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MUNGER TOLLES & OLSON

Overtaking a Death Row Conviction

MUNGER, TOLLES & OLSON PARTNER AND former U.S. Solicitor General Don Verrilli last June won a U.S. Supreme Court victory, overturning the conviction of James McWilliams, an Alabama death row inmate.

McWilliams was convicted of capital murder in 1986 and sentenced to death. Verrilli served as co-counsel with the Southern Center for Human Rights. The team argued that McWilliams had been sentenced to death without the expert mental health assistance required by the Supreme Court's 1985 decision in *Ake v. Oklahoma*.

"In any death penalty case to the Supreme Court, there is a very strong presumption of deference to state court judgments that the death row inmate has to overcome," Verrilli said. "While there was a clearly set right from *Ake*, what the scope of that right is and how it is applied was unclear, so we had the lack of clarity combined with deference to state court judgments."

The Supreme Court's decision to hear the case marked a turning point, Verrilli said. "The court takes only a tiny fraction of the cases presented to it," Verrilli explained. "If they weren't interested in your defendant, they would just not hear it."

In *Ake*, the court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."

In *McWilliams*, Verrilli said "the offer of expertise was a doctor who was an employee of the state, not an expert that's on your side."

On June 19, 2017, in a 5-4 decision, the high court ruled in favor of McWilliams. In the



DON VERRILLI

majority opinion written by Justice Stephen Breyer, the court held that Alabama's mental health assistance fell "dramatically short of what *Ake* requires."

Verrilli said McWilliams' case "has the potential to be quite significant as it reinforces and clarifies the scope of the right that capital defendants have to the experts they need to be able to make their case."

Stephen Bright, Harvey Karp Visiting Lecturer in Law at the Yale Law School, co-counseled the case. "Don [Verrilli] and Michael DeSanctis of the D.C. office and Joshua Meltzer of the San Francisco office of the firm co-counseled the case with me and two other lawyers from the Southern Center for Human Rights," Bright said. "Their insights, analysis and experience were indispensable in writing the briefs, preparing for oral argument, and bringing about the favorable decision."

—RICH ACELLO

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