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Defending the Death Penalty Case: What Makes Death Different?

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ART OF DEFENDING

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by Andrea D. Lyon*

I. INTRODUCTION

The United States Supreme Court has said time and again that "death is different."[1] Lately, reading the Court's decisions makes the death penalty defense attorney wonder why, in those cases in which the imposition of the death penalty is the greatest, it is seemingly all right to have the most conviction-prone jury,[2] a racially biased history of the death penalty's imposition,[3] and fewer procedural safeguards.[4]

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For purposes of consistency only the personal pronoun "he" is used throughout this Article.

1. *See* Gregg v. Georgia, 429 U.S. 1301 (1976).
2. *See* Lockhart v. McCree, 476 U.S. 162 (1986).
3. *See* McClesky v. Kemp, 481 U.S. 279 (1987).

Attempting to answer these questions would lead to a political article, which this Article is not. The intent of this Article is to discuss the ways in which preparing and trying a death penalty case differs from the non-capital trial. This Article is intended as a guide, as a series of suggestions, and as a perspective for preparing the attorney for the most emotionally and intellectually difficult trial there is: the trial for life.

The capital defense attorney should note two things. First, any capital trial must focus on how to save the client's life. There may be, and often is, a valid winnable trial defense, but the attorney must not count on it. Indeed, a death-qualified jury is authoritarian and conviction-prone.[5] Therefore, the chances of winning are lessened. Second, although this Article is not a political one, necessity mandates addressing some political issues. Anyone who doubts that the death penalty is a political tool need only recall the recent gubernatorial elections in Florida and Texas. In both campaigns the candidates were trying to "out execute" each other. There is *always* a political component to a death penalty case, even if it is no more than the prosecutor's wish to appear tough on crime. In preparing to try a capital case, the attorney must keep in mind the political atmosphere in which he is operating.

Another consideration is the importance of a defense team. This cannot be emphasized enough. An attorney should never try a capital case alone. No matter how talented or experienced, the attorney needs another pair of trained eyes and ears and another mind to consult. Indeed, when possible, the team should include a trained investigator and mitigation specialist to assist in the all important fact gathering process. What the capital trial attorney is trying to do is find a way to convince a jury full of people who think the death penalty is a good idea to make an exception in this particular case. This is too difficult a job to do alone.

This Article will be divided into four sections: motions practice; preserving the record; developing mitigation; and matching the theory of the case with the theory of mitigation.

II. Motions Practice

The things that persuade a trial judge or a reviewing court are not necessarily the same kind of things that persuade juries. Judges are persuaded by legal issues and technical defenses. They are persuaded by the amount of time that you are going to cost them and by the fact that you are laying land-mines in the record that are going to blow-up in their

4. *See* Teague v. Lane, 489 U.S. 288 (1989).
5. *See Lockhart*, 476 U.S. at 184 (Marshall, J., dissenting).

faces on appeal. These issues may not be that important to juries, but all are legally and factually persuasive to judges.

It is very important to remember that when the attorney designs a motions strategy the very simplest of rules apply. The best defense is a good offense. The prosecution for your client's death will be costly and difficult. Everything that is ordinarily done in preparation for trial must be done tenfold for the capital trial.

For instance, if the attorney is litigating a motion to suppress statements, and the prosecution fails to call all material witnesses as required by statute and case law, an objection by itself is insufficient. Many reviewing courts tend to slide over that issue, finding that the law has been adequately complied with if only one of the police officers who was present in the interrogation room at the time the statement was given later testifies about the circumstances surrounding the taking of the statement. Nonetheless, the capital defense attorney must raise such an issue and ask, "Your Honor, may I be heard?" The attorney must then state his objections in constitutional terms.

Every motion has an impact on whether the client lives or dies. Thus, the phrase "may I be heard?" is a very important one. It is important for two reasons. First, the judge may in fact hear the attorney and require the testimony or grant the motion. That is a victory in itself. Second, because the judge has become tired of listening to the defense attorney, the judge may say to him, "No, you can't be heard," in which case the attorney has laid the groundwork for a very important federal basis for relief: the denial of a full and fair hearing.

Attorneys should be imaginative in the kind of motions they file. Motions should be specific to the case and the client. Do not adopt the language of the prosecution when referring to your client. The client has a name and it is important that the court personnel use that name. In order to effectuate this usage, refer to the client by name, rather than as "the defendant," in all motions.

It is reasonable to assume that the court will deny all motions of any substance which would knock out the prosecution (such as a motion to suppress statements when the prosecution's case rests on the confession). Thus, even if the motion is a good one, with facts and law that mandate granting it, the capital defense attorney must be prepared to lose the motion and to use its denial to make the record, know the case better, or perhaps, as leverage for another motion.

If the defense attorney thinks there might be a motion in fact or in law, and it even comes close to passing the "laugh test," he should file it. Because there is no way to know what will persuade a court later, do not take chances by failing to file a motion when there is any reasonable basis for doing so.

One thing that applies to all phases of trial, including the motion and sentencing phase, is that the attorney *must* "federalize" all issues at every opportunity. A procedural "black hole" has developed in the case law into which your client will slip if you do not tell the trial court the federal constitutional reason why the client should win on a particular issue. If you allow the client to fall into this "black hole," the client cannot later win a federal habeas corpus proceeding based on the unraised federal issue. Indeed, in light of *Teague v. Lane*,[6] which severely restricts what habeas corpus can reach, the importance of federalizing the issue cannot be emphasized enough. What *Teague* means in practical terms is that if the attorney is filing a *motion in limine* to preclude hearsay from being introduced, he needs to present the motion in both evidentiary terms and as a sixth amendment denial of the right to confront witnesses.

When designing motions, a primary goal should be to get evidentiary hearings on them. These hearings should be difficult and time consuming, when appropriate, because they become a negotiating tool in the search for a nondeath offer.

There are different purposes for filing and litigating motions. Some motions can be won and are important for all the obvious reasons. For example, these motions can be used to keep out damaging evidence, to limit that evidence, and to resolve issues ahead of trial. These motions can also be used as a method of *voir dire* of the trial judge's attitude regarding the case. Know where the judge stands. Is the judge careful? Is the judge record-conscious? Is the judge favorably disposed to the defense? An attorney can manipulate a record-conscious judge to at least stay off his back while he is trying the case. Is this a sympathetic judge who might be approachable in a conference? This is important to know. Maybe this is a judge who says either, "Look, you don't have to talk to the jury about the death penalty because I don't feel like being involved with all that stuff, and the case just isn't that serious to me," or "I find the mitigation compelling."

Is this a judge who is openly hostile? If the judge is openly (or covertly) hostile, that attitude becomes part of the strategy at trial. The attorney must deal with the judge's hostility and use it to the client's advantage by allowing the jury to see that the defense is being "ganged up on" by the prosecution and the judge. Motions provide early detection of these potential problems by allowing the attorney to see how the judge reacts to him.

Some motions are likely to be lost, but should be litigated anyway. For instance, in Illinois there are general verdict forms finding a defendant guilty of first degree murder, even when the prosecution has filed alterna-

6. 489 U.S. 288 (1989).

tive theories to support first degree murder. Thus, although the prosecution could have charged felony murder, intentional murder, and knowing murder, the jury will return just one general verdict form—guilty of murder in the first degree. The lawyer, in anticipation of this problem, could file a motion asking the judge to submit special interrogatories to the jury to find out upon which of the theories they agreed. Thus, a predicate could be made to block a move to the eligibility phase of the proceedings because the eligibility requirement is intentional murder, not merely knowing or felony murder. The odds of winning such a request are low, but it highlights for the record a problem with the statute, and may lay the groundwork for an attack on the basis of an eligibility finding.

Another kind of motion that should be filed, even though the likelihood of winning is slight, is a motion for special kinds of discovery relating to the sentencing phase. Most states do not require the prosecution to disclose aggravating evidence that they intend to introduce. Thus, the defense needs a special motion regarding discovery. Why file such a motion? The attorney does not file it because he is likely to get this kind of discovery. Most judges will deny this motion. The attorney files the motion because if the judge does deny the request, the attorney will then be in a position later to say, "I cannot effectively represent my client because I didn't know about 'X or Y.'" No doubt there will be some surprises regardless of the amount of preparation. By filing this motion, however, the attorney is saying:

> I requested this. I explained in my discovery motion that death is different, that I need to be able to meet this evidence, that the standards are higher, and that reliability of the most serious penalty we have is involved. I need to know about presentencing motions that I should file. Judge, I told you all this and then look what happens. They come up and introduce evidence that I argue is inadmissible. Evidence that I should have been able to challenge in a pretrial motion. Now the defense is irrevocably prejudiced.

By litigating this motion, the attorney has re-established sixth, eighth, and fourteenth amendment issues.

The attorney will file some motions, such as a motion to suppress statements, because he wants to lock the State's witnesses into their testimony. Every motion that appears in an "ordinary" criminal case should appear in a capital case and should be litigated as fully as possible.

It is important, in terms of making a record, not to give up an apparently lost issue. For example, look at the famous case of *Batson v. Kentucky*.[7] Prior to *Batson*, the Illinois Appellate Court in *People v. Payne*[8]

7. 476 U.S. 79 (1986).
8. 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982).

made basically the same decision as the court in *Batson* by holding that the prosecution cannot use preemptory challenges in a racially discriminatory manner.[9] The Illinois Supreme Court, however, reversed *Payne*, and the United States Supreme Court subsequently reversed them.[10] Thus, although the law in a state presently says that "this is not an issue anymore" or that "the statute is constitutional," somewhere down the line another court might disagree. Do not be discouraged by the "we've heard this before" attitude. Raise the issues. Do not prejudge the likelihood of winning the motion. If the motion has a foundation, file and fight for it.

Another kind of motion that is useful for "testing the waters" is one which does not exactly fit into a proper category. An example of this type of motion would be as follows:

> Mr. Jones's Motion to Declare the Death Penalty Inapplicable in this Case Because the State Cannot Prove that Mr. Jones Inflicted Any Injuries Substantially Contemporaneously with Death, Which is a Requirement for the Accountable Person in an Alleged Felony Murder.

Of course, there is a strategic problem involved in litigating such a motion. A lot depends upon who the judge is, upon who the prosecutor is, and upon what the defense attorney knows about them. Maybe the prosecutor does not realize that this defense to eligibility exists and making the motion would tip the defense attorney's hand. It is important to understand that most of the motions discussed here also involve strategic decisions. Counsel must decide if it is worth the effort to make the motion, based on the strategy involved in the case.

Sometimes counsel should file motions just to make trouble. It is part of a capital defense attorney's job to do just that. If the prosecution wants to kill the client, they have to go through the defense attorney. File motions for money, for special investigations, and for opinion polls of the community. File all kinds of motions. Support them as much as possible with affidavits or proffers that can be introduced in evidentiary form. Constantly make a record and constantly make trouble.

During trial, let the judge, who is, after all, at least in part a politician, know that there is an interest in how he responds to the motions. Thus, as critical as it is to pack the courtroom during trial with people who do not want to see the client dead, it is also important to pack the courtroom during motions. Packing of the courtroom is not necessary when obtaining a continuance, although that would not hurt, but make sure that there are always two, three, or four people there. Most states have coali-

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9. 436 N.E.2d at 1053-54.

10. People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44 (1983), *rev'g* 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982).

tions to abolish the death penalty. Often times these people ask, "What can I do to help?" Tell them to "courtwatch." A nice little old blue-haired lady, who is sitting down with a pad of paper and a pencil taking notes when the case gets called, and who responds when asked, "Who are you?" "Oh, I'm just a person interested in the court system," will serve as a positive judicial deterrent. If this woman only appears when the judge is hearing motions on the attorney's death penalty case the deterrent effect is even greater.

Prosecutors are also political. If they start to get the feeling that perhaps the community is interested in the client in a positive way, maybe they will be more amenable to negotiation.

An important aspect of motions practice is tiered motions. For example, assume that the judge is one who hates the client and her lawyer, and the judge wants the client to die. One motion that the defense attorney will naturally make is a motion to improve *voir dire* conditions. The first thing requested will be attorney-conducted, individually sequestered *voir dire*.[11] If the judge denies the request, the attorney should then make it clear on the record that the attorney is in *no way* giving up the client's sixth, eighth, and fourteenth amendment rights to this request. Once the motion has been denied, as a less favored alternative, ask the judge for the next motion down the tier: attorney-conducted *voir dire* in small groups. If the judge denies this request, make the same record and ask for *voir dire* in groups of twelve. The idea being that at some point the judge will give counsel more than counsel started off with, rather than risk a record that shows an abuse of discretion.

It is very important in motions practice to familiarize the judge with the language of the case; with the gravity of the case; and with the cost in time, aggravation, and dollars. The object is to advocate the client's position with the judge, the prosecutors, the victim's family, the client, and the client's family. The chief message that the defense attorney is trying to convey through motions is that the client's life is of paramount importance, and that the prosecution is not going to take it without a fight.

III. PRESERVING THE RECORD

Probably the most frightening part of death penalty litigation is the ever-present specter of waiver. This Article does not attempt to discuss the law in this area,[12] but rather makes some practical suggestions to the practitioner.

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11. For a checklist of possible motions, see A. LYON, ILLINOIS DEATH PENALTY DEFENSE MANUAL ch. IV (1988).

12. For an excellent legal discussion of waiver problems, see 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 9.4, 24.5 (1988).

Do not give up the record. For instance, suppose the prosecution introduces triple hearsay at the sentencing hearing. At side bar, counsel objects and explains the reasons for the objection. The judge sustains, overrules, or says that the objection is "premature" (one of the author's personal favorite nonrulings). Back in front of the jury, the prosecutor continues on the same line of questioning. If the trial attorney does not object again, or has not made a continuing objection to this hearsay at side bar, the objection is waived. It must be clear on the record that counsel did not give up the objections. Hearsay objections are particularly important. Hearsay can be extremely damaging and nearly impossible to refute. At a death hearing with the "kitchen sink" theory of admissibility currently in vogue, the only question is whether the testimony is relevant and reliable.

The law is not very clear, however, and many decisions talk about finding either no error or harmless error in the admission of testimony that the defense did not "directly challenge." What does that mean? Does it mean that the attorney has to put the client on the witness stand or admit some other evidence? Who knows what it means? The way for the attorney to protect the client is to object, naming all appropriate grounds. For example, counsel might say:

> I am directly challenging the probative value of this evidence because I have no way of cross-examining it for its veracity. In addition, Your Honor, I would proffer too that if this witness, who supposedly made the hearsay statements, were called to testify, that would not be their testimony, or they would be impeached by *X* or *Y*.

Of course, if there was no discovery it will be difficult to impeach such hearsay.

It is the author's recommendation that, as part of defense counsel's motion strategy, counsel should read one of his previous trial transcripts. All capital defense attorneys should have the humbling experience of reading their arguments in a transcript. Attorneys always remember the eloquent arguments that they made to the judge, during which the courtroom was silenced. The attorney's command of the case law and the issues amazed everyone in the courtroom. Upon reading the transcript, the attorney may be horrified to find that what he thought was an eloquent argument was just one long run-on sentence, one without a subject, verb, or object. In written form, the argument seems much less clear than it sounded in the courtroom. Many arguments are made with gestures, pauses, and drama that are clear when heard, but obscure when read.

Therefore, during the trial, keep a separate manila folder and a separate piece of paper for recording errors made at trial. Each time there is an error, write it down and place it into the "error" file. Then every two or three days, gather it up and file a motion. The motion could be denom-

inated as a "motion for a mistrial," a "motion to reconsider," or a "motion for a new ruling." Gather up all errors, write them down clearly, and then make sure they are adequately federalized. This should cure any problems in preserving the error because the judge must have an opportunity to cure the problem at trial. By filing such a motion during trial, the attorney provides the judge with the opportunity to so cure and can feel more confident about the state of the record. This recommendation is also useful when the error occurs in front of the jury, and it is not possible to argue the error adequately on the spot for trial strategy reasons.

IV. Developing Mitigation

When does the attorney start to develop mitigation, that is, those reasons we need to give the jury to punish the defendant with less than death?[13] As soon as he gets the case.

Literally, mitigation begins with the onset of the client's life: prenatal care and birth. Many clients' problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy.

Mitigation is anything that might persuade a jury to punish with less than the death penalty. In essence, the defense attorney should bring three types of evidence to the jury's attention: (1) Evidence that shows the jury the good things the client has done throughout his life; (2) evidence that explains away the bad things the client has done by showing psychiatric, addiction, or family problems; and (3) evidence that convinces the jury that the defendant's life in the penitentiary will be productive for both himself and others.

Because the client is a good source of mitigating evidence, start there. The client can provide a great deal of information about his background. The client can also provide the attorney with the names of people he knows and places he has been.

Sometimes it is difficult to conduct a thorough interview with the client during the first few weeks of the representation. There are two reasons for this. First, when the attorney initially meets the client, he should try to gain the client's trust. During the first meeting with the client, the attorney should not sit down with a yellow pad of paper and a pen and immediately start taking notes. To the client, the attorney who does this is indistinguishable from all the policemen and intake workers to whom the client has talked since being arrested. Second, if the attorney immediately talks about the client's background for mitigation, the client will get

13. The author wishes to thank the present Chief of the Cook County Public Defender's Homicide Task Force, Michael Morrissey, for permission to use portions of his article, Morrissey, *Investigating the Death Case*, Illinois Death Penalty Defense Manual (1988).

the idea that the attorney has given up on the trial of the case. It may be better to talk to the client about "character" witnesses, rather than mitigation witnesses.

In talking to the client about his background, the attorney must realize that he may have to go slowly. It will take time to gain the client's trust. The attorney will be asking the client to talk about the personal problems and failures that he has endured during his lifetime. It takes time to build the kind of relationship necessary for this type of disclosure.

Also, consider the various pressures acting upon both the attorney and the client during the preparation stage of a death penalty case. An attorney preparing for a death penalty case is under a great deal of pressure. The anxiety and the tension can be overwhelming. Always keep in mind that the client's anxiety and tension during this time must be ten times that which the attorney may feel. The heinous crime of which he has been accused will be exposed to the jury. His life story will be revealed in court. His life will be on the line.

During the months before trial, the attorney has a duty to investigate the client's case to the best of his ability. There is, however, another dimension to the job. The attorney must give the client hope, emotional support, and courage. Such support is important, because on a human level, it is the right thing to do.

Another reason to give the client support is that as an attorney facing a death penalty hearing, your client must want to win. *The attorney must have a client who wants to save his own life.* Every person facing a death penalty case will come to a time during the pretrial period, when he will say that if he does not get acquitted, he wants to die. He will say that he does not want to spend the rest of his life in prison and that he would rather be dead. If this is the client's attitude when the trial begins, the jury will know it. The chances of saving his life will be slight no matter how many legal motions the defense attorney makes and no matter how many mitigation witnesses the attorney lines up to testify.

Take the time to build a strong relationship with the client when preparing the case. A strong relationship is necessary to explore fully the client's background with him, and the attorney needs that strong relationship to give the client the courage to fight for his life at trial.

Another source of mitigation is the client's family. Indeed, the client's family can frequently provide more information than the client. Have a separate division of the investigation file for the names, current addresses, and phone numbers of as many people in the client's family as possible. This file should include parents, brothers, sisters, aunts, uncles, grandparents, cousins, wives, and children. Keep the file current. People frequently move, and if the attorney waits until trial to contact them, he will not find many of them. Be ready to persuade and motivate the client's family about the need for their participation and help. Some family

members are very cooperative, while others are indifferent or even hostile. Make sure the family knows that the attorney cares, and if necessary, make them feel guilty if they do not.

Arrange transportation for family members who live out of state as well as those who live nearby. Make sure they attend the trial as well as the death penalty sentencing hearing.

Meet with the client's family at their homes. It is easier to reach them at their homes than to get them to come to the attorney's office. In addition, counsel will get a better feel for the family members if he sees them in their homes. Furthermore, it might be a good idea to get the family together as a group for a motivational "pep talk," or to share recollections of the client. The attorney should select one or two key leaders in the family to help organize the family and should let them know that he is relying upon them.

Get personal records and objects from the family such as photographs, report cards, favorite books, or even a baseball mitt. Try to get anything that will humanize the client.

It is important to gain the family's trust in order to get family problems out in the open. At first the family may be reluctant to talk about problems. The following are some of the types of family problems that the attorney needs to know about: (1) The parent's relationship; (2) substance abuse by parents; (3) the relationship of parents to defendant and other children; (4) criminal records of other family members (shows who defendant's role models were); (5) who was the dominant influence on defendant's life; and (6) mental problems of other family members.

In the vast majority of cases, a person facing the death penalty comes from a family riddled with problems. The investigation for a death penalty hearing should explore the problems of the client's family members, as well as the client's own problems. The family can provide the defense attorney information on other potential witnesses, such as childhood friends of the defendant or neighbors who have since moved away.

Furthermore, every client has gone to school. Through subpoenas and release forms, obtain records from all of the schools the client has attended. Investigate (1) schools the client attended, (2) the client's attendance record, (3) grades, (4) the courses in which he did well, (5) the names of teachers, (6) psychological evaluations, (7) special education programs, (8) disciplinary records, and (9) any awards that the client may have received. Keep in mind that the goal of investigation is to produce witnesses and exhibits for court. Getting school records is just part of the job. After obtaining the names of teachers and psychologists, locate and interview them. If the client received an award or a good report card, try to get these items for exhibits to introduce during the death penalty hearing.

An investigation of your client's work record can reveal potential mitigation witnesses. Try to contact every place the client has worked, whether for a corporation or for a neighborhood peddler. Keep in mind that as counsel you will have to be ready to advocate for your client's life with everyone that you contact. People who employed or worked with the client may be reluctant to come to court, even if the client had a good work record. People hate going to court, especially as character witnesses for someone charged with a heinous crime. Thus, a defense attorney should not only obtain the client's work records and contact people, but also get them to come to court.

In addition, research the client's military background. Sometimes it is difficult to get military records. Each branch of the military has a central location for records. Find out where these records are kept and the procedure to get them. Military records can reveal information such as education, psychological examination, types of work assignments and duties, awards, disciplinary actions, and addiction problems. The evidence might support that the client's lifestyle changed radically after combat or a similar experience in the military. This type of information might be helpful for mitigation.

Another important area of investigation in any death penalty case is the client's alcohol and drug history. Statistics show that a large percent of violent crimes are committed while the actor is under the influence of some drug.[14] In my experience, I have found that a large percentage of defendants in death penalty cases have serious addiction problems. A history of addiction is important because an argument to the jury might well be that addiction and intoxication caused your client's violent act, rather than a cold and calculated mental state.

There are many places to investigate for substance abuse. The defense attorney should begin the investigation with an inquiry into the level of intoxication of the client at the time of the crime. Talk to people that the client was with on the day of the incident, look for evidence at the scene of the crime, check medical records if the client was arrested shortly after the incident and had injuries, and talk to as many eyewitnesses as possible. In addition, investigate the general history and length of the addiction. Consider the type of drugs used, the frequency of use, changes in normal behavior when the client was on drugs, clinical investigations of the effects of certain types of drugs, and any expert testimony available concerning problems of intoxication and addiction. Finally, determine if

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14. *See, e.g.*, M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 136 (Philadelphia: Univ. of Pa. Press 1958); D. Mulvihill & M. Tumin, 12 CRIMES OF VIOLENCE, A Staff Report to the National Commission on the Causes and Prevention of Violence 641-49 (U.S. Government Printing Office 1969). (Alcohol is the drug most consistently and significantly linked to criminal acts.)

the client has tried, on his own, to get help for his drug addiction or alcohol abuse.

Furthermore, it is extremely important to investigate any psychological or psychiatric problems that the client may have. The attorney may obtain this information from the following sources: (1) The client himself; (2) family members; (3) school records; (4) military records; (5) juvenile court records; (6) prison records; and (7) psychiatric examinations in connection with other cases. Investigation of the psychological background of the client is extremely important. Such investigation is important not only because it humanizes the client, but also because it is the only statutory mitigating factor that there is a chance of meeting.

Even if counsel does not plan to present a psychiatric defense at trial, seriously consider sending the client for a psychiatric or psychological examination in order to present this type of mitigation at the death penalty hearing. The attorney should complete the investigation before sending the client to the examination. Consider the following points concerning a psychiatric or psychological examination. First, be careful about which expert you send the client to for examination. There are psychiatrists and psychologists who make judgments about the crime rather than about the client. Avoid these people. Second, check the background of the expert psychiatrist or psychologist for academics, courtroom demeanor, and past courtroom testimony. Third, make sure you have all of the client's records so that the psychiatrist or psychologist can use this information to evaluate him and to avoid embarrassment on cross-examination. Fourth, make sure the psychiatrist or psychologist has test results to support his findings. Fifth, have the psychiatrist or psychologist see the defendant more than once (nothing is worse than one twenty minute interview). Finally, have the psychiatrist or psychologist talk personally with those who will testify concerning your client's mental problems or provide him with summaries of the witness's testimony.

In addition, the attorney must also research the client's past criminal record, if any, and the client's history while incarcerated. This evidence may convince the jury that the defendant's life in the penitentiary will be productive for both himself and others. It may also have the opposite effect, but the attorney needs to know.

It is not uncommon for a person to commit violent crimes while on the street and yet behave like a model prisoner when locked up. A psychologist may determine that the client needs a structured environment. In a death penalty case, the defense attorney wants the jury to believe that if the client's life is spared, he will not kill or injure anyone in prison. Furthermore, the jurors must believe that he will make use of the rehabilitation programs available in prison. A good way to do this is to investigate the client's criminal background and his incarceration history. Get a copy of the client's "rap sheet." Also get a copy of the client's jail records for

each arrest and a copy of all of the client's records if he has spent time in the penitentiary. These records will show place of assignment (maximum, minimum, medium), school programs, work programs, psychological interviews, disciplinary actions, and religious programs. From these records, get the names of people who knew the client while the client was incarcerated.

Talk to the officers. They can be very effective witnesses regarding what the client is really like. Their testimony might be more believable than a high-priced psychologist. Talk to teachers, job supervisors, counselors, and anyone who has seen the client functioning in a structured environment and can testify about how he acts. Areas of inquiry for these people should include the client's behavior and relationship with other inmates. They should also include the client's participation in programs and family visits, and the client's respect for guards and the warden. Finally, this inquiry should consider evidence of improvement or rehabilitation during incarceration. Anything can be mitigation and used to show that the client's punishment should be less than death. The defense attorney is limited only by his imagination.

V. Matching the Theory of the Case to the Theory of Mitigation

Just as it would be foolish to try a case with two conflicting defenses ("I wasn't there, but if I was, I was insane"), it is *literally* deadly to fail to integrate the theory of the case with the theory of mitigation. If the jury perceives defense counsel as insincere or tricky because his theories conflict, a jury will undoubtedly take that out on the client. Former Appellate Justice R. Eugene Pinchman, a famous defense lawyer, once said: "When you get a case in your office there's three baskets, one of the baskets is 'you can't lose it,' a very small basket, one of the baskets is 'you can't win it,' a big basket, and then there's this basket in the middle called 'maybe so.'" The "maybe so's," of course, are the ones that worry the attorney the most. They are the cases in which the preparation, skill, and zeal of the attorney make the most difference. This section of the Article deals with the "maybe so" and the "can't win" baskets because the "can't lose" basket, even if it is technically a death penalty case, never is. In other words, if there is a really good defense on the facts, it is just not a death penalty case. Remember, it is harder to defend a death penalty case on the facts since the attorney must do so before death-qualified juries which are more prone to convict.

Develop a theory of trial that compliments and does not fight with the theory of mitigation. It is not good to put on a "he didn't do it" defense and a "he is sorry he did it" mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.

Thus, it is of paramount importance to prepare for trial and for sentencing at the beginning of your representation.[15]

Of the "can't win" cases, there are those that absolutely cannot be won and those that probably cannot be won, but lightning might strike the jury box. In the "definitely won't win" category was Robert Jones's case.[16] Five eyewitnesses saw Robert go into the pool hall to rob it. He left a palm print on the door and signed a twenty-one page court reported confession. Robert's co-conspirator, the girlfriend of the man killed during the robbery, gave a court reported statement. The prosecution recovered keys to the pool hall that the girlfriend had given to Jones. The prosecution also had in custody a codefendant who gave Jones the gun, which was matched ballistically to the bullet recovered in the body of the deceased. It was fair to say there was not a lot of reasonable doubt in the case.

There just was not a theory that means "not guilty" anywhere in that case file. But what was the client's statement? The client's statement was "I went in there to rob him." The client had a drug problem. "I go in there to rob him. I pull the gun. I say give me the money, and he says [an expletive] and when he goes for the gun, it goes off." The physical evidence did not contradict the possibility that the gun could have gone off during a struggle. It was a close wound and not a contact wound.

So what was the theory of defense? Not that Jones was "not guilty," but rather, that although this was a felony murder, it was not intentional murder. That was the argument at the guilty-innocence phase. What verdict did the jury sign? Guilty of murder, of course, but because the theory of the case fit the facts and was not ridiculous, the theory of the case matched the mitigation theory. That theory included remorse, the fact that Jones had been a pretty good kid until his alcoholic father left home, and he became involved with some bad kids and drugs and developed a drug habit that caused him to commit the crime. It is important to emphasize that his drug habit was not an excuse or defense, but rather an explanation and a reason to punish with less than death. This fit the nonintentional murder theory, which really was not a theory of defense, but a good predicate to the theory of mitigation.

In the "almost certainly won't win" category is the psychiatric defense. Almost no one has won a psychiatric defense since the *Hinckley* case.[17] In such a case, jurors believe they are in essence being asked to forgive and

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15. The author assumes that no attorney would plead his client guilty on a death penalty case without a guarantee from the judge or an offer from the prosecutor.

16. The author has changed the names of clients, witnesses, and other parties for this Article.

17. United States v. Hinckley, 525 F. Supp. 1342 (D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

let a defendant go by finding the defendant not guilty by reason of insanity. A death-qualified jury is especially unlikely to do that.[18]

James Morgan was in the middle of a divorce. He was a black police officer on disability as a result of a gunshot wound. Because of the gunshot wound, Morgan suffered from Brown-Sequard syndrome, which meant, among other things, that Morgan could not walk far without falling down. Morgan went to court in a wheelchair and, in front of seventeen eyewitnesses, shot the white divorce judge and his wife's white lawyer, because he had taken three oaths in his life. One oath was to serve his country, one oath was to serve the police department, and one oath, made to God, was to stay married to his woman for life. Since the judge and his wife's lawyer were trying to make him break an oath to God, Morgan believed that God required him to eliminate them. That was Morgan's defense and a clue to his attorneys that an insanity defense was in order. Morgan, however, did not want an insanity defense because he wanted to get the death penalty. Morgan believed a death penalty sentence would force the Illinois Supreme Court to agree with him that divorces should not be granted. The truth of the matter was that everyone on the jury knew James Morgan was crazy. The jury, however, was not going to let him go, which was what they thought they would be doing by finding him not guilty by reason of insanity. Thus, the trial was one long mitigation hearing.[19]

Consider now that category of cases in which it is unlikely the attorney will win before a death-qualified jury. An example of this is a case in which the defense is misidentification, but there is corroborating evidence of more than one identifying witness, or perhaps a distinguishing characteristic. Consider, for example, the case of Gregory Ortiz. Ortiz was a six-foot, nine inch tall Puerto Rican. This was a problematic distinguishing characteristic, and made it unlikely that the case could be won, especially since three people identified him.[20] With a homogeneous, Witherspooned jury,[21] the odds of winning the case were very low, not impossible, but very low.

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18. See Ellsworth, Bukaty, Cowan & Thompson, *The Death Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

19. He was very angry with his attorneys when the jury did not impose death.

20. To try to combat this distinguishing characteristic, several Latino starters from the Clemente High School baseball team were put in the audience. They were tall, 6'6" and 6'7". During the testimony of one of the witnesses, they stood up to test the witness's ability to judge height. The court sustained the State's objection to this procedure.

21. By "Witherspooned jury" I mean one qualified to return the death penalty under the standards laid out in Witherspoon v. Illinois, 391 U.S. 310 (1968). In *Witherspoon* the Court held the death penalty may not be imposed if the selection of jurors excluded potential jurors who expressed only a general objection to capital punishment; or a general religious or conscientious objection to it. However, the Court also held it is permissible to exclude a

So what was the matching theory of mitigation if the case was lost? The theory of mitigation came from *Lockhart v. McCree*.[22] Justice Rehnquist's majority opinion held that "residual doubts" from the trial may inure to the defendant's benefit at the penalty phase.[23] As awful as that is as a justification for conviction-prone juries, it is nonetheless, the basis for an instruction.

Thus, the theory of mitigation had two parts. First, there were some small remaining doubts of guilt. Second, there was substantial evidence of mitigation[24] to present to the jury, not because the defense conceded guilt, but because it was too difficult a decision for the jury to make without mitigation. Then all of the good things Gregory did in his life were presented to tell the jury. If they were *right*, and he was guilty, he should not die. But if they were wrong, there was a doubly strong reason not to kill him. It is clear that to win a death penalty hearing, the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

VI. Conclusion

In trying the penalty phase, it is necessary for the attorney to keep in mind that he is helping the jurors to choose which punishment is appropriate, death or life. Remember not to challenge the jury's belief that the death penalty is an appropriate punishment in the right case. If that is done, the jury listens to nothing else you say. What the attorney should say is that "it may be appropriate in some cases, just not this one. Make an exception in this case. Here's why . . . ."

This work is difficult both intellectually and emotionally. It is good work. It is work that needs to be done because we cannot have a society in which we make ourselves more violent by attempting to eradicate violence. It is work that needs to be done because it is really true that the attorney can make a difference in the most difficult trial of all: the trial for life.

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potential juror who expresses an unwillingness to even consider returning a verdict of death regardless of the evidence presented.

22. 476 U.S. 162 (1986).

23. *Id.* at 181.

24. There is NEVER any case in which mitigation is not presented.