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### Representing Death-Sentence Appellants

Charles B. Blackmar

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## REPRESENTING DEATH-SENTENCE APPELLANTS

Charles B. Blackmar\*

### I. INTRODUCTION

Most of the nations which share our political and cultural traditions have done away with the death penalty. There was a period during the middle of the twentieth century when executions in the United States became less and less frequent, and some thought that the death penalty would become a thing of the past here too. Then there came an abrupt turnabout with widespread belief that crime was getting out of control and that the law should “get tough,” so death sentences were pronounced more often. When the Supreme Court made it clear thirty years ago that most, if not all, existing death-sentence statutes had constitutional infirmities,<sup>1</sup> quite a few states were quick to respond with modified statutes. Executions have in consequence become more frequent, and hundreds of prisoners languish on death rows throughout the nation.

Defendants in capital cases are often unable to employ counsel. Many capable lawyers specialize in criminal law, but few capital defendants, or their families, can afford those lawyers' customary fees and expenses. The practice of appointing private counsel to serve without compensation is used less frequently today than it was in the past, and so the burden of defending death-sentence cases falls primarily on public defenders or lawyers who volunteer their services.

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\* The author practiced law in Kansas City, Missouri from 1948 to 1966. From 1966 to 1982 he was Professor of Law at Saint Louis University. He was appointed to the Supreme Court of Missouri in 1982 and served actively until 1992, when he became Senior Judge. He is the author of numerous books and articles on legal subjects and practice methods.

1. See *Furman v. Ga.*, 408 U.S. 238 (1972).

It is to these public lawyers and volunteers—and to those who might consider joining their ranks—that I direct the material that follows. Defense of a death-sentence case presents a great challenge to the advocate. Almost all cases in which the prosecution seeks a death sentence involve shocking scenarios, widely publicized. Most prosecutions are in the hands of highly competent professionals with adequate resources. Yet lives are at stake, and there is always a chance that the death penalty can be avoided. The task of the lawyer who undertakes to represent a defendant sentenced to death is to win that reprieve for his client by acquittal, new trial or mitigation of sentence. My advice is offered in the hope that it will help at least a few of those lawyers succeed.

## II. BACKGROUND

When I was admitted to the bar in 1948, I thought that I would have a busy civil practice with minimal involvement in the criminal law. I had no reasonable expectation that I would be involved in death-sentence litigation. In the late 1950s, however, United States District Judge (later Justice) Charles E. Whittaker appointed me, along with another lawyer, to defend a man charged with a shocking kidnap-murder under the Lindbergh Law. Our client pleaded guilty and said that he wanted to be executed. We had him examined to determine whether he was competent to defend himself. Then we advised him that he had the right to plead guilty, but that we could not assist him in his expressed desire to be executed, and that we felt obliged to argue against the death penalty.

Our efforts were unsuccessful. On the last day we called on our client in the jail, advised him that we thought there were grounds for appeal, and asked whether he wanted us to file notice of appeal. He instructed us not to appeal, and we determined that, inasmuch as he had been found legally competent to assist in his defense, we were bound by his instructions. We visited with the judge, who agreed with our analysis. So our client was executed, the federal government borrowing the state's gas chamber for the purpose.

The experience of seeing and talking with a man whose life was later taken from him by government authorities had a profound effect on me and, since that time, I have been an opponent of capital punishment.

This opposition, however, did not prevent me from arguing for affirmance of death-sentence judgments under Missouri's pre-1978 law, in my capacity as Special Assistant Attorney General of Missouri. I am a professional advocate, and I have always felt justified in representing my client's interest without regard to my personal beliefs. I secured several affirmances, but the sentences were later set aside as violative of the *Furman* principle.<sup>2</sup>

After Missouri modified its death-penalty statute, I briefed and argued one death-sentence appeal under the revised law, and the Supreme Court of Missouri reduced the sentence to life imprisonment in accordance with its duty of proportionality review.<sup>3</sup> Then, in my nine-plus years as a judge of the Supreme Court of Missouri, I sat on dozens of death-sentence cases. I did not believe that my personal views about the death penalty prevented me from applying the law to the record in these appeals. In most cases I voted with the majority in upholding death sentences,<sup>4</sup> writing for the court when I drew the opinion. I felt very strongly that the Court did not at that time fully perform its duty of proportionality review, and so I filed quite a few lone partial dissents and separate concurrences.<sup>5</sup>

When I retired from the Supreme Court of Missouri in 1992, I did not think that, in any homicide case I had heard, there was substantial doubt that the defendant was guilty of the

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2. See e.g. *State v. Cobb*, 484 S.W.2d 197 (Mo. 1972).

3. *State v. McIlvoy*, 629 S.W.2d 333 (Mo. 1982).

4. See e.g. *State v. Laws*, 661 S.W.2d 526 (Mo. 1983).

5. See *State v. Reuscher*, 827 S.W.2d 710, 719 (Mo. 1992) (Blackmar, J., concurring and dissenting); *State v. Davis*, 814 S.W.2d 593, 606 (Mo. 1991) (Blackmar, J., concurring and dissenting); *State v. Powell*, 798 S.W.2d 709, 718 (Mo. 1990) (Blackmar, J., concurring and dissenting); *State v. Wilkins*, 736 S.W.2d 409, 417 (Mo. 1987) (Blackmar, J., dissenting); *State v. Grubbs*, 724 S.W.2d 494, 501 (Mo. 1987) (Blackmar, J., concurring); *State v. Lashley*, 667 S.W.2d 712, 717 (Mo. 1984) (Blackmar, J., concurring and dissenting); *State v. Battle*, 661 S.W.2d 487, 495 (Mo. 1983) (Blackmar, J., concurring and dissenting).

charged homicide. Recent events have, however, caused me to reassess that conclusion.

In 1987, I voted with the majority to affirm the death sentence in *State v. Amrine*,<sup>6</sup> a case in which an inmate was found guilty of the murder of another inmate while both were confined in the state penitentiary. The conviction was supported by the testimony of three other inmates, and I concluded when the case was before the Court that the jury had the right to believe them. In the intervening years, however, all three recanted their testimony. The Supreme Court of Missouri issued a writ of habeas corpus, and, by vote of four to three, ordered a new trial.<sup>7</sup> The prosecuting attorney made a careful investigation and determined that he could not make a case on retrial, and so Amrine, whose initial sentence had expired in the meantime, was released. The possibility that an innocent man might have been executed after a trial which had appeared to be free of legal error has weighed on me ever since, affecting all of my recent thinking about the death penalty.

### III. GENERAL ADVICE

My experience, especially on the Supreme Court of Missouri, has left me with some thoughts which might be helpful to lawyers assigned to brief and argue death-sentence appeals. To keep the length of this essay within reasonable bounds, I have imposed several limitations on myself as I write: (1) All my experience has been with Missouri law, and so I shall assume in the discussion that follows that Missouri procedural and substantive law applies, with the conviction that most of what I suggest can be readily transferred to other settings by attention to local statutes and court rules; (2) I shall assume that appellate counsel has had no part in the trial or in post-trial motions, but rather has been designated after final judgment in the trial court; (3) I will not treat of post-conviction proceedings

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6. 741 S.W.2d 665 (Mo. 1987).

7. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003). The dissenters did not want to deny relief, but rather wanted the Court to appoint a master to report on the credibility of the recantations. *Amrine*, 102 S.W.3d at 550-51 (Benton & Price, JJ., concurring and dissenting).

or collateral proceedings in the federal courts, with which I have no experience, and which are in any event deserving of separate consideration; and (4) I will not deal with formal matters such as preparation of the record on appeal and the format of briefs, except to suggest that the governing rules should be carefully studied and strictly adhered to.

*A. The Preliminary Question: Is Separate Counsel Necessary on Appeal?*

There has been a debate for many years as to whether the lawyer who has tried a case should have primary responsibility for the processing of the appeal. When I was in practice, I liked to brief and argue my own appeals. If I won a case, I thought that nobody could do a better job in preserving my victory. If I lost, I wanted to be able to expose the resulting judicial outrage in the studious atmosphere of the court of appeals. Some argued that trials and appeals are separate species, and that appeals should be handled by a specialist. Some who so argued held themselves out as appellate specialists. Their arguments did not persuade me. In capital cases, however, I now believe that the arguments preponderate in favor of separate counsel on appeal, although there is no legal requirement to this effect. My reasons relate to the probability of post-conviction proceedings in state and federal courts.

The lawyer who tried the case will undoubtedly be accused of incompetence after the judgment of conviction has become final. This circumstance might have a subconscious effect on the processing of the appeal if the same lawyer continues to handle the case. A lawyer may hesitate to argue for plain-error review on points which were not raised before the trial court, and may be harassed by the appellate judges if unpreserved points are argued. I suggest, then, that at the very minimum, another lawyer be assigned to assist in the appeal by studying the record in depth and consulting with trial counsel. If a decision is made to have new counsel on appeal, the trial counsel should likewise be available for consultation. The ultimate decision on the question of new counsel is up the client, following careful explanation of the available alternatives. I understand that it is

the practice of the Office of the Public Defender in Missouri to assign new counsel for capital appeals, and I endorse this procedure.

### *B. The First Steps in Undertaking the Appeal*

There is little difference between capital appeals and other appeals in connection with the appropriate preparatory steps to be taken after being assigned an appeal. The lawyer should read the record in careful detail and should study the motion for new trial. There should be consultation with the lawyer who tried the case. Both should then visit with the client to explain the further proceedings and answer any questions. Careful research of the law is essential, and should continue throughout the case because of the continuing flow of new decisions.

The lawyer should then formulate a tentative idea of the points to be raised. An initial question is what should be asked for on appeal. Can there be a reasonable argument that a submissible case was not made, or is the most that can be hoped for a new trial, either of the entire case or of the punishment phase? Even though the guilt of some degree of homicide is patent and the facts show every indication of deliberation by the jury, counsel should not concede that the guilt phase is error free, and should look carefully for errors which might require a new trial. A second jury may convict only of a lesser degree of homicide, or may not assess a sentence of death. Or, if there is a reversal, the prosecutor may be willing to bargain for a plea. If counsel intends to argue that the case is not submissible, then might an argument that, even if there is a submissible case, the death sentence should be set aside on proportionality review, possibly detract from the argument for outright reversal?

The decision about the relief to be sought is ultimately one for the client, but it can be made only after full explanation by the lawyer. After doing the necessary explaining, however, the lawyer must listen to the client, who might feel that there is little difference between a death sentence and a sentence of life imprisonment without probation or parole, and who might not care for an argument which might detract from the basic

argument that the conviction should be set aside and the defendant discharged.

After legal research, study of the record, and a preliminary decision on the points to be argued, counsel should proceed with a first draft of the brief. In some large private offices the preparation of the brief may be delegated to talented associates. There are dangers in this practice unless the lawyer who is to argue the appeal is fully involved in the preparation of the brief at all stages. It is fine to make use of the research capacity of junior associates or interns, but many a lawyer who lacks a close familiarity with the brief and record has been embarrassed when undertaking to argue the case. In every appeal I argued, I was the primary draftsman of the brief.

It should not be necessary to say that a lawyer undertaking the preparation of a brief should become thoroughly familiar with the rules of appellate practice for the applicable jurisdiction, and should follow the detailed requirements of these rules meticulously. Yet many briefs are filed which contain serious rules violations. Appellate courts will sometimes dismiss appeals when the briefs fail to comply with the rules, and although a court would probably not dismiss an appeal in a capital case for this reason, counsel should bear in mind that rules exist for a purpose. Even if that purpose is not apparent to the lawyer, deviations may irritate the judges, and they are bound to have an adverse effect on counsel's credibility.

### *C. Preparing the Statement of Facts*

The rules of the Missouri Supreme Court provide that the statement of facts should be

a fair and concise statement of the facts relevant to the questions presented for determination without argument.

Such statement may be followed by a resume of the testimony of each witness relevant to the points presented,<sup>8</sup>

and other jurisdictions have similar requirements. Under any state's rules, then, there should be citations to the transcript or to the legal file for the assertions made in the statement of facts.

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8. Mo. R. S. Ct. 84.04(c).



Remember that the judges will find your statement more useful if you use separate headings and subheadings for each assertion of fact and its supporting material.

Several judges have told me that they customarily read the state's counterstatement of the case first when studying the briefs, because it proceeds directly with the facts relating to the guilt phase, whereas briefs on behalf of capital defendants often begin with a lengthy discussion of possibly mitigating evidence shown by the record. As this practice is perhaps also influenced by the enviable reputation for candor and accuracy which the Attorney General's office in Missouri has developed, the private lawyer's goal should be consistently to write statements of facts on which the judges can rely with the same confidence.

As in any appeal, it is important in a death-sentence case to achieve credibility with the court. The briefs in capital cases are studied carefully by the judge and are meticulously examined by law clerks, who will report material discrepancies to the judges. If any exaggerated claims are made, or if the citations to the transcript do not support the items in the statement to which they refer, the effectiveness of the entire brief is seriously compromised.

In drafting the portion of the statement dealing with evidence in support of the judgment, counsel must remember that the court will assume that the state's evidence is true. It is not inappropriate, however, to point to conflicting evidence which is material to the appeal, as if, for example, error in instruction is charged, because it is necessary to show that the error is prejudicial. If submissibility is challenged, it is essential to set out all evidence which might arguably support the state's case. If arguments for mitigation are presented, it is quite proper to describe the evidence which indicates a conclusion in conflict with the jury's verdict. But the appellate court will not retry the case, and should not be asked to. The jury has the privilege of disregarding any evidence, and if the statement refers to evidence which the jury has obviously rejected, there should be a reason for setting it out, which should probably be explained at some point later in the brief. The injunction against argument in the statement of the case should be strictly adhered to.

Because the state's highest court has the power of mitigation, items may be properly stated in a capital case which would be inappropriate in a less serious criminal case. The relevant Missouri statute, for example, permits the Supreme Court to mitigate a death sentence to life imprisonment. In exercising its discretion the Court is directed to consider

whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.<sup>9</sup>

The Missouri Supreme Court has seldom exercised its authority under this section, and has not developed a yardstick to apply to death sentences.<sup>10</sup> It has specifically held that, in proportionality review, it will not consider sentences in cases in which the jury has opted for life imprisonment.<sup>11</sup> Yet counsel will and should argue for mitigation of the sentence in almost all cases, and the statement should consequently set out facts shown by the record which might tend to mitigate. I suggest the following:

- (1) The age and ethnic background of the defendant;
- (2) Whether the defendant is a person of low intelligence;
- (3) Personal circumstances in the defendant's upbringing, such as absence of a parent, broken home, shifting from one home to another, limited education, chronic illness, and similar circumstances;
- (4) Diagnosed mental disease or mental defect, assuming, as is typical, that the defendant had been examined before trial. People who are normal and well adjusted seldom commit atrocious crimes, and although there

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9. Mo. Rev. Stat. §565.035(3)(3).

10. In addition to *McIlvoy*, 629 S.W.2d 333, see *State v. Chaney*, 967 S.W.2d 47 (Mo. 1998).

11. See *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. 1993). As to cases in which the prosecutor did not seek the death penalty, and in which the jury did not find guilt of first degree murder, see the authorities cited in *Battle*, 661 S.W.2d at 494, which indicate that "[d]eath-waived cases are not relevant to . . . proportionality review."

may be something of a risk in showing, in effect, that the defendant is a homicidal maniac, I would still include a brief statement of any diagnosed mental condition;

- (5) The disposition of the cases of other persons who are legally responsible for the crime of which the defendant has been found guilty. If a co-felon has received a life sentence, or has been accorded lenient treatment in return for providing evidence against the defendant, this should also be stated. The Missouri Supreme Court has not indicated that it would consider such dispositions, but some judges may be concerned about disparate treatment. If the defendant is not the principal actor in the homicide, or is subject to substantial influence by other participants, this should be brought out and the disposition of the case as to the others included;<sup>12</sup>
- (6) If there are unrelated cases in which life imprisonment was assessed which present strong similarities, I would mention these briefly, in spite of a particular appellate court's indication that they will not be considered in proportionality review. There might be a brief point suggesting reconsideration of the court's prior position about life sentences. It is always appropriate to ask the court to reconsider an existing rule of law, even one of long standing. Counsel should make it clear that a change is requested, and should show why it is needed. Many people, including judges, are instinctively disturbed by disparate treatment of offenders, especially in death-sentence cases, and a brief reminder about disparities might be helpful;
- (7) If the evidence against the defendant is relatively weak, even though legally sufficient for submissibility, the statement of facts should contain a summary of the evidence favoring and opposing a finding of guilt that

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12. *McIlvoy*, 629 S.W.2d 333.

points out infirmities in the prosecution's case.<sup>13</sup> These statements might have been included in the facts stated relating to the guilt phase so that repetition in the penalty phase statement is not required, or might be set out in greater depth in the penalty phase portion, as counsel thinks wise;

- (8) Any evidence indicating that the homicide was spontaneous rather than planned, or that it arose out of an altercation, should be included.

Counsel should be careful to include facts which might be adverse to the client's interest, but which are bound to come out in the prosecution's statement if the defendant does not mention them. If the defendant's statement dwells on the defendant's background, criminal history should be included. If there is reference to psychiatric evidence, the presence of opposing evidence should be reported. If objection was not made to particular evidence, this should be acknowledged. What counsel wants to avoid is any possible feeling on the part of the judges that matters are being covered up, and any omission which will allow opposing counsel to argue that the statement is incomplete. Counsel in any statement of the case must strive to achieve and to maintain credibility.

Try also to eliminate any unnecessary verbiage. A complicated case raising several issues may require a relatively long statement, but most drafts can—and should—be condensed. Judges appreciate concise briefs.

#### *D. The Argument Portion of the Brief*

##### *1. Know and Follow the Rules*

The other portions of the brief are the prelude for the argument, in which counsel undertakes to persuade the court of the desired result. Almost all appellate courts have rules about

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13. *Chaney*, 967 S.W.2d 47.

the manner in which the points to be argued are stated. Missouri Rule 84.04(d), which sets out the following formula, is typical:

The trial court erred in [*identify the ruling or action*] because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*].

This simple directive should be scrupulously followed. Missouri courts have been quite strict in applying the rule, and cases have been dismissed for failure to state points properly. Such a sanction probably would not be applied in a capital case, but the judges are more likely to think that a lawyer who knows and follows the rules is worth listening to.

## 2. *Narrow the Issues*

As has been suggested earlier, a process of selection is necessary in determining what is to be argued on appeal. Several judges have suggested to me that some defenders are prone to present multifarious and unmeritorious points, which may dilute the possibly meritorious ones. I hesitate to endorse this position because I recall an experience of my own, in which we lost a civil case in the trial court and were proceeding with the appeal. I worked out six points to argue for reversal. A younger lawyer who had sat with me at the trial suggested a seventh. I demurred because I thought the brief was getting too long, but finally, to please him, I told him to draft an argument for his point, and it was included in the brief. When the opinion came down, it read in effect: "We conclude that the appellant's seventh point clearly demonstrates that the judgment must be reversed, and so we do not have to consider the other interesting arguments presented in the briefs." So, formulate your tentative points before you make a selection and consult with your colleagues! Counsel should not present a point which is not fairly arguable as a ground for reversal but, with this qualification, any argument is in order.

### 3. *Decide Which Points to Raise*

#### a. Submissibility

The lawyer must first decide whether submissibility can reasonably be questioned. The capital cases in which there is a legitimate issue as to whether the defendant was the criminal actor are relatively few, although sometimes an essential element depends on an extended chain of circumstances. If a claim of nonsubmissibility is clearly without merit, it should not be argued. But, if a legitimate argument can be made, it should be, even if chances for success seem slight, because it provides the opportunity for summarizing the evidence in a way which may inject doubt into the case.<sup>14</sup> If submissibility is challenged, counsel must scrupulously set out the evidence on the issue which is favorable to the state.

It is also possible to challenge the submissibility of a case of first degree murder by arguing that the evidence does not support a finding of deliberation. This point, if sustained, would not necessarily result in the grant of a new trial. The appellate court, rather, might remand with directions to enter judgment of guilt of second degree murder, and resentence accordingly. Missouri authorities generally hold that, if the evidence shows that a killing was done intentionally, the jury can find the element of deliberation,<sup>15</sup> so the chance of success of a claim that no deliberation was involved is slight. If the point can be tolerably argued, however, it might provide a chance for an extra argument in favor of mitigation.

#### b. Errors at Trial

Points of possible trial error requiring a new trial should then be considered. Even though guilt of homicide seems evident, any opportunity to argue for a new trial should be pursued. A second jury might find guilt only of second degree,

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14. *Id.*

15. *State v. Hershon*, 45 S.W.2d 60 (Mo. 1932).

or might not assess a death sentence, so all legitimate claims of trial error should be pursued.

The first area to examine is that of jury selection, especially if the defendant is a member of a minority group. Prosecutors used to excuse minority jurors freely, but now must exercise care and be prepared to demonstrate valid reasons.<sup>16</sup> It may also be claimed that the trial court too freely sustained challenges to jurors who expressed reservations about capital punishment, or overruled challenges to jurors who demonstrated substantial bias in favor of death sentences. Success in complaints about jury selection is not probable, and it would usually be futile to raise complaints on appeal which were not presented to the trial court, but jury selection is an area to be considered for appeal.

Next to be considered are questions of admission and exclusion of evidence. The appellate court will seldom consider claims that evidence was improperly admitted unless there has been an objection. If complaint is made on appeal, the brief should cite the record and state the substance of the objection.<sup>17</sup> On the other side, if objection has been sustained to evidence proffered by the defendant, an offer of proof is required, and the claim may be illustrated in the brief simply by quoting the offer, or summarizing it if it is lengthy.

Then the trial court's instructions should be scrutinized. Missouri historically has been very strict in requiring precision in instructions. To avoid reversals the Supreme Court has prescribed pattern instructions, which are to be used to the exclusion of other formulations if they are applicable. Quite often it is necessary to alter the pattern instructions to adapt them to the particular case, however, and the form and substance of the alterations may be challenged. It is also perfectly possible to challenge the legal correctness of the pattern instructions, on constitutional or other grounds. Missouri courts, in contrast to requirements on matters of evidence, have not been strict in requiring specific objection to tendered instructions at trial, but have required preservation of the objections in a motion for new trial. Objections which have been made in the trial court should

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16. See e.g. *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979).

17. When no objection has been made, the only basis for review is a plain-error claim, which will I consider in Section 3(D)(3)(c), *infra*.

be referred to, along with objections made in the motion for new trial. Rule 84.04(e) specifies that “[i]f a point relates to the giving, refusal, or modification of an instruction, such instruction should be set forth in full in the argument portion of the brief.”

There may also be legitimate points relating to closing argument. Prosecutors are prone to use an excess of zeal in closing argument. Reversals and post-conviction relief for improper argument are not infrequent.<sup>18</sup> As with other claims of error, it is ordinarily necessary that the point be presented to the trial court in the form of a contemporaneous objection, or, at the very least, in motion for a new trial. So a point in the brief relating to argument should always cite the portions of the record in which exception was taken to the court’s ruling. Sometimes the trial court will seek to foreclose a claim of error in argument by sustaining the objection and instructing the jury to disregard the argument, in which case there should be a motion for mistrial. Whether such a motion is made or not, the point should be preserved in the motion for new trial. There must be appropriate references to that motion in the appellate brief.

### c. Plain Error

After all points relating to preserved errors have been considered, there should be attention to claims of “plain errors affecting substantial rights” in support of an argument for new trial in spite of failure to preserve the error.<sup>19</sup> There is a place for these arguments, but counsel should take care to include only relatively strong claims, and must make it clear that plain error review is sought. Trials are steeped in tension, and judges understand that it is quite possible to overlook a substantial point. The failure to preserve the point should be frankly conceded. The appellate court may still refuse consideration of the unpreserved errors, but their inclusion in the appeal may serve to lay a foundation for post-conviction relief, on the

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18. See e.g. *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989).

19. Mo. S. Ct. R. 84.13(c).



ground that counsel was incompetent in failing to preserve the error.

With this qualification, however, the appellate brief should seldom raise questions of competency of trial counsel, such as would be appropriate in post-conviction proceedings. There may be unusual cases in which the record shows so clearly that the defendant was not afforded proper representation in the trial court that relief would be in order, but these cases are very rare. Claims of trial error, and argument for proportionality review, are ordinarily sufficient to consume counsel's full attention, and should not be diluted.

#### d. Proportionality

After claims for trial error have been set out, the brief should deal with the matter of proportionality review. There are so few Missouri cases in which death sentences have been mitigated that it will seldom be possible to point to such a case and argue that it is more aggravated than the one before the court.<sup>20</sup> I suggest in consequence that there be a terse summary of the circumstances, statutory or otherwise, which might support argument for mitigation. The argument should be concise, and should not include unsupportable factual assertions. It is quite proper to argue that the case for guilt was not strong, or that the evidence was sharply controverted.

The brief on points dealing with the guilt phase should present legal arguments designed to appeal to reason and authority. The penalty phase, however, appeals to matters which are purely within the court's discretion, so emotion and eloquence are not inappropriate there. The change of pace between the portions dealing with the two phases may, indeed, be a persuasive factor.

#### *E. Statement of Points and Authorities*

Missouri Rule 84.04(d)(5) provides as follows:

Immediately following each "Point Relied On," the

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20. See e.g. *McIlvoy*, 629 S.W.2d 333; *Chaney*, 967 S.W.2d 47.

appellant. . . shall include a list of cases, not to exceed four, and the constitutional, statutory and regulatory provisions, or other authority on which that party principally relies.

The obvious purpose of this provision is to discourage string citations by requiring careful selection of authorities.<sup>21</sup> Although other courts may not issue similar guidelines, as a general rule a case worth listing is worth discussing. Counsel cannot depend on the judges or their clerks to study cases cited but not discussed to try to find out why they are deemed applicable. It should seldom be necessary to quote the language of the cases in depth, but quotation of relatively brief and well-phrased portions of opinions is quite appropriate. Tell the court why you think the case supports your claims!

### *F. Conclusion*

The conclusion to the brief should be short. Counsel should not summarize the arguments previously made, for the statement of points operates as a summary. The court should be told, however, about the dispositions indicated by the several points. Where there are broad challenges, a conclusion (somewhat attenuated to cover all eventualities) might read as follows:

For the reasons stated in Point I, the judgment should be reversed and the case remanded with directions to enter a judgment of “not guilty.” Otherwise for the reasons stated in Point II the judgment should be reversed and the case remanded for resentencing for murder in the second degree. Points III through VI show that a new trial of the entire case is required. Point VII requires a retrial of the penalty phase. In any event the sentence of death should be vacated and the case remanded for sentencing to life imprisonment without probation or parole.

## IV. REPLY BRIEFS

Missouri Rule 84.04(g) makes it clear that reply briefs

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21. *See also* Mo. S. Ct. R. 84.04(e) (addressing the argument portion of the brief, and noting that “[l]ong quotations from cases and long lists of citations should not be included”).

should not be used for reargument of points previously argued.<sup>22</sup> Reply briefs, however, serve a definite purpose: They give the petitioner a chance to rebut the state's arguments and counter its analysis. Seldom should a reply brief be omitted, because this sort of rebuttal is usually necessary.

The state's brief may make extravagant claims about facts, which should be answered tersely, with record references. New cases may be introduced in the state's brief, which should be answered in as much depth as necessary, with additional citations, if appropriate. The state's arguments may be countered. The state will undoubtedly cite new cases in opposition to a claim for mitigation, and response to these is necessary. Even so, the reply brief should be short and to the point. Sound arguments are more emphatic if they are concise.

#### V. FURTHER SUGGESTIONS ON BRIEF WRITING

Busy lawyers inevitably operate under time pressure. Counsel in a capital case should start early enough so that a draft may be produced in time for thorough examination and revision. The brief writer should ask, "Is something else necessary?" and "What could be condensed or eliminated?" If new counsel is designated to handle the appeal, trial counsel should be invited to review the draft. And why not send a copy of the draft to the defendant? I strongly recommend also that the draft be reviewed by another lawyer who has had no previous part in the case for recommendation as to what can be eliminated, what else might be included, what items are not so clear as they should be, and what can be tightened up.<sup>23</sup> This process of examination and review should continue until the last possible moment.

The draft may exceed the page limits, so counsel may seek leave to file a longer brief. If so, that application should be filed

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22. Mo. S. Ct. R. 84.04(g) ("The appellant may file a reply brief but shall not reargue points covered in the appellant's initial brief.")

23. If appellate counsel's office does not have an extra attorney available, there are volunteer lawyers opposed to capital punishment who will review the brief without charge. Some of these are in private practice and some are on law faculties. The lawyer in need of such assistance might contact a nearby law school or a local organization such as the Western Missouri Coalition to Abolish the Death Penalty, which can, for example, suggest potential volunteers in the Kansas City area.

in time to permit the necessary editing if it is denied. Whether an application is filed or not, efforts to condense the brief should continue.

If extensions of time are required, they should be sought as soon as the need is apparent, and early enough so that counsel will still be able to get the brief filed on time if the extension is denied. Consent of opposing counsel should be sought and filed with the application. It may be possible to learn from the clerk of the court when the case will likely be scheduled for argument, and extensions may be more readily granted if substantial time remains. If counsel believes that an emergency requires that the case be set over past the time when it would ordinarily be heard, application should be made promptly as possible, with consent of opposing counsel if available, and with no assurance that the extension will be granted. The safe solution is to budget one's time and do one's best to stay within the limits.

## VI. ORAL ARGUMENT

Counsel in a capital case should never waive oral argument. Never!

### *A. Who Should Argue*

The argument should be made by the lawyer who has primary responsibility for writing the brief. It is not uncommon, in both public and private law practice, for a senior attorney to pull rank after the briefs are written and to appear for oral argument. I deplore this practice, and have seen some veteran lawyers demonstrate on oral argument that they are only vaguely familiar with the case. It is far better for the senior attorney to allow an associate familiar with the case to make the argument than to attempt to prepare for oral argument without sufficient time in which to master the subtleties of the case. Whoever argues the case, a moot court before the argument, using office associates and perhaps lawyer friends who are willing to help out, is highly desirable. The participants should ask probing questions such as judges might ask.

### *B. Organizing the Argument*

Argument should center on the strongest points. It may not be possible to cover all the points relied on in the brief, and total coverage is not necessary. The Supreme Court of Missouri, like most state supreme courts and the federal courts of appeals, is a “hot” court. The judges are prepared and questions are frequent. The questions give counsel the chance to see what concerns the judges, and to adapt the argument accordingly. Counsel should welcome questions because they enable the lawyer giving the argument to address those concerns. Questions present the problem of consuming counsel’s time, however, and so flexibility is required. Even though the arguing counsel has not said everything that was intended, the temptation to encroach on rebuttal time should be avoided. Nor should counsel ask for more time, unless a judge has thrown an unanticipated curve.

### *C. Rebuttal*

Rebuttal time is best used to make short, sharp responses to the state’s arguments. Only the points to which there is a ready response should be covered. Sometimes opposing counsel may have answered a question in a way which is not entirely satisfactory so that, on rebuttal, counsel may say, “I’d like to answer the question posed by Justice Sharp,” and proceed to do so. Sometimes counsel may say, “If there are no questions, I have nothing further.” The judges will appreciate this after a long day of argument.

## VIII. EN FIN

The defense of capital cases is sometimes a discouraging matter. The evidence of the defendant’s misdeeds is usually patent. The situation is often such as to invoke rage in anybody who hears about the facts. Many judges are strong supporters of the death penalty, and unsympathetic to claims for new trial or mitigation.

Yet the state is trying to take a life! There are numerous instances in which the death penalty has been inflicted in error.

There have been serious errors in procedure in death cases. People have been convicted and executed when their mental capacity was substantially in doubt. Some lawyers, jurors and judges have a revulsion, often suppressed, against taking a life by legal process, which can work in the defendant's favor.

When the state undertakes to take a life, it should do so with procedures which are as flawless as possible. Lawyers who represent capital defendants on appeal thus serve an important purpose in our legal system; their work can lead to the correction of errors which might otherwise go unchallenged. Difficult and discouraging as the process may be, the lawyers who volunteer to engage it may save a life!



