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New York Legal Team Urges U.S. Supreme Court To Grant New Trial for Condemned Florida Man

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BODY:

THE HORRIFIC life of Joe Elton Nixon, briefly referenced last week during a narrow procedural hearing before the U.S. Supreme Court, is at the heart of a capital murder case that Eric M. Freedman predicts will be studied in law schools for years to come.

Mr. Freedman, part of a team of New York attorneys in the cause of winning Mr. Nixon a new trial in Florida, is a professor of constitutional law at Hofstra University School of Law.

The Nixon case, he said, "illustrates all the elements that typify death penalty cases, and the people who wind up getting sentenced to death. Race, lousy counsel -- all the fundamental problems.

"We certainly hope the justices look at it in that context," Mr. Freedman said of Florida v. Nixon, 03-931, in which he is joined by five pro bono lawyers from Coudert Brothers. "The lower courts," he added, "should be persuaded against getting off and killing a guy who's never had his story told."

An immediate question before the high court is whether Mr. Nixon's trial lawyer in July 1985 was rendered ineffective by conceding guilt without the explicit consent of his client. According to court papers, Tallahassee defense attorney Michael Corin took that tack in an unsuccessful effort to win life imprisonment in lieu of death by electrocution.

The now 34-year-old defendant -- a mentally retarded black man who grew up as a victim of poverty, incestual rape, sexual humiliation, forced labor in tobacco fields and near-daily beatings at home, on the job, or in juvenile institutions -- was tried in absentia and sent to Florida's death row for lashing a white woman to a tree with car jumper cables and setting her on fire, leaving her to die in a secluded woods while he pawned her rings. [See sidebar.]

The grisly homicide stunned the people and the press of Leon County, Fla., and dominated the final years of Jonathan Lang, a Manhattan real estate attorney who failed in numerous post-conviction proceedings on Mr. Nixon's behalf.

In December 2002, Mr. Lang was suffering brain metastases associated with lung cancer, a disease he contracted despite never having smoked. But Mr. Lang rallied himself for victory in the Supreme Court of Florida in the matter of Nixon v. Florida, SC01-2486, which vacated Mr. Nixon's conviction and ordered a new trial. Lawyers for the state of Florida appealed to the U.S. Supreme Court. Mr. Lang died at age 51 in March.

For several years in representing Mr. Nixon, however, Mr. Lang was aided by Edwin S. Matthews Jr., of counsel at Coudert, along with Coudert partner Edward H. Tillinghast III and associates Damion K.L. Stodola, Shirin Keen and Annie C. Tsai. In fact, a Coudert office -- cluttered with scores of document boxes but still befitting a senior partner --

has long been maintained for the firm's pro bono commitment to the Nixon case, which was further aided by several classes of summer associates.

Last week, Mr. Tillinghast and Mr. Stodola went to Washington, D.C. Mr. Tillinghast, who heads Coudert's global financial restructuring and insolvency group and who was once a prosecutor in the Suffolk County District Attorney's Office, argued for Mr. Nixon before the U.S. Supreme Court. As a prosecutor, said Mr. Tillinghast, "I would have had Joe Nixon examined by competent psychiatric doctors. That should have been put into the equation from a prosecution side, and from a defense side.

"But the only exam came during a 45-minute lunch break during his trial," he added. "There was a psychologist in the courthouse for something else. He wasn't trained in the criminal context. The judge asked him to talk to Nixon for awhile."

Mr. Stodola, a Canadian who opposes capital punishment, jumped at the chance to assist in the Nixon case, in which he said he has worked "hundreds of hours a year" for nearly three years.

"As a young lawyer working at a large corporate firm, this is a remarkable opportunity, backed up by the dedicated support of partners. It provides soul to a law firm," said Mr. Stodola, 31, a graduate of McGill Faculty of Law in Montreal. "I'm grateful to be able to give voice to my belief that the [death penalty] is just wrong."

On the narrow issue before the Supreme Court, he and Mr. Tillinghast explained, the Nixon case claims violation of the defendant's right to effective counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment. Mr. Nixon's trial lawyer, Mr. Corin, could not be located for comment. Attorneys for the state of Florida declined to comment.

But the U.S. Justice Department filed an amicus brief in support of Mr. Corin and Florida's official determination to execute Mr. Nixon.

"As a number of courts have held," wrote then-Solicitor General Theodore B. Olson in the amicus brief, "when counsel concedes a defendant's guilt as a 'tactical decision, designed to lead the jury towards leniency ... such a 'tactical retreat' is 'deemed to be effective assistance.'" [U.S. v. Tabares, 951 F.2d 405, 409, and U.S. v. Holman, 314 F.3d 837, 840.]

The Justice Department brief noted Mr. Corin's closing remarks at trial. "Corin argued that [Nixon] should be spared a sentence of death because he has 'never been' and 'never will be' an 'intact human being,'" the brief stated. "He ended by stating, 'It's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that.'"

According to court papers, Mr. Corin said Mr. Nixon gave silent consent to the tactic of pleading guilty. But in an early brief on behalf of Mr. Nixon -- a 306-page document filed in 1993 with the Circuit Court for the Second Judicial District of Florida -- Mr. Lang recounted the defendant's objection to such tactic by way of refusing to appear in court under such condition, and his repeated demands for new counsel.

"This was an egregious assault on Mr. Nixon's rights," said Mr. Stodola. "He never affirmatively assented to that [guilty] plea."

Without explicit consent, Mr. Freedman said, a defense lawyer has no right to interject his own wisdom for the wishes of the client. "A trial should give you a high quality outcome, rather than what's happening in the death penalty system," Mr. Freedman added. Contrary to American Bar Association guidelines on capital defense procedure, he said, "As it is now, the trial merely gives us a rough draft, which is then polished through layers of post-conviction review in the hope of eventually achieving what should have been put forward in the first place."

Namely, in the case of Mr. Nixon, the mitigating circumstances of lifelong physical and emotional abuse should have been brought out at trial, said Mr. Freedman, as well as the client's relationship with his older brother, John Nixon. According to Mr. Lang's 1993 brief, John Nixon routinely taunted his younger brother by parading him through the streets in girl's clothing, and telling Joe Elton Nixon's friends that he was regularly raped by an uncle and aunt. John Nixon, a paid informant for the Leon County Sheriff's Department, was the principal prosecution witness against his brother at the 1985 trial.

Joan E. Bertin, Mr. Lang's widow, said her husband headed the civil rights committee of the Association of the Bar of the City of New York when he took on the Nixon case. At the time, she said, the case was "radioactive." For his

years of work in the Nixon matter and other death penalty defense work, Mr. Lang was given posthumous honor in September by the National Coalition to Abolish the Death Penalty.

Of the Nixon case, said Ms. Bertin, an attorney and executive director of the National Coalition Against Censorship, Mr. Lang "became convinced that there was more than met the eye. It took him a long time to get [Mr. Nixon] to come out of his cell. But he built trust over the years.

"Joe was paranoid -- with good reason," she said. "In fairness to [Mr. Corin], he was asked to an incredibly difficult job in an incredibly hostile setting."

Yet now, 19 years after trial, the state of Florida insists that both the prosecution and defense of Mr. Nixon was properly conducted, and that the jury's death sentence is appropriate.

In last week's Supreme Court hearing, justices issued a barrage of skeptical questions about the position advanced by Mr. Nixon's team.

"You said his lawyer acted without consent ... but he said nothing," said Justice Ruth Bader Ginsburg in an exchange with Mr. Tillinghast, according to the Associated Press. "Where a client doesn't say yes and doesn't say no, mustn't a lawyer do what he thinks is best to do?"

Justice Antonin Scalia agreed: "According to the lower courts, [conceding guilt] was a good strategy. I don't know why you want counsel, when a client doesn't answer, to take a course that gets him executed."

Mr. Stodola suggested a lesson in the exchange.

"At this level, you become very divorced from the facts," he said. "The nuances in legal theory is what lawyers have to cling to in order to remain at peace with themselves."

And Mr. Freedman suggested a high court decision on the matter, which he expects to be handed down early next year, is not the most important detail in the ongoing Nixon case.

"If we win in the Supreme Court, there will be a new trial and a real test," he said. With reference to ineffective counsel claims under the Strickland standard, set in 1984 by *Strickland v. Washington*, 466 U.S. 688, Mr. Freedman added, "If we lose, then left on remand is Strickland. Either way, we expect and intend that eventually all of Jon Lang's digging and getting to know the client will come out as the basis of a just outcome."

Mr. Lang never revealed his mortal illness to Mr. Nixon. In a recent letter from jail, Mr. Nixon said of his lawyer, "When Jon died like a part on me inside died also, he was alot more than my attorney we were best friends and family who cherish our time ... I am familyless."

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