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Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court

Gerald F. Uelmen*

I. INTRODUCTION

Much has been written about the unique perspectives that Justice Thurgood Marshall brought to the United States Supreme Court and the influence of his life experiences on conference room deliberations.¹ One perspective is frequently overlooked in the eulogies, however, reflecting that it has all but disappeared from the United States Supreme Court today. It is the perspective of a criminal defense lawyer — the gut-wrenching experience of having the life or liberty of a fellow human being riding on one's tactical choices. Thurgood Marshall had been there, so he spoke with authority when the Court addressed the nuances of due process and criminal law. As counsel for the NAACP Legal Defense Fund, Marshall represented dozens of criminal defendants in both trials and appeals in courtrooms across the United States.²

Marshall's experience as a criminal defense lawyer was most apparent in death penalty cases and strongly influenced the course of his unflagging opposition to the death penalty.³ That opposition was rooted in his belief that the death penalty was administered in an arbitrary and discriminatory fashion even after the decision in *Gregg v. Georgia*.⁴

* Dean, Santa Clara University School of Law. The author would like to acknowledge the assistance of Dan Nishigaya, Santa Clara University School of Law 1995, in the research and preparation of this article.

1. See Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1222-23 (1992); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 726-28 (1992); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1992).

2. See John P. MacKenzie, *Thurgood Marshall*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978 3063, 3066-67 (Leon Friedman & Fred L. Israel eds., 1980).

3. See Jordan Steiker, *The Long Road Up From Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1163 (1993). Professor Steiker served as law clerk to Justice Marshall during the 1989 term. *Id.* at 1131.

4. 428 U.S. 153, 190-95 (1976) (holding constitutional "guided discretion" systems of capital sentencing).

Justice Marshall appreciated the extent to which arbitrariness and discrimination were products of the states' failures to provide adequate representation for those on trial for their lives.⁵ The cases in which he excoriated the failures and lapses of appointed counsel in death cases have a special ring of authenticity, because they came from a lawyer who had himself assumed the responsibility of assigned counsel for death-row inmates.

II. THE CASES THURGOOD MARSHALL LOST

Appointed to the Supreme Court in 1967, Justice Marshall's senate confirmation hearings were held soon after the Court announced its decision in *Miranda v. Arizona*.⁶ Marshall had briefed that case as Solicitor General.⁷ Senator Sam Ervin, Jr. protested that the Supreme Court was "amending the Constitution" by excluding voluntary confessions.⁸ Marshall replied: "I tried a case in Oklahoma where the man 'voluntarily' confessed after he was beaten up for six days. He 'voluntarily' confessed."⁹

The case Marshall referred to was *Lyons v. Oklahoma*,¹⁰ one of the few he lost in his thirty-two appearances to argue cases before the United States Supreme Court. Lyons was a young African American man accused of murdering a family of three and burning down their house to conceal the crime.¹¹ He confessed after eleven days in custody.¹² Evidence of physical brutality was disputed, but there was no dispute that the police elicited an oral confession after placing a pan of the victims' bones in Lyons's lap.¹³ He then was taken to the state prison, where the warden obtained Lyons's signature on a written confession.¹⁴ The prosecution did not offer the oral confession, and the United States Supreme Court upheld the admission of the written confession as

5. See Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 2-3 (1986).

6. 384 U.S. 436, 444-45 (1966) (holding that the prosecution may not use statements obtained during interrogation or investigation unless it demonstrates the use of procedural safeguards that comport with the Fifth Amendment's privilege against self-incrimination).

7. MacKenzie, *supra* note 2, at 3084-87.

8. *Id.* at 3087. Senator Ervin, along with many southern senators, voted against Thurgood Marshall's confirmation. *Id.*

9. *Id.*

10. 322 U.S. 596 (1944).

11. *Id.* at 598.

12. *Id.*

13. *Id.* at 599-600.

14. *Id.* at 600.

“voluntary” by a 6-3 vote.¹⁵ Dissenting Justice Frank Murphy argued: “To conclude that the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of twelve hours is to close one’s eyes to the realities of human nature.”¹⁶ *Lyons* certainly was not the last case in which the United States Supreme Court closed its eyes to the realities of human nature,¹⁷ but Thurgood Marshall certainly made a valiant effort in his twenty-four years on the Court to keep those eyes open. *Lyons*, incidentally, was not a total loss for Marshall. He convinced the jury to impose a life sentence rather than the death penalty.¹⁸

Not so fortunate was the nineteen-year-old African American that Thurgood Marshall represented in *Taylor v. Alabama*.¹⁹ Charged with the rape of a fourteen-year-old white girl, Samuel Taylor was represented by local appointed counsel who did not object to the admission of a confession made by Taylor at 3:00 a.m. to a police officer, a second admission made to the town’s mayor, and a third confession made to the assistant solicitor to “get it off his chest.”²⁰ After Taylor was sentenced to death, the same lawyer presented an appeal to the Alabama Supreme Court, where the death sentence promptly was affirmed.²¹ Thurgood Marshall sought to challenge the voluntariness of the confession on a state writ of *coram nobis* and took the case to the United State Supreme Court when the state courts refused permission even to file the writ.²² Marshall lost the case by a 5-3 decision holding that states are not required to hear such claims,²³ and his client was executed.

In another case, Marshall was trial counsel for an African American man accused of raping a white woman.²⁴ The prosecution offered a life sentence in exchange for a guilty plea.²⁵ Marshall conveyed the offer to his client who exclaimed: “Plead guilty to what? Raping that woman? You gotta be kidding. I won’t do it.”²⁶ Marshall later recounted: “That’s when I knew I had an innocent man.”²⁷

15. *Id.* at 604-05.

16. *Id.* at 606 (Murphy, J., dissenting).

17. See Gerald F. Uelman, *Amendment IV: When Supreme Court Justices Enlist in a War*, *THE CHAMPION*, Apr. 1991, at 14, 16.

18. See *Lyons*, 322 U.S. at 597.

19. 335 U.S. 252 (1948).

20. *Taylor v. State*, 30 So. 2d 256, 259-60 (Ala. 1947).

21. See *id.* at 261.

22. *Taylor v. Alabama*, 335 U.S. 252, 254-55 (1948).

23. *Id.* at 271-72.

24. O’Connor, *supra* note 1, at 1218.

25. *Id.*

26. *Id.*

27. *Id.*

Marshall told that story to his fellow justices, concluding: "The guy was found guilty and sentenced to death. But he never raped that woman."²⁸ He paused, flicking his hand, and added: "Oh well, he was just a Negro."²⁹ In a tribute to Justice Marshall after his retirement, Justice Sandra Day O'Connor reflected that stories like these "would, by and by, perhaps change the way I see the world."³⁰

III. CONSTITUTIONALITY OF THE DEATH PENALTY

The issue of the constitutionality of the death penalty came before the United States Supreme Court five years after Thurgood Marshall joined the Court. Surprisingly, he did not base his opposition on the arbitrariness and discrimination in its application he had seen as a lawyer. Instead, Justice Marshall's concurring opinion in *Furman v. Georgia*³¹ focused on two debatable propositions. First, he rejected retribution as a legitimate purpose of punishment under the Eighth Amendment, concluding that death was an excessive punishment because it served no legitimate governmental purpose.³² Second, he relied upon then-declining levels of public support for the death penalty to assert that a properly informed public would find capital punishment morally unacceptable.³³ Four years later in *Gregg v. Georgia*, the Court sustained "guided discretion" death penalty laws on the premises that the states could minimize arbitrariness and fairly and uniformly apply the punishment.³⁴ Justice Marshall's dissent did not challenge these questionable premises.³⁵ Instead, he returned to his *Furman* theme that retribution is not a legitimate governmental objective, and capital punishment is little more than "vestigial savagery."³⁶

Justice Marshall presented his most persuasive attack on the death penalty in *Godfrey v. Georgia*.³⁷ His concurring opinion drew on the

28. *Id.*

29. *Id.*

30. *Id.* at 1220.

31. 408 U.S. 238, 240 (1972) (holding that standardless jury discretion in capital cases was unconstitutional under the Eighth Amendment's prohibition of "cruel and unusual punishments").

32. *Id.* at 342-45 (Marshall, J., concurring).

33. *Id.* at 360-69 (Marshall, J., concurring); see also Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 Wis. L. Rev. 171, 177-80 (1976).

34. 428 U.S. 153, 190-95 (1976).

35. See *id.* at 231 (Marshall, J., dissenting).

36. *Id.* at 236-38 (Marshall, J., dissenting).

37. 446 U.S. 420, 433 (1980) (Marshall, J., concurring).

Court's experience since *Gregg*, decided four years earlier,³⁸ and on his own experience as a defense lawyer. In his concurring opinion, Marshall suggested "why the enterprise on which the Court embarked in *Gregg v. Georgia* . . . increasingly appears to be doomed to failure."³⁹

Justice Marshall found compelling evidence that the "disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences."⁴⁰ He pointedly reminded Justices Stewart and White that the capriciousness and attenuation in the administration of the death penalty that led them to concur in *Furman* still were present.⁴¹ Concluding that eliminating arbitrariness may be a task that no criminal justice system ever can achieve, he stated:

I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it - and the death penalty - must be abandoned altogether.⁴²

IV. STANDARDS FOR COMPETENCY OF COUNSEL

The manifestation of death penalty arbitrariness that drew Justice Marshall's sustained challenge during his final eight years on the Court was the frequent incompetence of trial counsel appointed to defend death cases.⁴³ Marshall must have been particularly disheartened to see so little improvement in the quality of appointed counsel from his personal experiences in the 1930s and 1940s through the 1980s Supreme Court cases. Justice Marshall assigned the responsibility for that lack of improvement to the Court itself.⁴⁴ The Court's failure to articulate clear standards of competence to be applied in capital cases created no impetus for improvement. This theme resounded in Justice Marshall's telling dissent in *Strickland v. Washington*:⁴⁵

38. *Gregg*, 428 U.S. at 153.

39. *Godfrey*, 446 U.S. at 434 (Marshall, J., concurring).

40. *Id.* at 439 (Marshall, J., concurring).

41. *Id.* at 438-40 (Marshall, J., concurring); cf. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2525 (1992) (Blackmun, J., concurring) (expressing "ever-growing skepticism" that the death penalty "really can be imposed fairly and in accordance with the requirements of the Eighth Amendment").

42. *Godfrey*, 446 U.S. at 442 (Marshall, J., concurring).

43. See *infra* note 46.

44. See *Strickland v. Washington*, 466 U.S. 668, 706 (1984) (Marshall, J., dissenting).

45. *Id.*

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." . . . The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing procedures.⁴⁶

In many cases coming before the Supreme Court on petitions for certiorari in the wake of *Strickland*, Justice Marshall found significant evidence that defense counsel had performed inadequately in death penalty cases and dissented from the denial of certiorari.⁴⁷ Justice

46. *Id.* at 715-16 (Marshall, J., dissenting).

47. In *Alvord v. Wainright*, 469 U.S. 956, 995 (1984), Marshall dissented from the Court's denial of certiorari specifically because he believed that "the lower court decision seriously misconstrues the constitutional role of a criminal defense lawyer." *Id.* at 957 (Marshall, J., dissenting). Alvord had a long history of mental illness and was convicted of three murders for which he received the death sentence in Florida. *Id.* Alvord's counsel, a part-time public defender, conducted absolutely no independent investigation into Alvord's history of mental illness and the possibility of raising insanity as a defense. *Id.* at 957-58. Marshall argued that counsel has "a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense." *Id.* at 959. This duty, according to Marshall, is "the essence of effective assistance of counsel," *id.* at 961, and represents "defense counsel's vital function as an advisor." *Id.* at 959.

Marshall further expanded on defense counsel's duties in *Maxwell v. Florida*, 479 U.S. 972, 972 (1986). After noting that the right to effective assistance of counsel is "[a]n essential element of our society's protection of citizens accused of crime," *id.* at 975 (Marshall, J., dissenting), Marshall asserted:

Counsel's duty to maintain . . . trust and confidence extends beyond the trial itself. Though he may not continue to represent the defendant following [the] conviction and the disposition of post-trial motions, he must nevertheless cooperate with defendant's attempts to challenge the conviction or sentence, especially if he possesses unique information about a claim the defendant seeks to raise.

Id. at 975-76. Consequently, Marshall would have granted certiorari in *Maxwell*, *id.* at 972, where "petitioner's trial counsel refused habeas counsel's informal request to produce" pertinent files, and time constraints rendered it impossible to subpoena the files prior to filing petitioner's motion for habeas relief. *Id.* at 973.

In *Dufour v. Mississippi*, 479 U.S. 891, 891 (1986), Justice Marshall continued to criticize the two-part *Strickland* standard for evaluating claims of ineffective assistance of counsel. *Id.* at 893. The *Strickland* Court held that 1) "defendant must show that counsel's performance was deficient," and 2) "defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Dufour's case provided Marshall with "a graphic demonstration of the untenable

Marshall summed up these concerns in a remarkable address to the Judicial Conference of the Second Circuit in 1985.⁴⁸ Noting the frequency with which appointed trial counsel were ill-equipped to handle capital cases, he suggested the appointment of competent counsel on appeal or for habeas corpus review often came too late:

Counsel on collateral review is boxed in by any mistakes or inadequacies of trial counsel. In these circumstances, entrance at the habeas corpus stage simply cannot guarantee the defendant the opportunity to vindicate his constitutional rights.⁴⁹

These comments reflect the experience of Thurgood Marshall, the criminal defense lawyer who lost *Taylor v. Alabama*.⁵⁰ In decrying the

nature of the prejudice standard announced in *Strickland*.” *Dufour*, 479 U.S. at 893 (Marshall, J., dissenting). Marshall stated that the prejudice prong of *Strickland* “will have the effect of depriving . . . defendants of their constitutional rights solely as a result of their indigence.” *Id.* at 894. In *Dufour*, the prejudice standard was “insurmountable” because “the alleged error of counsel was in failing to seek the appointment of an expert without whose assistance the evidence which would show prejudice cannot be brought to light,” and *Dufour*, being indigent, could not afford to retain the expert either in preparation of trial or upon his application for post-conviction relief. *Id.* at 893.

In another case where the Court denied certiorari based on the prejudice standard, Marshall characteristically rejected that standard, but stated that even under the prejudice standard the petitioner was entitled to relief. *Aldrich v. Wainright*, 479 U.S. 918, 921 (1986) (Marshall, J., dissenting). Defense counsel for *Aldrich* admitted that “he had never been as unprepared to try even a misdemeanor case as he was for petitioner’s capital murder trial.” *Id.* at 920. Working within the language of the *Strickland* majority, Marshall reiterated: “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 922 (quoting *Strickland*, 466 U.S. at 686). For Marshall, cases as “closely balanced” as *Aldrich*’s cannot be relied on when a man’s life is at stake. *Aldrich*, 479 U.S. at 922.

On two occasions, Justice Marshall discussed at length mitigating evidence that defense counsel failed to investigate. Justice Marshall dissented from a denial of certiorari in *Mitchell v. Kemp*, 483 U.S. 1026, 1026 (1987). *Mitchell*’s defense counsel failed to investigate mitigating circumstances, *id.* at 1027 (Marshall, J., dissenting), and “rest[ed] his entire defense . . . on an untried legal theory.” *Id.* at 1029. Although Marshall recognized that attorneys must have latitude to make strategic decisions, he stated: “[A]n attorney’s decision to advance a defense that is wholly unfounded in law, combined with a failure to investigate the merit of accepted and persuasive defenses, cannot be characterized as ‘sound trial strategy.’” *Id.* at 1030.

Similarly, in *Laws v. Armontrout*, 490 U.S. 1040 (1989), Justice Marshall questioned whether an attorney’s failure to investigate mitigating circumstances satisfied even the first prong of *Strickland*. *Id.* at 1042 (Marshall, J., dissenting). Marshall found this failure particularly troubling given that *Laws* was a capital case, “posing the heaviest professional responsibility on counsel.” *Id.*

Finally, in *Bonin v. California*, 494 U.S. 1039 (1990), Marshall dissented from a denial of certiorari because of a potential conflict of interest that violated petitioner’s Sixth Amendment right to adequate assistance of counsel. *Id.* at 1041-42 (Marshall, J., dissenting).

48. Marshall, *supra* note 5, at 1.

49. *Id.* at 4.

50. 335 U.S. 252 (1948). See *supra* text accompanying notes 19-23.

insensitivity of the courts to claims of ineffective assistance of counsel in capital cases, Justice Marshall sought to mobilize the bar to "find resources to establish training and assistance for local attorneys appointed to handle capital cases."⁵¹ While criminal defense attorneys have responded admirably to this charge,⁵² they have received little public support. The Habeas Corpus Reform Act of 1993,⁵³ sponsored by Senator Joseph Biden, may finally change that by mandating state standards for the competence of attorneys appointed to handle the trials and appeals of capital cases and providing the resources needed for implementation of those standards.

VI. CONCLUSION

The life of Thurgood Marshall coincided with an era of incredible change in racial attitudes in America. In 1908, the year Justice Marshall was born, eighty-nine African Americans were lynched in the United States.⁵⁴ Despite the progress of the intervening eighty-five years, racism continues to pervade the administration of the death penalty in America. In 1992, the year of Thurgood Marshall's death, American states, primarily in the South, executed thirty-one convicted criminals.⁵⁵ Nearly forty percent of those executed were African Americans.⁵⁶ Many were singled out for the ultimate penalty because of their poverty, lack of education, or race.⁵⁷ As long as Justice Marshall sat on the Supreme Court, we were given persistent reminders of our failures to achieve justice in our "rush to judgment."⁵⁸

One of the last cases presented to Justice Marshall came before the Court from Ogden, Utah.⁵⁹ The defendant, an African American, was convicted of the particularly gruesome murders of three white robbery victims.⁶⁰ The single African American member of the venire was

51. Marshall, *supra* note 5, at 4.

52. An example is the Death Penalty College, co-sponsored by California Attorneys for Criminal Justice and the California Public Defenders Association. For each of the past two years, the program brought fifty lawyers appointed to defend indigents in death penalty cases to the campus of Santa Clara University for intensive training in litigation of penalty-phase issues.

53. S. 1441, 103d Cong., 1st Sess. (1993).

54. *Foreword*, 6 HARV. BLACKLETTER J. 1, 2 (1989).

55. See statistics in EXECUTION UPDATE (ACLU/Capital Punishment Project, Washington, D.C.; NAACP Legal Defense and Educational Fund, New York, N.Y.), Apr. 15, 1993; *Death Row, USA "Snapshot,"* EXECUTION UPDATE (ACLU/Capital Punishment Project, Washington, D.C.; NAACP Legal Defense and Educational Fund, New York, N.Y.), Apr. 15, 1993.

56. EXECUTION UPDATE (ACLU/Capital Punishment Project, Washington, D.C.; NAACP Legal Defense and Educational Fund, New York, N.Y.), Apr. 15, 1993.

57. See HELEN PREJEAN, C.S.J., DEAD MAN WALKING 47-51 (1993).

58. Marshall, *supra* note 5, at 4.

59. *Andrews v. Shulsen*, 485 U.S. 919 (1988).

60. *Id.* at 920 (Marshall, J., dissenting).

excluded, and an all-white jury was empaneled.⁶¹ In the midst of the trial, while the jury was eating lunch, a juror handed the bailiff a drawing on a paper napkin.⁶² The drawing depicted a man hanging from the gallows, below which the words "Hang the Niggers" were scrawled.⁶³ Without conducting an evidentiary hearing to ascertain the source of the drawing, the number of jurors who had seen it, or the effect it might have had on the jurors, the judge simply instructed the jury to "ignore communications from foolish people."⁶⁴ The federal district court denied the defendant's petition for a writ of habeas corpus,⁶⁵ the Court of Appeals for the Tenth Circuit affirmed the denial,⁶⁶ and the United States Supreme Court denied a petition for certiorari.⁶⁷ In dissenting, Justice Marshall expressed outrage, asserting that "the Constitution, not to mention common decency," required at least an evidentiary hearing:

It is conscience shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all.⁶⁸

This sense of outrage was the product of Justice Marshall's unique background. Obviously, his background as a criminal defense lawyer was only part of the personal experience Thurgood Marshall brought to his role as a judge:

Justice Marshall was not only the first minority justice, he was also a non-Establishment Justice. He was not an insider; his background was not one of advantage, privilege or wealth. What is fair and just in any given situation depends on one's perspective, and Justice Marshall's perspective was different from that of his colleagues.⁶⁹

Particularly in criminal cases, however, and especially in death penalty cases, Justice Marshall's experience as a criminal defense attorney enabled him to keep his eyes open "to the realities of human nature."⁷⁰

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. 600 F. Supp. 408 (D. Utah 1984).

66. 802 F.2d 1256 (10th Cir. 1986).

67. *Andrews*, 485 U.S. at 919.

68. *Id.* at 921 (Marshall, J., dissenting).

69. Honorable Theodore McMillian, *Reflections Upon the Retirement of Justice Marshall*, 34 *How. L.J.* 3, 4 (1991).

70. *See Lyons v. Oklahoma*, 322 U.S. 596, 606 (1944) (Murphy, J., dissenting).

