearest successes and one that started out as a disaster. In the summer of 1999, the Warden, with the Attorney General's office as his lawyer, began taking discovery—nearly a year after the discovery period had started. We learned this one day in late July when we received in the mail the Attorney General's motion to compel all of Tommy's counsel's files. Accompanying this motion was a request to the court to hold that Tommy had waived all of his protections under the attorney-client privilege and work-product doctrines. Now, those of us who conduct discovery outside of habeas would realize that this was very odd because the Attorney General had not subpoenaed the records, negotiated with counsel about waiver of privilege, or even discussed a protective order. The first official pleading from the Attorney General was a motion to compel. We immediately started drafting a response.

Before we had a chance even to start our work, we received an order from the court the next day granting the motion to compel and holding that Tommy had waived all his attorney-client privilege and work product protections. The *next* day! In addition to the remarkable speed with which the court acted, the order did not limit the waiver to the former counsel's privilege and work product. Instead, the order was so broadly written that it could be read to include our work for Tommy as well. Thus, all of Tommy's privileges and protections had been forfeited without any chance to respond. We rushed a letter to the judge, asking him to vacate the order and give us a chance to respond.

The court did vacate the order and we quickly responded, explaining that while Tommy had put the advice of his counsel at issue by claiming ineffective assistance of counsel, this acted as a limited waiver. More importantly, we asserted, it certainly did not act to waive his privilege as to our advice. Moreover, we asked for an order protecting Tommy's files from disclosure to third parties and protecting their confidentiality. While the court agreed that Tommy's privilege and work product protections with Drinker Biddle had not been waived, the court found that Tommy's claim of ineffective assistance of counsel had acted as an absolute waiver as to his former counsel.

While the right legal answer was that a claim of ineffective assistance of counsel should act only as a limited waiver and that Tommy had a right to a protective order, the habeas court found that the requested order to protect Tommy's privacy was unripe for adjudication. We knew the habeas court was predisposed to such a

19. 360 U.S. 264, 269 (1959) (holding that it is a denial of due process for the state to obtain a conviction through testimony the state knows to be false).

ruling. It had already done so once and it was not a surprise when it merely reinstated, with a minor clarification, its earlier ruling. We had drafted our papers knowing we were likely to lose, but hoping that when we eventually appealed we would have success. We did not know how soon that was going to be, nor how significant that success would be for capital habeas petitioners in the future.

Although the habeas court denied our certificate for interlocutory appeal, we, nonetheless, filed for immediate review to the Georgia Supreme Court.²⁰ We did not think we had much of a chance of the Georgia Supreme Court hearing our case because not only was it discretionary, it was a novel procedural approach to begin with. But, not only did the court take our case, it held oral argument on the jurisdictional issue,²¹ as well as on the privilege and the protective order questions.²²

Each issue before the Georgia Supreme Court was a question of first impression. On June 20, 2000, the Georgia Supreme Court issued its opinion and agreed with us on all three issues: (1) it had jurisdiction; (2) Tommy had made only a limited waiver; and (3) Tommy deserved a protective order.²³ No one thought we would argue before the Georgia Supreme Court on interlocutory appeal, much less win. This was a tremendous success for Tommy, but, importantly, the precedent provides valuable protection for all capital habeas petitioners in Georgia.

I Am Still Learning

As these small vignettes demonstrate, I have learned a great deal, mostly through trial and error, from Tommy's case. These "war stories," however, only scratch the surface of Tommy's case and what it has meant to my development as a lawyer. I have learned complex litigation skills. I have learned the necessity of performing due diligence on every aspect of a case, regardless of the subject matter. I have also learned that no matter how large the record or complicated the facts, one must be thorough and persistent. From the appeal to the Georgia Supreme Court, I learned that you do not always fight the battles you are going to win, but you fight the battles worth fighting, because the success sought may not be achieved until all other appeals are exhausted. Finally, while I have no moral objection to the death penalty, what I have learned over the last few years is that many cases, including Tommy's, are so riddled with inconsistencies, errors, and misconduct that fair trials and correct decisions are far from guaranteed. But, just as the memo we discovered is only one of many examples of clear constitutional violations we unearthed in Tommy's case,²⁴ the lessons I have learned here stretch far beyond these few examples.

Obviously, being a volunteer lawyer for someone on Death Row is rewarding in more important ways than simply becoming a better lawyer. Even though I have learned so much in this case, that is not why I would recommend being a volunteer

20. This court hears directly all appeals on death penalty cases.

21. The jurisdictional question was whether the court could properly take the case.

22. Moreover, it held the oral argument at Georgia State University Law School, in front of the entire law school student body.

23. See *Waldrip VI*, 532 S.E.2d at 383.

24. Our post-hearing briefs requesting relief on more than 43 claims were more than 800 pages long.

lawyer. Tommy's case is important to me and it is not simply what is at stake. I know Tommy. I know his wife Linda. I know his children: Mike, John, and Paul. Depending, in large part, on what I do, Tommy will or will not be executed. That's huge and overwhelming, but it is not everything.

Tommy's case has been with me from the beginning of my legal career. Every other case that I started working on in my first year at Drinker has since been resolved. Until very recently, when we filed our last post-hearing brief and now await the habeas court's decision, I have always had something to do on this case. One of the "joys" of working in a large law firm is that I have meticulously tracked my time over the last five years—I know what I have worked on every working day since I started. After recently reviewing my time, I realized that I have worked harder and spent more hours on Tommy's case than on all of the school work I ever did. This includes my work as an undergraduate, graduate, and law school student combined.

But this still does not explain why I cannot "leave it behind" when I go home. There have been months when I have worked exclusively for other clients on extremely important matters. In these cases, however, when the brief is filed or the hearing finished, I am able to let go and move onto the next task for that client. This is nearly impossible with Tommy.

Tommy is the only reason I wake up in the middle of the night afraid that I have forgotten to do something or afraid that I did not do a good enough job. This is not attributable to the amount of work I do for Tommy. This is not attributable to Tommy's flawed underlying trial or the numerous blatant constitutional violations by the prosecution. It is not even attributable to Tommy's being on Death Row, though that contributes to it. What makes me stay up at night and worry is that, even though I am not morally opposed to the death penalty, I am absolutely convinced that Tommy should not be on Death Row—because he is INNOCENT of any capital crime.

This is what keeps me up and worried. Tommy has received the short-end of the proverbial stick in every stage of his underlying trial. These wrongs have allowed a man actually innocent of capital murder to await his execution. While I would do this work even if Tommy were guilty,²⁵ I feel more responsible for every possible decision and potential mistake, because of Tommy's innocence. Having passion for Tommy and his case and, maybe most importantly, learning to channel that passion, is one of the greatest gifts Tommy's case has given me. Howling at the moon, ranting about injustice in the system, and screaming that Tommy is innocent will not get him off Death Row. Careful, strategic, considered legal work is Tommy's only chance. Learning how to apply the law in, I hope, a skillful way, even when the odds seem stacked against you, is a rewarding lesson itself.

And, even if you did not believe it, and even if you were to think Tommy was guilty, based on all the facts and everything that I know, I doubt that you would not feel the same in representing Tommy. We started this case thinking there was no hope for Tommy. We thought that we would fight the "good fight," consciously aware of the fact that Tommy had no issues and nothing to which he could cling.

25. One thing you quickly learn doing capital work is that from both a constitutional and moral perspective, not every murderer deserves the death penalty.

It only took a little bit of digging (about three years worth), but we could not have been more wrong. Tommy's underlying criminal trial cannot possibly support his incarceration and sentence of death.

While being a volunteer counsel can be exhausting, nerve-wracking, and frustrating, above all it is rewarding. I am sure I am a better lawyer having represented Tommy with the full resources of Drinker Biddle & Reath behind me. When I started, not knowing what I was getting into, the opportunity to be involved in a large complex litigation was enticing. I envisioned learning as much as possible as quickly as possible. It was all important to me to become involved and obtain substantial responsibility as soon as possible. My wishes were granted in the extreme, but it no longer drives me and, in itself, is no longer important.

I became a volunteer lawyer to become a better lawyer, but what is actually important is overturning the gross injustices in his case. Because we took on this representation, we should succeed—and nothing would make me happier.