Professor Bernard E. Harcourt Asks U.S. Supreme Court to Review Arbitrariness of Judicial Review in Federal Habeas Corpus Cases

Columbia Law School and Columbia College students unearth deep disparities in federal review of prisoner cases.

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New York, May 13, 2020—Columbia Law School Professor Bernard E. Harcourt is petitioning the U.S. Supreme Court to review the way in which the federal courts decide to hear appeals in prisoners' habeas corpus cases. Harcourt just filed a Reply Brief with the Supreme Court, and the case was distributed to the Justices today for conference on May 28, 2020.

"We're challenging the arbitrariness in how U.S. Courts of Appeal deny any review of habeas corpus appeals," Harcourt stated. "It's become a total lottery, a crapshoot for prisoners."

The challenge arises in the case of Phillip Tomlin, who was convicted of capital murder and spent 27 years on Alabama's death row before being sentenced in 2004 to life imprisonment without parole, for the 1977 murders of Ricky Brune and Chery Moore in Mobile, Alabama. Mr. Tomlin has been challenging his sentence now for over 42 years.

"Mr. Tomlin spent 27 years on Alabama death row for a crime that the state of Alabama now concedes was not even death-eligible," explained Harcourt, who represents Tomlin. "He's now serving life imprisonment without parole under a statute that required his jury to return a mandatory sentence of death. Clearly, that was not the right statute under which to sentence him, and yet the federal appeals court in Atlanta would not even hear his appeal."

The litigation rests on new research from Columbia Law School and Columbia College students that has unearthed deep arbitrariness in the way federal judges decide whether to allow an appeal in prisoners' cases. "Some federal judges on the Eleventh Circuit deny any review in almost 98% of the cases they decide, while other judges grant review in over 25% of their assigned cases," Harcourt noted. "That means prisoners are basically playing Lotto when they file a habeas appeal in federal court. Whether you are even heard on federal appeal has become a roll of the dice."

One study conducted by Julia Udell CC '21 discovered that the Eleventh Circuit grants review at a far lower rate than other circuits—with an 8% grant rate for the Eleventh Circuit that is about half of the 14% grant rate for the First Circuit. Moreover, the study uncovered striking disparities between judges on the same circuit. Some judges grant review in about 10 times more cases than others.

Another study, *Certificates of Appealability as Rubber Stamps* by Luis Angel Valle CLS '21, revealed that a large proportion of the federal judges' opinions denying review are extremely short and provide practically no reasoning for the decision to prohibit an appeal. Of the 258 denials reviewed in that study, 43% were fewer than three paragraphs long.

The studies also discovered deep disparities in the rate of review in capital (58%) versus noncapital (8%) cases in the Eleventh Circuit, despite the fact that the standard of review is the same. Valle's study highlighted, as well, a disturbing drop in the review rate in capital cases in both the Eleventh and Fifth Circuits. "The grant rate in capital cases appears to have decreased sharply in both circuits,

with rates dropping from 41% to 13.33% in the Fifth Circuit and from 93.7% to 58.3% in the Eleventh," the study finds. "Despite the drastic decrease in the Eleventh Circuit, the circuit split identified in [an earlier] study persists."

The studies have also unearthed arbitrariness in the procedures implemented by the different Circuit Courts to consider granting review. The Eleventh Circuit, in Mr. Tomlin's case, did not empanel a three-judge panel at any point in the process, while other Circuit Courts require a three-judge panel on the first application for review, with the Fourth Circuit even emphasizing in its local rules that the use of three-judge panels may be required by the federal rules of appellate procedure, which provide that a single judge "may not dismiss or otherwise determine an appeal or other proceeding."

The litigation is now before the U.S. Supreme Court, where Harcourt today filed a Reply Brief and Reply Appendix. The legal challenge is being conducted under the supervision of Professor Harcourt and Alexis Hoag of Columbia Law School, who is the inaugural Practitioner-in-Residence at the Eric H. Holder Jr. Initiative for Civil and Political Rights, as part of the Social Justice Practicum run by Hoag and Harcourt. Columbia Law School students Naomi Bates CLS '21, Ibrahim Diallo CLS '21, and Ashwini Velchamy CLS '20 conducted legal research and helped write the pleadings. Other Columbia College and Barnard College students, Sonam Jhalani CC '22, Mary LeSeur BC '22, and Ilina Logani CC '22, conducted research under the auspices of the Eric H. Holder Jr. Initiative for Civil and Political Rights.

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Additional Resources:

Docket and Filings in Phillip Tomlin's Case at the Supreme Court

Professor Bernard Harcourt Honored by New York City Bar Association

Jennifer Gonnerman story from *The New Yorker*

Students Play Vital Role in Death Row Case

Law professor gets Phillip Tomlin off death row in legal victory

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