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CASE STUDIES AND THE CLASSROOM: ENRICHING THE STUDY OF LAW THROUGH REAL CLIENT STORIES

Michael Millemann*

I. EARLY LIFE

To institute the narrative component of this Journal, the editors asked me to write about what I have done as a lawyer in forty-three years of law practice.¹ Initially, I thought I would decline. Such personal reflections, not to put too fine a point on it, usually are obnoxious. At best, they are suspect because they are based on first-hand accounts.²

When I told my son about the Journal's request, and that I would decline it, he said, "that would be a mistake; you should just tell the stories you told me growing up, the events as you witnessed them." Okay, I thought, this provides a vantage point that is not narcissist, or at least not wholly so, as a lawyer-witness to events that were important to clients and as parts of movements that were more broadly important in the country.

When I thought about it some more, I realized I have additional vantage points, as a clinical and classroom teacher, as well as a lawyer. Although I was counsel in many major cases before I began teaching,³

* Jacob A. France Professor of Public Interest Law, University of Maryland Francis King Carey School of Law. I deeply appreciate the extremely helpful editorial suggestions of Professors Richard Boldt, Lee Kovarsky, and Sheldon Krantz, as well as the excellent research assistance of Ian Anthony and Matthew Gorman. I also appreciate the patience and essential editorial assistance of the Journal staff, particularly Ameet Sarpatwari, Chelsea Jones, Amber Hendrick, and Mayer Kovacs.

¹ I graduated from Dartmouth College in 1966 and Georgetown University Law Center in 1969, and began practicing at the National Prison Project in Virginia and the Baltimore Legal Aid Bureau in 1969.

² Personal histories are notoriously self-aggrandizing and inaccurate. *See, e.g.*, Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1291 (1995); Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 89 (1998).

³ Before I began teaching in 1974, I represented prisoners in a variety of civil rights class action suits and classes of criminal defendants, welfare recipients, juveniles, and mental patients in law reform cases. When I was hired to teach in the law school in 1974, I told Dean Cunningham that I felt qualified to teach civil procedure, civil rights courses, trial practice courses, evidence, criminal law, and

the cases and project that I discuss in this Article were matters that I worked on and taught with as a clinical teacher in partnership with clinical law students in several different clinics. These included a constitutional law clinic, which I created in 1984 to introduce students to major litigation, including capital litigation;⁴ a criminal defense clinic in the mid-1980s in which my students and I represented abused women who had killed their abusers;⁵ and a post-conviction clinic in the

criminal procedure. This was before we had multiple clinics; there was only one then, the Juvenile Law Clinic, and it was fully staffed. The Dean listened respectfully, nodding at all the right times, and at the end of the meeting told me I was teaching contracts and that given space problems in the law school building, my office would be in the nursing school. We shook hands warmly, and I enthusiastically began my teaching career as a contracts teacher from an office in the nursing school.

⁴ *State v. Fitzpatrick* was one of the cases in this clinic. See *infra*, Part III. I had taught clinically with major litigation prior to that. In 1976, my clinical students, clinical co-teachers, lawyers from, then, Piper and Marbury, and I, acting through the newly created Legal Service Clinic (a partnership project with Piper), represented Baltimore City Jail inmates in a federal class action, *Duvall v. Lee*. See *Duvall v. Schaeffer*, Civ. A. No. K-76-1255, 1988 WL 228561, at *1, *1 (D. Md. 1988). We challenged an array of jail conditions, especially overcrowding, and settled the case on terms favorable to the inmates. *Id.* The Public Justice Center is still working today to enforce that and subsequent consent decrees. *Health Care and Humane Conditions*, PUB. JUSTICE CTR., <http://www.publicjustice.org/our-work/prisoners-rights/access-to-health-care-and-humane-conditions> (last visited Jan. 5, 2013). The major cases in the 1980s Constitutional Law Clinic included not only the Florida death penalty case, but also a Maryland death penalty case (we helped persuade Governor Harry Hughes to commute the death sentence of Doris Foster to life imprisonment); a class action that closed a notorious state juvenile facility; a successful lawsuit on behalf of the Frederick County NAACP against the local Ku Klux Klan; representation of a patient suffering from end-stage amyotrophic lateral sclerosis, in a successful effort to give him control of his decision to end his life with the removal of a ventilator; a successful damage action on behalf of a State prisoner who was brutally beaten by a Maryland Penitentiary “goon squad;” abused women who killed their abusers and were charged with murder, see Thomas W. Waldron, *Governor: Women Were “Pushed to the Brink,”* THE EVENING SUN, Feb. 20 1991 at C1; the successful defense of Baltimore City’s tenants’ right-of-first-refusal ordinance (giving tenants the first option to buy); and a statewide prisoner class action successfully challenging an exhaustion of state remedies requirement in federal civil rights cases. See Constitutional Law Clinic Docket (on file with author). In 1985, a lawyer-friend and colleague of mine, Nevett Steele, and I created the Public Justice Center as an independent non-profit to litigate major civil rights cases, which it has done superbly since then. *Mission and History*, PUB. JUSTICE CTR., <http://www.publicjustice.org/about/mission-and-history> (last visited Jan. 5, 2013).

⁵ *State v. Johnson* was one of these cases. See *infra* Part IV.B.

2000s, in which Professor Renee Hutchins and I represented, among others, life-sentenced prisoners who, in fact, were innocent.⁶

I have taught many more students with these cases, in the forms of case studies, in a variety of classroom courses, including first and second year required courses, seminars, legal theory and practice courses, and clinics.⁷ These are what I would call “personal case studies,” since they are based on cases and projects in which I played significant roles. They contain packages of documents; excerpts from court opinions; parts of trial transcripts, press clips, and correspondence; other records; and sometimes video-taped interviews of the clients. I do not use confidential information in these case studies. If without that information, a case study would be misleading or inaccurate, I do not use the case to create a case study. Client consent is important, and there has been a client consent provision in clinic retainer agreements that I have used over the years.⁸

I have written elsewhere about the value of teaching required professional responsibility and legal writing courses with ongoing legal work.⁹ This Article gives me the opportunity to evaluate the use of personal case studies based on completed cases to teach classroom courses. I teach the case studies with a variety of methods, including simulations (i.e., teams of students, in role, perform tasks in the case), seminar-type discussions (with different assignments to different teams of students), the Socratic technique, and story-telling.

⁶ See *infra* Part IV.C (discussing the plight of Walter Arvinger and Mark Grant).

⁷ These courses have included criminal law (both large classes and small section legal analysis and writing courses), constitutional law, a death penalty seminar, and a course called Lawyers and Their Legal Systems and Social Context, in which students use actual cases as the bases for plays that they write. See *infra* Part IV.C.

⁸ One of the latest versions states: “You understand that the Law Clinic is both a law office and an educational program. You agree that the Law Clinic may (1) videotape, audiotape or otherwise record conversations with you and (2) use these (and other) materials from your case to supervise and teach law students. The Law Clinic, its lawyers and students will protect your privacy and confidentiality. The Law Clinic will not disclose any information related to your case in any way that injures the attorney/client privilege.” UNIV. OF MD. FRANCIS KING CAREY SCH. OF LAW CLINICAL LAW PROGRAM, CLIENT AGREEMENT 3 (2013) (on file with author).

⁹ See generally David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education Into the First Year*, 12 CLINICAL L. REV. 441 (2006).

The case studies contain different types of legal stories, told by and from the vantage points of a lawyer (Part III), clients speaking for themselves (Part IV.A), a client looking back on her case a decade later (Part IV.B), law students filling in the gaps in actual cases of innocent prisoners with theatrical productions (Part IV.C), and the many other actors in these cases and projects, including judges and opposing counsel (Part IV.D).

In Part III of this Article, I focus on a Florida death penalty case and the stories from it that I regularly use to teach classes in criminal law and constitutional law courses. In Part IV, I describe other cases, case studies, and stories that I regularly teach with. In Part V, I describe what I believe to be the educational value, and some of the educational challenges, of teaching with personal case studies. I begin, however, with my introduction, in the summer of 1967, to the primacy in our democracy of the rule of law, to its fragility, and to the heroic people who demanded it and fought for it. That summer started me on the path that I continue to walk down forty-five years later, albeit at a slower pace today.

II. THE SUMMER OF 1967

Some of the stories I teach with derive from the summer of 1967, when I worked in the civil rights movement in Louisiana. In 1967, I was an unhappy second semester law student at the University of Oregon School of Law. I did not see the relevance of law or lawyers to the pressing national issues of the 1960s. I had gone to the University of Oregon from Dartmouth College in reliance on advice from a lawyer from my small home town in Oregon, whom I respected. “If you want to practice in Oregon,” which I did, or thought I did, “go to a State law school,” he said, and “the best of the three is the University.” So, I did. I was doing well in law school but was not sure why I was there.¹⁰

¹⁰ The problem was not the first year faculty. I took courses from the three best law professors I would ever have, including after I transferred to Georgetown in my second year. They were Hans Linde, Robert Summers, and Herbert Titus. Linde taught at the law school from 1959–1978, and then served on the Oregon Supreme Court from 1977–1990. His state court jurisprudence was important nationally. Shirley S. Abrahamson & Michael E. Ahrens, *The Legacy of Hans Linde in The Statutory and Administrative Age*, 43 WILLAMETTE L. REV. 175, 177 (2007).

Summers was a law professor at the University of Oregon until 1969 when he began his first of forty-two years as a professor at Cornell Law School. He is best known for his treatise on the Uniform Commercial Code published in 1972. Sum-

In the spring semester of 1967, I saw a notice on the bulletin board inviting law students to apply for summer placements through the Law Students Civil Rights Research Council in civil rights organizations in the north or the south.¹¹ There was a kindred spirit in my class, and we both applied. I was accepted and assigned to Louisiana. He went north to Seattle. I could not know it at the time, but as a future law school professor, I was to be in very good company.¹²

mers “helped dramatically increase minority enrollment in American law schools” during the 1960s. Lauren Gold, *Robert Summers, Pre-eminent Legal Scholar and Beloved Teacher, Says Goodbye*, CORNELL UNIVERSITY CHRONICLE ONLINE (Dec. 1, 2010), <http://www.news.cornell.edu/stories/Dec10/SummersProfile.html>.

Herbert Titus taught Constitutional Law and common law courses at several state law schools, including the Universities of Oregon, Oklahoma, and Colorado, as well as at Oral Roberts University School of Law. He was also the founding dean of Christian Broadcasting Network University (later named Regent University), and then founding dean of its law school. He is now in general practice at William J. Olson, P.C. *Herbert W. Titus*, WILLIAM J. OLSON, P.C. ATTORNEYS AT LAW, <http://www.lawandfreedom.com/site/aboutus/hwt.html> (last visited Jan. 5, 2013).

¹¹ This is my best effort to reconstruct the announcement. I do not have a copy but remember generally its content. Northeast law schools, especially the New York University School of Law, created LSCRRC. Tony Amsterdam, Norman Dorsen, Monroe Freedman, Jack Greenberg, Jacob Javits, Arthur Kinoy, William Kunstler, Louis Pollak, Norman Redlich, Eugene Rostow, and William Robinson were on the Board. This was national civil rights lawyers recruiting like-minded law students to join with them. See Amy R. Tobol, *The Law Students Civil Rights Research Council 71–73* (Aug. 26, 1999) (unpublished Ph.D. dissertation, State University of New York at Buffalo).

¹² Among my LSCRRC “classmates” who would become noted academics were, in alphabetical order, Ursula Bentele, who teaches criminal and capital punishment law and directs the Capital Defender and Federal Habeas Clinic at Brooklyn Law School; Thomas Geraghty, Professor of Law, Associate Dean for Clinical Legal Education, and Director of the Bluhm Legal Clinic at Northwestern University School of Law; Kenneth Gray, a professor at Duquesne Law School who teaches political and civil rights among other courses; Lawrence Grosberg, Professor of Law, Director of the Lawyering Skills Center, and Co-Director of the Elder Law Clinic at New York Law School; David Kairys, a professor at Temple University Beasley School of Law, the first James E. Beasley Chair (2001–2007), and a well-known civil rights lawyer; Sylvia Law, the Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry and Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law and a nationally respected scholar; David Rudenstine, former Dean and Sheldon H. Solow Professor of Law at Cardozo Law School and a nationally respected scholar; Nadine Taub, S.I. Newhouse Professor of Law Emerita at Rutgers Law School and former Director of the Women’s Rights Litigation Clinic (1973–2001). See *Ursula Bentele*, BROOKLYN LAW SCH., <https://www.brooklaw.edu/faculty/directory/facultymember/biography.aspx?id=ursula.bentele> (last visited Jan. 5, 2013); *Thomas F. Geraghty*, NORTHWESTERN LAW,

When I arrived in New Orleans, I went looking for my supervisor, Richard Sobol. He was a pro bono lawyer from Arnold and Porter who was the head of the Lawyers Constitutional Defense Committee in Louisiana, the organization to which I had been assigned. He was unavailable, however, because, as a plaintiff, he was attending a deposition of Leander Perez, the ultra racist boss of Plaquemines Parish (the equivalent of a county), who had arrested Sobol for practicing law without a license in Sobol's representation of Gary Duncan. Perez claimed to have created an "isolated jail for civil rights demonstrators" in Plaquemines Parish, constructed from an old, below-ground Spanish fort that was infested with "[h]uge rattlesnakes and water moccasins."¹³ Sobol's representation of Gary Duncan led to *Duncan v. Louisiana*, in which the Supreme Court recognized a federal constitutional right to a jury trial in state criminal cases.¹⁴ In the end, the federal court in Sobol's case enjoined the state court prosecution of Sobol,¹⁵

<http://www.law.northwestern.edu/faculty/profiles/thomasgeraghty/> (last visited Jan. 5, 2013); *Kenneth Gray*, DUQUESNE UNIV., <http://www.duq.edu/academics/faculty/kenneth-gray> (last visited Jan. 5, 2013); *Lawrence M. Grosberg*, N.Y. LAW SCH., http://www.nyls.edu/faculty/faculty_profiles/lawrence_m.grosberg (last visited Jan. 5, 2013); *David Kairys*, TEMPLE UNIV. BEASLEY SCH. OF LAW, http://www.law.temple.edu/pages/Faculty/N_Faculty_Kairys_main.aspx (last visited Jan. 5, 2013); *Sylvia A. Law*, N.Y. UNIV. SCH. OF LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=20071> (last visited Jan. 5, 2013); *David Rudenstine*, CARDOZO LAW, <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10540> (last visited Jan. 5, 2013); RUTGERS SCH. OF LAW-NEWARK, <http://www.law.newark.rutgers.edu/our-faculty/faculty-profiled/nadine-taub> (last visited Jan. 5, 2013).

There were many outstanding lawyers as well, including Nancy Duff Campbell, who co-founded the national Women's Law Center; Alan Houseman, Executive Director of the Center for Law and Social Policy and the most important advocate for national legal services programs in this country in the last half-century; and John Oberdorfer, a Patton Boggs partner who has been a national pro bono leader. See *Nancy Duff Campbell, Co-President*, NAT'L WOMEN'S LAW CTR., <http://www.nwlc.org/profile/nancy-campbell> (last visited Jan. 5, 2013); *Alan W. Houseman*, CLASP, <http://www.clasp.org/experts?id=0006> (last visited Jan. 5, 2013); *John L. Oberdorfer*, PATTON BOGGS LLP: ATT'Y AT LAW, <http://www.pattonboggs.com/joberdorfer/> (last visited Jan. 5, 2013).

¹³ *Perez Readies "Dungeon" For CR "Demonstrators,"* LA. WEEKLY, Nov. 2, 1963, at 2. I have no evidence that it was ever used, and it likely was intended to intimidate civil rights workers from coming to Plaquemines Parish.

¹⁴ 391 U.S. 145, 154 (1968).

¹⁵ *Sobol v. Perez*, 289 F. Supp. 392, 400 (E.D. La. 1968).

and the federal court in Duncan's case enjoined the state court prosecution of him.¹⁶

The legal work was fascinating and important. Sobol ran the civil rights office to which I had been assigned and was lead counsel in school desegregation and employment discrimination cases in federal courts in Louisiana.¹⁷ The office also defended civil rights workers, like Gary Duncan, who were arrested by local authorities. A Louisiana attorney, Donald Juneau, provided essential legal support. Because there were only two attorneys in the office, the law students did much of the work.

With the arrogance of youth, I kept no record of the summer of 1967. What are left behind are recollected vignettes. Here are two of them.

After working in the first part of the summer in New Orleans on school desegregation cases, Sobol asked me to tour Northern Louisiana, talk to local civil rights leaders, and report on the status of civil rights in these communities. I did so with enthusiasm and caution. This was a very dangerous area in which the local law enforcement officers were usually the source of much of the danger. During the 1960s in the south, well over 100 civil rights workers were killed.¹⁸

¹⁶ *Duncan v. Perez*, 445 F.2d 557, 560 (5th Cir. 1971). *See generally* PETER J. HONIGSBERG, *CROSSING BORDER STREET: A CIVIL RIGHTS MEMOIR* (2000) (describing the work of the Law Students Civil Rights Research Council in Louisiana).

¹⁷ *See, e.g.*, *Hicks v. Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La. 1970); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 425 F.2d 1211 (5th Cir. 1970); *Jenkins v. City of Bogalusa Sch. Bd.*, 421 F.2d 1339 (5th Cir. 1969); *Hall v. St. Helena Parish Sch. Bd.*, 417 F.2d 801 (5th Cir. 1969); *Andrews v. City of Monroe*, 425 F.2d 1017 (5th Cir. 1970); *Moses v. Wash. Parish Sch. Bd.*, 421 F.2d 865 (5th Cir. 1970).

¹⁸ By the time I got to Louisiana in 1967, Ku Klux Klan members and other virulent opponents of civil rights had killed many civil rights workers, including several white workers. The nationally galvanizing murders were of James Chaney, Andrew Goodman, and Michael Schwerner (Goodman and Schwerner were white and from the north while Chaney was black and from Mississippi) in 1964. *See generally* Ben Chaney, *Schwerner, Chaney, and Goodman: The Struggle for Justice*, 27 *HUM. RTS.* 3 (2000). There had been before then, and were after then, however, many more murders, including brutal torture murders, of black civil rights workers. Many of these murders were forgotten until the Justice Department, as part of a "Cold Case Initiative" in 2006, re-opened and began to re-investigate the cases of over 100 black civil rights workers who had been killed in the South during the civil rights movement. U.S. DEP'T OF JUSTICE, *THE ATTORNEY GENERAL'S SECOND ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007* 7 (2010), *available at*

There were certain survival rules. First, appreciate the danger and do not put others at risk. I had been in a car with two other law students that broke down on the Lake Pontchartrain freeway. When the three of us walked into the only gas station on the bridge, and before we could say what we needed, the attendant looked at us, pulled a gun out of the cash register, and told us we had thirty seconds to get exit. Two of us left immediately. The third stayed behind to argue. Soon thereafter, he was sent home. We could not afford his foolhardiness. Second, when you travel, drive a car with Louisiana plates. We used rental cars from a local agency. Never drive your car, with out-of-state license plates, to a meeting with a local civil rights leader. Third, arrive at night at the home of the local civil rights leader, not downtown during the day.

I met many good people on this trip, people who were working in their communities to integrate schools, register voters, and desegregate jobs. One was an elderly woman who was the head of a local civil rights group. As I recall, a grandson or grandsons of hers had helped her run it, but he or they had been drafted and sent to Vietnam. She was one of the most courageous people I had ever met. There were windows in her house that had been blown out by the Ku Klux Klan and mattresses sitting against them.

The second vignette involves the bar library at the Supreme Court of Louisiana. I went there late in the summer to do some legal research. When I needed to use the bathroom, I went looking for it. I saw two male bathrooms, which had been for “white men,” and for “colored men.” The year was 1967, thirteen years after *Brown*,¹⁹ and the State Supreme Court had taken down the “white men” and “colored men” signs. These “signs,” however, had been comprised of individual letters that had been up so long they stained the wood. This is a metaphor I have never forgotten for the lingering effects of race discrimination. The law can make you take down the letters, but how do you get the stain out of the wood?

By the end of the summer, I had found what I had been searching for. I transferred to Georgetown and became fully engaged in law school. I have built on that summer ever since in my practice, teach-

http://www.justice.gov/crt/about/crm/documents/COLD_CASE_REPORT_2010.pdf. After a summer in 1967 Louisiana, I had absolutely no doubt that the heroes of the movement were the black civil rights workers who lived in their local communities without police protection.

¹⁹ See *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1954) (declaring that “separate educational facilities are inherently unequal” and an affront to the equal protection guarantees of the 14th Amendment).

ing, and scholarship. When I tell these stories to students, I urge them to find their passion in the law, and we discuss many of the ways in which they can do it, including through summer placements sponsored by the Maryland Public Interest Law Project.²⁰

III. STATE V. FITZPATRICK: A DEATH PENALTY CASE IN FLORIDA

Seventeen years later, I would return to the south to do civil rights work, representing Ernest Fitzpatrick, Jr., this time with the essential help of my law students. Here is the story.

On April 29, 1980, in Pensacola, Florida, Ernest Fitzpatrick, Jr., a twenty-year-old mentally ill, African American, put a .38 revolver into a paper bag, took a bus to a real estate office, and entered the office to take a hostage. He “planned” to walk the hostage up the public highway to a bank .7 miles away, use the hostage to rob the bank, and then, well, “just sort of mingle with the crowd” until “things had quieted down” and he “could get back on a bus and leave.”²¹ Fitzpatrick’s motive was to get money so he could help the poor and finance his inventions, which included “robots” and “bionic body parts.”²²

Unsurprisingly, Fitzpatrick never got out of the real estate office. Instead, within a minute or so, he had taken three people into a back room within the office, where he waited. Within ten minutes, two deputy sheriffs entered and in a shoot-out, Fitzpatrick allegedly killed Douglas Heist, a white deputy sheriff and father of five, and then emptied his gun (the other five bullets) while wrestling with one of the men he had taken into the office: Paul Parks, a retired naval officer, whom he also wounded. Fitzpatrick was shot in the shoulder.²³

The local community responded with understandable anger and support for the victim’s family. The deputy’s funeral procession, said

²⁰ One big difference, however, between my experiences and theirs is the amount of student debt they are carrying. See Jeff Manning, *Law School Graduates Lost in Debt, Looking for Work: Diminished Expectations*, PORTLAND OREGONIAN (Aug. 4, 2012), http://www.oregonlive.com/business/index.ssf/2012/08/lawyers_lost_in_debt_looking_f.html. I did not have this problem, at least to the same extent, given the availability of federal student loans at a 3% interest rate. This issue is of extraordinary importance for all of us who care about helping law students find their passion within the law.

²¹ Brief for Appellant at 6, *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) (No. 70,927) [hereinafter Brief for Appellant] (describing Fitzpatrick’s account to Dr. George Barnard, a forensic psychiatrist who testified at Fitzpatrick’s resentencing hearing).

²² *Id.* at 6 & n.5.

²³ *Fitzpatrick v. State*, 437 So. 2d 1072, 1074–75 (Fla. 1983).

to be the largest in the county's history, "stretched for miles."²⁴ The public defender, who was the sheriff's stepson and a friend of both deputy sheriffs, refused to represent Fitzpatrick.²⁵ The trial court appointed a private lawyer to represent Fitzpatrick in this capital case. He had not handled a capital case before and was subsequently suspended from the practice of law.²⁶

At trial, the jury convicted Fitzpatrick of first degree murder, two counts of attempted murder, and three counts of kidnapping.²⁷ After "deliberating" thirty-six minutes, the jury unanimously recommended the death penalty (in Florida, the jury's decision is a recommendation only to the judge).²⁸ The judge imposed death, finding five aggravating circumstances and no mitigating circumstances.²⁹ The Florida Supreme Court affirmed both the convictions and the death sentence,³⁰ and the United States Supreme Court denied certiorari.³¹ The state of Florida was now getting ready to kill Ernest Fitzpatrick.

That's where we came in.

Scharlette Holdman's Phone Call

In February, 1984, I received a phone call from Scharlette Holdman, Executive Director of the Florida Clearinghouse on Criminal Justice ("Clearinghouse"), an organization that she operated out of her rented apartment on a "shoestring budget of just \$50,000 a year—much of it donated by religious groups."³² Scharlette, as I would learn, was "a natural force, like a hurricane or a rockslide; she was unstoppable."³³ She needed to be. In 1984, Florida was the early national leader

²⁴ *Fallen Hero Honored: 400 Lawmen Pay Tribute*, PENSACOLA NEWS J., Apr. 30, 1980, at 1A.

²⁵ Mark O'Brien, *Deputy Heist Clings to Life; Suspect Jailed*, PENSACOLA NEWS J., May. 1 1980, at 1C.

²⁶ *Florida Bar v. James R. McAtee*, 601 So. 2d 1199, 1201 (Fla. 1992).

²⁷ *Fitzpatrick*, 437 So. 2d at 1075.

²⁸ *Id.* at 1077 ("After the jury returned with its advisory recommendation of a death sentence, the trial judge issued his written findings of fact.").

²⁹ *Id.* at 1077–78.

³⁰ *Id.* at 1079.

³¹ *Fitzpatrick v. Florida*, 437 So. 2d 1072 (Fla. 1984), *cert. denied*, 104 S. Ct. 1328 (1984).

³² Peter Carlson, *Florida's Death Row Defender Stands between 89 Condemned Men and the Electric Chair*, PEOPLE MAG. (Jul. 11, 1983), <http://www.people.com/people/archive/article/0,,20085454,00.html>.

³³ DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* 143 (1995).

in executions. With four of the eleven as of July 1,³⁴ Florida was beginning to earn Millard Farmer's claim that it was "the buckle of the death belt" (very soon, however, it would be eclipsed by Texas).³⁵ All of these executions took place in southern states.³⁶

Scharlette was recruiting volunteer lawyers from around the country—primarily from large firms—to represent Florida prisoners in state post-conviction and federal habeas corpus proceedings. Florida did not then provide counsel in capital post-conviction cases. Instead, at the end of the direct appellate process, where Fitzpatrick's case then was, the state required death-sentenced prisoners to represent themselves.

So, the man who took a bus to get a hostage to rob a bank and, for an escape plan, was going to "mingle with the crowd" and catch a return bus,³⁷ was tasked with understanding the complex rules that govern state and federal post-conviction procedures, including the several different levels of procedural default and several different bodies of substantive law that perplex specialized lawyers and judges. From his prison cell, he needed to produce the facts that were necessary to show, for example, that his trial lawyer was constitutionally ineffective and that the state had withheld exculpatory evidence in his case.³⁸

Scharlette had thought of me when she read a United Press International article announcing that I had been successful in a right-to-counsel action on behalf of a class of mental patients in Maryland.³⁹

³⁴ See DEATH PENALTY INFORMATION CTR.,

<http://www.deathpenaltyinfo.org/views-executions> (last visited Jan. 5, 2013).

³⁵ See ANN RULE, THE STRANGER BESIDE ME 336 (1986). From 1985 to the present, Texas has had more executions per year than Florida. *Compare Execution List: 1976-Present*, FLA. DEP'T OF CORRECTIONS (Aug. 22, 2012),

<http://www.dc.state.fl.us/oth/deathrow/execlist.html> with *Executions*, TEX. DEP'T OF CRIMINAL JUSTICE (Aug 22, 2012),

http://www.tdcj.state.tx.us/stat/dr_executions_by_year.html.

³⁶ Texas and Louisiana had carried out two executions apiece while North Carolina had performed one. See <http://www.deathpenaltyinfo.org/views-executions>. See DEATH PENALTY INFORMATION CTR., *supra* note 34.

³⁷ Brief for Appellant, *supra*, note 21, at 10.

³⁸ As it would turn out, he had both of these claims. See *id.* at 84 n.69.

³⁹ In *Coe v. Hughes*, C.A. No. K83-4248 (D. Md. Apr. 4, 1985), we argued that the access-to-court right of mental patients required the State to provide counsel to patients to help them evaluate and file federal civil rights claims, among other claims. The settlement created an external legal assistance program staffed by lawyers and an internal grievance process for residents. See Darrell M. Nearon, *Resident Grievance System*, DEP'T. OF HEALTH & MENTAL HYGIENE, http://dhmh.maryland.gov/yourrights/_layouts/mobile/mblwiki.aspx?Url=%2Fyourrights%2FSitePages%2FHome%2Easpx (last visited Jan. 5, 2013).

During spring, 1983, I had used this ongoing civil rights case to teach a large section of second semester civil procedure. Students had drafted the pleadings and discovery requests in this action against the state.

Scharlette explained to me that Ernest was mentally ill and that no lawyer in Florida would take his post-conviction case.

I explained to Scharlette that I had never been involved in a capital case, much less as lead counsel; that neither I nor the law school had a budget to do this (and Scharlette had none); and that I was in the early part of a busy semester teaching a clinical course to an overload of students.

Scharlette explained to me that I could master the required bodies of law quickly.

I explained, as she well knew, that based on the little bit I knew about capital cases, they were insanely complex, combining criminal law, criminal procedure, constitutional law, civil procedure, and trial practice, among other subjects.

Scharlette asked whether I had taught any of these courses.

I mumbled, “Yes” (in fact, I had taught them all), and she pointed out, with her wonderful rolling laugh and survival sense of humor, “I don’t think Ernest has taught any of them.”

I explained that there were five states between Maryland and Florida, and that somewhere in-between there must be a lawyer who would help.

Scharlette acknowledged the geography but said no lawyer in these five states had stepped forward. She added: “Don’t you have law students working with you, too, who do most of the work anyway (laughing)?” I mumbled, “Yes, kind of.”

She stressed that the Clearinghouse had helpful packages of materials, that she would find local counsel for me, and that she, her staff, and two national experts, Mark Olive and Mike Mello, would provide as much help as they could in the context of their backbreaking caseloads. Olive and Mello were among a handful of the very best capital litigators in the field, and, in fact, they were enormously helpful.

She ended with: “Can I at least have Ernest send you a letter?” I said, very relieved, “Of course you can.” Game, set, match to Scharlette.

Earnest Fitzpatrick’s Letter

It was a two-page letter. In the first page, Fitzpatrick introduced himself, described the status of his case, and asked me to come visit him. The second page, in hand-written capitalized block letters,

read:

“I” ALSO KNOW THAT YOU GO TO “A” UNIVERSITY SCHOOL THAT HAS A LOT OF PEOPLE AT THE SCHOOL, SO PLEASE GIVE MY NAME AND ADDRESS TO ALL OF PEOPLE AT THE SCHOOL, THAT YOU KNOW AND DON’T KNOW, PLEASE TELL THEM TO WRITE ME AS “A” PEN PAL, AND PLEASE TELL THEM “I” WILL WRITE BACK, AND IF THERE IS A SCHOOL BULLETIN BOARD, THAT IS EASY FOR SCHOOL STUDENTS TO SEE, PLEASE PUT MY NAME AND ADDRESS ON THE BULLETIN BOARD, AND ALSO WRITE ON THE BULLETIN BOARD THAT “I” NEED PEOPLE TO WRITE ME, AND “I” WILL WRITE BACK. PLEASE DO THESE THINGS FOR ME, AND PLEASE WRITE BACK SOON.⁴⁰

It read like a letter from a child, or at least a man-child. This, however, was a functional adolescent on death row in Florida, whom the State was poised to kill. The Florida Supreme Court, four years later, would agree that Fitzpatrick was a “man-child.” I discuss below how we persuaded the Court that this was true but begin with the question posed in 1984: should we represent Ernest Fitzpatrick, Jr.?

My clinical students and I discussed Ernest’s request, providing one of the most interesting professional responsibility discussions we had that semester and that I have ever had in any semester. What obligations, if any, did lawyers have to represent, pro bono, pro se death-sentenced prisoners? What might be the sources of such an obligation? Could the obligation conceivably stretch from Florida to Maryland? What level of minimal competency was ethically required? Did we have it or could we develop it? How would you begin to try to unravel convictions and a death sentence that the Florida Supreme court had affirmed? What about our other pressing obligations as students and a lawyer/teacher? How should we balance them? How could we possibly finance capital litigation in Florida, from travel expenses

⁴⁰ Letter from Ernest Fitzpatrick to Michael Millemann (Feb. 19, 1984) (on file with author).

to fees for expert witnesses? These were the starting points in a conversation that went on for several days.

We agreed, in the end, that I should go visit Ernest. Although we did not admit it, my students and I knew this would be more than a “fact-finding and exploratory” visit. We knew we would likely be signing on to represent Ernest, although we were not sure how we would do it. We had no litigation fund, travel fund, or extra time.⁴¹ Practically, there was no way we could do it. Professionally, there was no way we couldn’t.

I wrote Ernest a letter telling him the week, but not the day, I would come. I had to travel from the east coast of Florida, where the prison was located, to middle Florida, where Scharlette was located, to Pensacola on the west coast, where the homicide had occurred. I was not sure when I would be at the prison. This imprecision would prove to be an important part of my conversation with Ernest and of my education about the death culture in Florida.

My worst fear was at the prospect of litigating the case “under warrant.” Then, the Florida Governor would sign a death warrant sometime after the Supreme Court denied certiorari on direct review. The Supreme Court had done this in Fitzpatrick’s case a few days after we received the letter. The good news, at least for Fitzpatrick, was that there were many other death-sentenced prisoners in Florida at the time, and although Fitzpatrick was working his way up the prioritized execution list (which was not public), he probably was not near the top yet, and he had some time, probably, but not much, probably. We just didn’t know.

“Litigating under warrant” meant that a death-sentenced prisoner would have thirty days to prepare pleadings for six different courts, file the pleadings in each, and litigate in all six of those courts unless somewhere along the line the prisoner obtained a stay of execution.⁴² One of Florida’s most experienced capital litigators explained:

⁴¹ After my trip to Florida, I sent a letter describing Ernest’s case to members of the faculty and lawyers throughout the metropolitan Baltimore area, asking for their support in creating a litigation fund. They responded wonderfully, creating a \$20,000 litigation fund. We would spend this fund on expert witnesses and other litigation costs. If anyone reading this article contributed to that fund, thank you again!

⁴² The State process started with a post-conviction pleading in Escambia County Circuit Court, followed by an appeal to the Florida Supreme Court, and then a writ of certiorari to the United States Supreme Court. The federal process began with a habeas corpus petition in district court, followed by an appeal to the United States Circuit Court for the Eleventh Circuit, and then a writ of certiorari to the United States Supreme Court.

Such litigation [entails] . . . defense lawyers flying from court to court in search of a stay, as the case moves down the assembly line of the capital appeals process from state trial court, to Florida Supreme Court, to the U.S. Supreme Court, to Federal District Court, to the Eleventh Circuit, to the U.S. Supreme Court, sometimes in a matter of days. The Ted Bundy case, for example, was decided by three different courts in one day.⁴³

This “process” nullified any theoretical protections provided by the state and federal post-conviction processes by making fact-finding, informed advocacy, and rational decision-making virtually impossible.

The key to preventing a warrant was to file a pleading in the case, at least one that had some merit. That would stop the warrant clock. So, when I went to Florida, it was to do as much as possible in a week to find a meritorious post-conviction claim, stop the warrant clock, and give my students and me time to do the fact-finding and legal research we needed to adequately represent Earnest. I also had to interview Fitzpatrick in Starke (in eastern Florida), meet with Holdman in Tallahassee (middle Florida), and go to Pensacola (western Florida) to investigate the case.⁴⁴

The existing case record, however, was only the starting point. As I would learn in this case and have reinforced in subsequent capital cases in which I have been counsel, the best vantage point for a capital post-conviction lawyer is to assume that the client has just been arrested and that you are the original defense counsel. You must think about what you would do as a good trial attorney to prepare the case for trial and what evidence you think the state might have, including exculpatory evidence. The two most important claims in post-conviction cases are that the trial lawyer was constitutionally ineffective (read “grossly incompetent” in ways that prejudiced the result),⁴⁵ and that the state failed to turn over exculpatory evidence.⁴⁶ The facts that support these

⁴³ Michael Mello, “*In the Years When Murder Wore the Mask of Law*”: *Diary of a Capital Appeals Lawyer* (1983–1986), 24 VT. L. REV. 583, 676 (2000).

⁴⁴ I drove to Florida, through Florida, and back over spring break.

⁴⁵ See *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (finding that to prevail on a claim, the defendant must show that the deficient performance prejudiced the defense).

⁴⁶ See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

claims rarely appear in the trial and appellate records. The claims are for what the defense lawyer and state did not do rather than what they did. As I would discover, there was overwhelming evidence of both claims in Fitzpatrick's case.

Meeting Ernest

I walked through several sets of fences, with heaping rolls of razor wire between each, as I entered the Florida State Prison. By 1984, I had visited many prisoners in many prisons in over seventeen years of practice. This one was locked down and remarkably quiet.

When I got to the visiting room, a guard brought Fitzpatrick in. He was about 6'1" or so and had a substantial Afro. He was dressed in a green one-piece jumpsuit, hands cuffed behind his back, with a chain connecting the hand shackles to leg shackles. I asked the guard to take off the shackles, but the most he would do was move the hand shackles from back to front. After several requests, ranging from polite to assertive, the guard finally agreed to sit outside the interview room.

Earnest and I shook hands as best we could as I introduced myself. Before I could get any further, he jumped in. "Thank you for coming, but you need to tell me when you are coming, not just the week or day, but the exact time; please, please do this," he said, obviously agitated. He repeated this request two or three times. "I am sorry," I said, when he paused, "but I have a lot of things to do this week throughout the state and . . .," but then he cut me off, repeating his request. I reassured him that I would do so in the future, which seemed to satisfy him. He then added, calmer: "And, when you come, please bring with you, pens—not the regular pens, but ballpoint pens that have the bubbles in the middle." I said "Okay," but he continued, "and paper pads, not the yellow ones but the white ones;" and when I said "Okay," he continued, "and envelopes, not the usual ones with V flaps, but the ones with circular flaps," and when I said "Okay," and quickly added, with some impatience, "let's talk about your case," he said, head cocked back, "Okay, what do you want to know?" We talked for several hours.

When I later met with Scharlette and described the interview, she explained the first part, the need to tell the prisoner exactly when you are coming. Then, when the governor signed a death warrant, the guards came to the prisoner's cell and said not, "The governor has signed your death warrant. Please come out." Rather, they said, "You have an attorney's visit." When the prisoner came out, in the now locked-down prison, the guards walked him from tier to tier, through

several gates, introducing him down the tier with the phrase “dead man coming” or “dead man walking” until they reached a death cell near the electric chair, where they put the prisoner. There, he had thirty days to live unless he could quash the warrant. Ernest thought the announcement of my visit might be the trigger of this process. I never again visited him without telling him the exact day and time I would arrive.⁴⁷

How the Death Penalty Deterred the Lawyer who was the Head of the Florida Criminal Appeals Division From Choking to Death One of His Ex-Wives

I had thought, as former head of the Civil Division and Chief General Counsel of the Maryland Attorney General’s Office from 1979-82, I would have some credibility in my effort to develop a working relationship with the Florida Attorney General’s Office, and thereby to gain time to litigate Ernest’s case without a warrant. This did not happen. The key people in the Florida Attorney General’s Office swore deep allegiance to the death penalty and were not interested

⁴⁷ A pirated copy of the then Florida execution guidelines described with chilling clarity what happened in the last five days of an inmate’s life. On execution day minus five, the “[e]xecution squad” was identified and the designated electrician tested all execution equipment, including the emergency generator and telephone. On execution day minus four, the inmate was measured for clothing; the inmate “specifie[d] in writing funeral arrangements;” a death watch supervisor and cell front monitor were assigned (in part, to prevent inmate suicides); the “[i]nmate personally re-inventor[ied] all property and seal[ed] property for storage;” and the institution chaplain was notified. Execution day minus three was a day of relative rest; there were no activities other than those of the front cell monitor. On execution day minus two, there was a “drill” for the “[e]xecution squad.” Execution day minus one was busy, involving all parts of the prison staff, from security through food, medical, programs and information. There was another “[e]xecution squad drill;” the assistant superintendent for operations tested the telephone; the electrician tested the equipment, including the emergency generator, and “[made] up [the] ammonium chloride solution and soak[ed] [the] sponges;” the condemned inmate ordered his last meal; the chief medical officer prepared the certificate of death, with the cause listed as “legal execution by electrocution;” the central office finalized the official witness list; the assistant superintendent for programs confirmed the funeral arrangements with the inmate’s family; the information office arrived to handle media inquiry and identified the twelve media pool observers; a security meeting was held; and the executioner was contacted. The activities on execution day, which began at 4:30 a.m. with the last meal, and ended at 7:20-7:30 a.m. with the removal of the dead inmate from the chair and payment of the executioner, take four single spaced pages to describe. SUPERINTENDENT OF FLA. STATE PRISON, EXECUTION GUIDELINES DURING ACTIVE DEATH WARRANT 235–38 (1983) (on file with author).

in extending courtesies to out-of-state counsel. Interviews of George Georgieff, Chief of the Florida Criminal Appeals Division and head of its death penalty unit, and Georgieff's top assistant, Ray Markey, help to explain why.

"I was having a fight with one of my ex-wives and I found myself choking her, and I saw her eyes start to pop out, and suddenly off to the left or the right I saw the electric chair."

....

"It deterred me," said Georgieff, head of the criminal appeals division of the Florida Attorney General's office.

Georgieff's personal experience was recounted in the September issue of the "American Lawyer" in an article by reporter Stephen Adler.

"I have told that story many times to people who ask me how I can be so sure that capital punishment is a deterrent to murder," he told UPI going back over the incident in an interview yesterday.

"It was a long time ago, but it's not the kind of thing you forget," he said.

Georgieff said he frequently tells the State Supreme Court, in urging death sentences be upheld, that death row inmates are "maggots."

"That is what they are," he said, "They are 2% of the 92% that are brought to trial, the very worst. They are the least among us."

"That doesn't mean they (death row inmates) don't have rights, but neither does it mean they have more rights than anyone else. We are the good guys, that obey the law," he said.

He said he sometime describes himself to the high court as "the ultimate whore."

"The madam doesn't expect her girls to say they won't go with a customer because he smells bad," Georgieff said.

“We don’t ask questions. That is up to the judges and the attorney general (who sits on the Clemency Board). We come over here as the ultimate whores,” he said.

Scharlette Holdman, head of Florida Citizens Against the Death Penalty calls the remarks “startling.”⁴⁸

Brain Surgery to Remove Anti-Social Behavior

The state’s other top specialist in death penalty law, Georgieff’s assistant Ray Markey . . . told Adler that 50 years from now, surgeons will be able to perform brain operations on people to remove their anti-social behavior patterns.

Marky, who successfully defended against appeals by Jon Spenkelink, the only person to die in the Florida electric chair in the past two decades, says Spenkelink was probably the “least obnoxious individual on death row . . . a guy who killed a faggot.”

Spenkelink, convicted of killing a traveling companion in a Tallahassee motel in 1973, died on May 25, 1979. Gov. Bob Graham has ordered 18 other executions, but all have been stayed by the courts for further appeals.

There are currently 168 inmates on Florida’s death row. Markey, 46, said in an unusually candid interview he was disgusted by human beings. “They can’t even behave as well as animals. At least animals kill only for need.”

Marky, who is just under five feet tall but speaks in a booming voice, helped write the capital punishment law, passed by the 1972 legislature after a prior law was struck down by the Supreme Court. A native of Buffalo, N.Y., he has worked for the attorney general for 15 years

.....

⁴⁸ *State Prosecutor Tells: “Suddenly I Saw the Electric Chair,”* FLA. FLAMBEAU, Sept. 17, 1981, at 1.

“I couldn’t care less about punishment per se. I want [the convict] gone. I want to be rid of him,” Marky said.⁴⁹

A coalition of groups, including the Clearinghouse, called for the firing of the two, saying: “The statements about wife abuse, civil liberties, and the value of human rights by two of the State’s highest staff members in the attorney general’s office shock the conscience of those of us concerned with social justice.”⁵⁰ However, “a spokesman [for Attorney General Jim Smith] said Smith had not been moved. ‘We’re not going to respond to any of that,’ said Spokesman Don North. ‘He (Smith) has no intention of asking for their resignations.’”⁵¹

Finding an Argument to Stop the Death Warrant Clock

When I returned to Baltimore, with a new appreciation for our task, my students and I began searching for a legal argument that we could use to stop the death warrant clock. My research assistant, Lisa Kershner, and I continued the search in the beginning of the summer of 1984, after the end of the spring semester. Lisa became a colleague, effectively co-counsel, and a good friend through her extraordinary summer work. She found what we needed.

A little background is necessary. One of the mitigating circumstances in Florida’s death penalty law is that the defendant has no “significant history of prior criminal activity.”⁵² At Fitzpatrick’s sentencing hearing, the court allowed the state to introduce Fitzpatrick’s bizarre juvenile record in its case-in-chief. The state argued that with this evidence, it was preemptively rebutting the “significant history of prior criminal activity” mitigator.⁵³ The problem was that defense counsel had waived reliance on that mitigator to keep the juvenile evidence out of the death penalty proceeding.⁵⁴

The primary part of Earnest’s juvenile record was an arrest in 1974 when he came to his vocational school wearing a mask, with paint on his

⁴⁹ *Id.*

⁵⁰ See *Death Penalty Opinions: Group Wants Top Aides to State Attorney General Fired*, ST. PETERSBURG IND., Sept. 22, 1981 at 4.

⁵¹ *Id.*

⁵² FLA. STAT. § 921.141(6)(a) (2012).

⁵³ *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986).

⁵⁴ *Id.*

face. He allegedly entered the principal's office with a five-gallon can of gasoline, a flashbulb, and a battery, which he claimed were rigged as a bomb. He also had a machete. Fitzpatrick was subdued without harming anyone. The psychologist who evaluated him said Fitzpatrick told him:

He . . . planned to hold the principal and several other school officials as hostages until "the police or someone would bring me a million dollars so that I could give the money to the poor." Ernest reported to me that he had been working on this plan for months and that the initial impetus for his plan occurred when he was watching a news program where he saw many starving children. From his report, it appears that the children were the subject of a documentary on Bangladesh and also possibly children of some nations in Africa who were experiencing very hard times due to the drought there. However, Ernest did not understand the geographical location of these children and thought that he would be able to distribute the money to them and to their families [H]e went on to describe that he planned to hide under some boarded-up steps near Beggs School, planned to bury the money in a hole, wait "until the heat was off" and then begin to distribute the money [L]ater in his life he planned to build a very big house "where all the poor children could come, where I could feed them and carry them to the hospital when they needed it." Ernest also stated that he would keep part of the money to experiment with the building of airliners. He felt quite confident that he could build an airliner and went on to explain that he had built several cardboard plans which appeared to work and he did not see any reason why he could not apply these same principles on a larger scale.⁵⁵

⁵⁵ Brief for Appellant, *supra* note 21, at 34 n.25 (quoting from an evaluation report performed by Dr. Lawrence Gilgun, a clinical psychologist). When we interviewed Ernest's mother, she explained that it may have been the derision of his

The psychologist concluded that Earnest was legally sane under the Florida version of the *M'Naghten* test because he knew right from wrong.⁵⁶ So, Fitzpatrick was committed to a Florida juvenile facility rather than a mental health facility, a missed opportunity to diagnose and treat Ernest's underlying disorder(s).

The legal issues in 1984 were: 1) whether the anticipatory rebuttal by the state violated the death penalty law, and if so, 2) whether the failure of Fitzpatrick's appellate lawyer to raise the issue on appeal constituted legally cognizable ineffective assistance of counsel. Lisa discovered a Florida Supreme Court decision holding that an anticipatory rebuttal similar to what the state did in Fitzpatrick's case violated the death penalty law: "Mitigating factors," the court said, "are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist."⁵⁷

Because Fitzpatrick's appellate lawyer had missed this issue, and it affected the direct appeal, we prepared a habeas corpus petition to reopen the appeal based on appellate counsel's ineffectiveness, which we filed directly in the Florida Supreme Court.

At the same time, we worked on a clemency petition for the governor and members of his cabinet, as well as a post-conviction petition. In the latter, we planned to argue, among other claims, that the trial lawyer was constitutionally ineffective. We were required to file the latter petition in the Escambia County Circuit Court, but it would take several more trips to Pensacola and more time to adequately prepare it.

We filed the habeas petition in August 1984, tolling the warrant clock. We breathed a big sigh of relief. The Florida Supreme Court allowed me to argue the habeas case *pro hac vice*. It would be nearly two years before the court rendered a decision.

schoolmates at one of his inventions that helped to provoke the incident. He had taken a cardboard airplane to school the day before, and the other students laughed at him. The next day, his mother saw him sitting in a chair at the dining room table, as if he were in a trance. From time to time, she would look over at him to see what he was doing. When she looked again, "He wasn't there." Later, "We got a call from the high school that he walked in there with his face all painted and with something he called a bomb and said he was going to blow up the school."

⁵⁶ In Florida, the test for insanity is the *M'Naghten* test, which provides, *inter alia*, that a person is legally insane when he is precluded by mental disease from distinguishing between right and wrong at the time of the act. *Wheeler v. State*, 344 So.2d 244, 245 (Fla. 1977).

⁵⁷ *Maggard v. State*, 399 So.2d 973, 978 (Fla. 1981).

In June 1986, the court ruled. We won on the anticipatory rebuttal issue! The court said the trial court had “allowed the state to present improper non-statutory circumstances in aggravation,” and this allowed the state to depict “the defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law.”⁵⁸ We not only had stopped the warrant clock; we had obtained a new sentencing hearing for Ernest as well.⁵⁹

The Re-sentencing Hearing in Pensacola

The hearing was set for May 1987, and we had a lot to do. My students in the Constitutional Law Clinic began work on pre-hearing motions and memoranda and continued their long-distance fact investigation. Although it was a “re-sentencing” in legal effect, procedurally the state would be forced to put on its full case again since the hearing would be before a new jury, impaneled seven years after Ernest had been convicted and sentenced to death. The court would instruct the new jury that it was bound by the verdicts in the case, particularly the finding of first degree murder, but to understand what happened, and why the state was seeking the death penalty, it would have to hear all of the evidence. In any event, the vast majority of evidence was also relevant to the array of aggravating circumstances that the state would seek to establish.

Scharlette had recruited a volunteer lawyer in Pensacola, John Carr. He is now, and was then, a wonderful lawyer and acted as lead counsel at the re-sentencing hearing. My students and I took primary responsibility for preparing for the hearing, including obtaining expert witnesses and drafting the extensive array of pre-hearing motions and supporting memoranda. At the hearing, I took primary responsibility for the expert witnesses.

Arguing our Case to the Widow

There was, however, a threshold issue to resolve. The prosecutor had told us that if we could convince the slain deputy’s widow to accept life imprisonment, he would agree to that. John took the lead on this effort. He met with the widow and asked her to accept a life imprisonment sentence instead of the death penalty. She said that he

⁵⁸ Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

⁵⁹ The error had affected the sentencing hearing and not the trial, so the Court did not reverse the convictions. *See id.*

should talk to her five children, who wanted the death penalty. When John checked, through back channels, about their views, he was told they were adamant about seeking the death penalty. The issue died at this point.

I mention this story because it provides an important teaching moment in the case. To summarize, the death penalty is constitutional, in part, because prosecutors exercise the charging discretion and that discretion is confined by statutory standards. A widow in another case, the prosecutor pointed out, had declined to seek the death penalty because she had religious objections to it. Heist's widow and her children, as it turned out, did not and instructed the prosecutor to seek the death penalty against Ernest.

Having determined that Fitzpatrick was death-eligible (certainly the original death sentence did this), was the prosecutor appropriately listening to the constituents who had suffered the greatest loss? Did we receive something, a chance for mercy, to which we were not legally entitled or was the administration of the death penalty being delegated to individuals who, understandably, were the angriest at the defendant? The answer may be yes to all of these questions. In any event, we filed a motion seeking to preclude the death penalty because the prosecutor had delegated the decision to the wife and children, which the court denied summarily.

Who Shot the Deputy Sheriff?

Defense counsel never argued that Ernest did not shoot Heist. The state's witnesses said that he did, but when we looked again at the evidence, we began to have doubts. In his testimony at the original sentencing proceeding, Fitzpatrick did not clearly admit or deny that he shot Heist but rather said he did not know. It is clear from his statement on the 911 tape, set forth below, that Fitzpatrick did not know whether he shot Heist.

The facts are these. When Ernest told Mary Helen Blake, a secretary in the real estate office, that "he wanted to use her as a shield and take her to a bank," she "resisted," and Ernest acquiesced.⁶⁰ He moved her further inside the real estate office, "down a hallway toward the back of the building," around "a corner."⁶¹ Blake said Fitzpatrick repeated that "he wasn't going to hurt me," "shoot me," or "rape me,"

⁶⁰ See *Fitzpatrick v. State*, 437 So. 2d 1072, 1074 (Fla. 1983).

⁶¹ *Id.*

although he did threaten to shoot her "in the leg," and later said that he might shoot himself and the hostages if the police came.⁶²

When Eric Shaw, a delivery boy, came in "the front door and walked down the same hallway, looking for someone to sign a receipt,"⁶³ Ernest told him to lock the front door and took both of them into an inner office.⁶⁴ "Meanwhile, David Parks, who was in a nearby office when appellant entered the building, called the sheriff."⁶⁵ Parks then approached Ernest and "offered [him] the keys to his car and some money."⁶⁶ Ernest "refused, saying he wanted [Blake] to go with him," and "then marched his three hostages into the [inner] office."⁶⁷ There he "sat on a desk chair next to the window [that had a] partition [sliding window] between the [inner] office and the reception area and forced [the secretary] to sit on his lap."⁶⁸ He "ordered [the delivery boy] and Parks to sit down at opposite walls."⁶⁹ Chart A depicts the office, locations of the hostages, and pathways of the bullets according to the Escambia County Sheriff's Department.

⁶² Brief for Appellant, *supra* note 21, at 11.

⁶³ *Fitzpatrick*, 437 So.2d at 1074.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1074–75.

⁶⁸ *Id.* at 1075.

⁶⁹ *Fitzpatrick*, 437 So.2d at 1075.

Charts A & B: The reconstructed crime scheme shows the path of the bullets that Fitzpatrick allegedly shot (Chart A: 8, 9, 10, 11, 12 & 14) and those that Deputy Sheriff Smith shot (Chart B: 6 & 7). Both Fitzpatrick and Deputy Sheriff Smith shot from 0.38 pistols. Ballistics tests could not determine the gun the gun that fired the fatal shot. Bullet fragments 14 and 14(a) killed Deputy Sheriff Heist. The broken line in the lower right corner of Chart A is that fatal bullet's projected pathway.

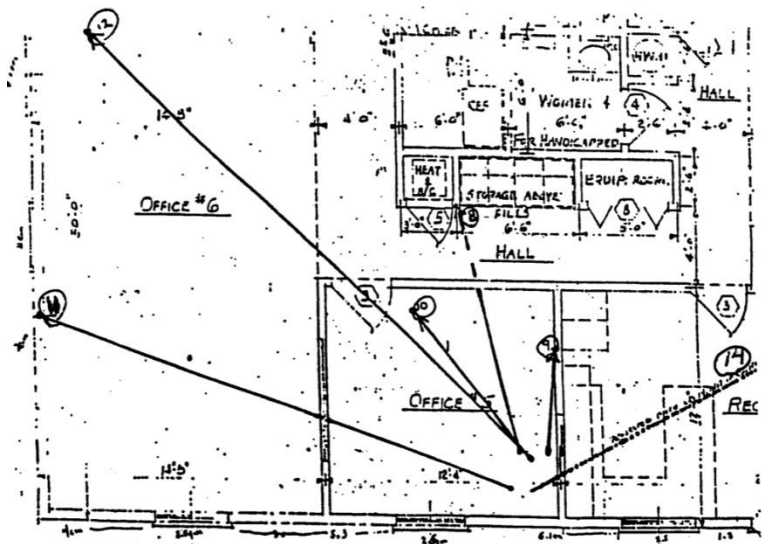


Chart A

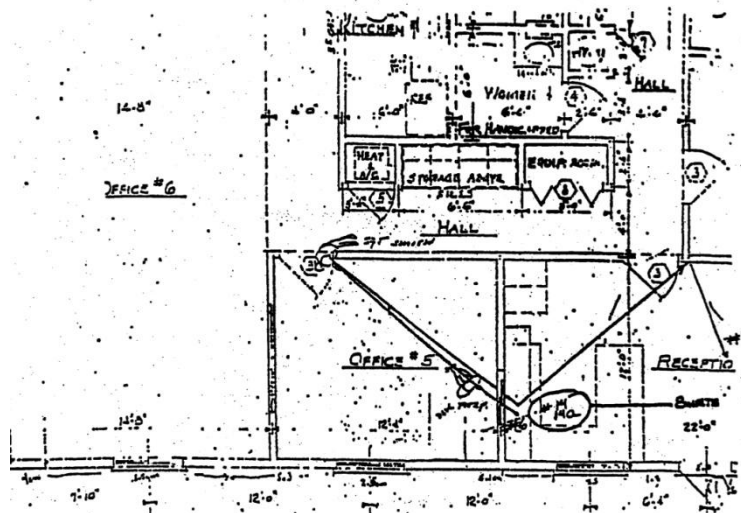


Chart B

“Within ten minutes of Parks'[s] phone call, two sheriff's deputies arrived and entered through the front door.” “Deputy Smith crept down the hallway and tried turning the handle to the office door.”⁷⁰ Deputy Heist positioned himself next to the sliding window, which was open.

Blake tells the next part of the story in her statement at the sheriff's office shortly after the shooting. She had wanted to close the partition “in case a policeman came in from the front door,” because “[she] didn't want the black guy to see him,” but she was unable to do so.⁷¹ What followed is detailed below:

A. [T]hen the police man put the gun through the window (subject started crying).

Q. Okay

A. And . . . told him not to move

Q. [W]as the black man facing the . . . the little window at that time?

A. [He was] facing [towards Eric and Paul].

Q. Okay, facing back towards the center of the room.

A. Yeah, and the . . . door was there, and the partition is right to here.

Q. Okay.

A. So, the police man was right here.

Q. Okay.

A. It was like, a distance maybe . . . 6 or 12 inches.

Q. Okay.

A. I don't remember at the time whether he had the gun in my lap or if he was still holding it towards Paul or Eric and when the policeman brought the gun up . . . I don't know if, if the black man let go of his grip on me or what . . . but . . . *there were, I remember three shots, I think . . . and then the policeman fell . . . (crying) and I knew he had gotten shot*

Q. Okay . . . were you lookin' at his gun as it came through the window?

⁷⁰ *Id.*

⁷¹Statement of Mary Helen Blake to Pensacola Sheriff's Office (April 29, 1984) (on file with author).

A. Yes.

Q. Did he fire a shot?

A. [N]o, *I think the black man fired the first shot . . . and then the policeman I think fired a shot . . . somebody fired a shot but I think there were three, a total of three shots . . .*⁷²

Deputy Smith testified that the first shot came through the wall where he was standing.⁷³ When Smith called the Sheriff's Department at 9:13, the taping equipment picked up, in the background, the voice of Ernest Fitzpatrick.

Fitzpatrick: *I didn't shoot him, did I?*

Smith: Yeah.

Fitzpatrick: Oh, My God.

Smith: Help me. Hello.

Voice: Emergency operator.

Smith: [I am at] 123 New Warrington Road, get me an ambulance down here. I have got a police officer down.

Fitzpatrick: Please don't die [phone ringing].

Smith: Move it.

Fitzpatrick: Please don't.

Smith: Get me two ambulances.

Dispatcher: Hello, this is the dispatcher.

Smith: This is Ed Smith. I have an officer down. I have three people shot. Get an ambulance.

Dispatcher: Where at?

Smith: 123 New Warrington Road, Fanning Realty.⁷⁴

Both Smith and Ernest had .38 caliber handguns, and, according to the Sheriff's Office, ballistics tests could not determine which of the .38 guns shot the bullet that killed Heist.⁷⁵ The charts show the pathways of the bullets of Fitzpatrick and Smith.

⁷² *Id.* (emphasis added)

⁷³ Brief for Appellant, *supra* note 21, at 12.

⁷⁴ Transcript of 911 tape (emphasis added).

⁷⁵ Brief for Appellant, *supra* note 21, at 83.

The state, by reconstructing the crime scene, had proven that Bullet # 1, which had split into fragments (1a and 1b), had killed Heist, and that Fitzpatrick had shot this bullet from his gun. It contended this during the original trial and sentencing, and the jury accepted this in its verdict. The state also proved that Smith had shot a bullet, #7, into the base of a cabinet above Heist's head.

When we looked at the ballistics evidence, however, we saw that fragments 1a and 1b did not weigh enough for a full bullet. So, we retained a former FBI agent to examine the bullets, and he concluded that fragments 1a and 1b, which Fitzpatrick allegedly shot, and Bullet #7, the bullet Smith shot, were *all* fragments. Fragments 1a and 1b were the base of a bullet. Fragment 7, which was embedded in the overhanging cabinet directly under which Heist was standing, was a large bullet fragment that had a missing base. It was "bevelled" and had a white substance on it (later determined to be human bone). The two small fragments (1a and 1b) and the larger fragment (7) constituted a single bullet. The state had concluded that Bullet #7 had come from Deputy Smith's gun by reconstructing the crime scene, and because "the rifling impressions . . . were consistent with those produced by [a] Smith and Wesson .38," Deputy Smith's gun.⁷⁶

We submitted the three fragments for a metallurgical and compositional examination. It established, beyond all reasonable doubt, that the three fragments comprised a single bullet. According to the state's evidence—the evidence that put Fitzpatrick on death row—Deputy Smith, not Fitzpatrick, had shot Heist. The bullet had broken apart in Heist's skull, with two fragments remaining inside and the third ricocheting up into the overhanging cabinet.

To make matters worse, there was compelling evidence that the state *knew this* before Fitzpatrick's trial. The examiner who did our test told us that the large fragment, Bullet 7, previously had been "mounted" for a similar test. "Someone did this test before," our examiner said. When we submitted a *Brady* discovery request,⁷⁷ the state revealed that it had requested a metallurgical examination in 1980, but for unexplained reasons, it said the state's lab could not actually do the test, and therefore there were no test results.⁷⁸ So, the state lab had mounted the large bullet fragment for the test, but had not actually done the test? Right.

⁷⁶ *Id.* at 83–84.

⁷⁷ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁷⁸ Brief for Appellant, *supra* note 21, at 84 & n.69.

The challenges for us now, were how to use this evidence at a re-sentencing hearing in which the new jury was going to be instructed that they were bound by the previous jury's verdict that had established beyond a reasonable doubt that Fitzpatrick had shot Heist, and why it mattered that Fitzpatrick had not shot Heist. After all, Fitzpatrick caused the shoot-out by taking the hostages into a small room, some might argue.

Establishing Ernest's Mental Illness

The record of Ernest's mental illness had been substantially underdeveloped at the trial and sentencing, and defense counsel had not linked what mental health evidence there was to Ernest's behavior on April 29, 1980, the key to developing an effective mitigation defense.

In developing the mental illness evidence, Lisa began with the family. In preparing the clemency petition, she interviewed and prepared affidavits for eleven siblings, none of whom original defense counsel had interviewed. Two of Fitzpatrick's sisters, Barbara and Ida, provided the most compelling evidence, which later would be the basis for their testimony at the re-sentencing hearing. Neither recalled Ernest voluntarily touching or hugging a family member. Both recalled abrupt changes in his mood: "within a few minutes he can change to about five different moods;" from "calm" to "all of a sudden just agitated" back to "calm." Suddenly, he was "a little child," and "the next second he may just start laughing."⁷⁹ He stayed in his room during the day, coming out at night when the family went to bed or early in the morning. Whenever he left the room, he would padlock it, even if it was just to go to the bathroom. Late at night and early in the mornings, he would go outside, where he would be "walking around" and "talking with someone," although there was no one there.⁸⁰ He would be "shaking his head" and "sometimes he would say things like he was disagreeing with someone."⁸¹ "He would just be strolling along like he had someone on the side of him."⁸²

We gathered records. Ernest's birth certificate indicated he had been born prematurely and weighed four pounds at birth.⁸³ The only

⁷⁹ *Id.* at 8 & n.9.

⁸⁰ *Id.* at 8 n.9.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2-3.

document left from his juvenile commitment (the state destroyed all other records five years after the juvenile was released), was a three-by-five note card that had Ernest's name on the front and two words—"schizophrenic and suicidal"—on the back.⁸⁴ We found other records containing evidence of Ernest's mental illness.⁸⁵

We talked to professionals and teachers who knew Ernest in high school and afterwards, including three with whom defense counsel never spoke. Dr. Robert Dorsey was the child psychologist at the high school Fitzpatrick attended.⁸⁶ He counseled Fitzpatrick several times per week during a four or five month period in 1974. He also tested him. He diagnosed Fitzpatrick as psychotic and schizophrenic and "recommended strongly" that "he be sent to a neurologist for a good neurological examination."⁸⁷ He thought Fitzpatrick "had something organically wrong with his brain."⁸⁸ At the resentencing hearing, Dr. Dorsey testified that, in lay terms, Fitzpatrick "was crazy as a loon," emotionally between ten and twelve years old, and operating at the "borderline" of intelligence.⁸⁹

Charles Stevens, a special education teacher, tutored Fitzpatrick regularly after Fitzpatrick was released from the juvenile system and when he was attending a special learning center.⁹⁰ Mr. Stevens regularly observed Fitzpatrick carrying on a conversation with someone that "he could probably picture mentally," but who wasn't there.⁹¹ Fitzpatrick told him that he "heard people talking to him."⁹² Mr. Stevens added that he brought this to his wife's attention because Fitzpatrick was "carrying on a conversation like that" and "doing all this gesturing and posturing."⁹³ He said, "[T]here is something wrong with [him]," and his wife "agreed that there was something definitely wrong."⁹⁴ Stevens said it took Fitzpatrick twelve times to pass his G.E.D. and that

⁸⁴ Brief for Appellant, *supra* note 21, at 8–9.

⁸⁵ *See id.* at 2–4.

⁸⁶ *Id.* at 4 & n.2. Dr. Dorsey taught at the Louisiana State University Medical School, supervised graduate students in psychology, taught graduate and undergraduate courses, and had performed court-appointed competency and responsibility evaluations for eleven years. *Id.* at 4 n.2.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.*

⁸⁹ Brief for Appellant, *supra* note 21, at 4–5.

⁹⁰ *Id.* at 7–8 & n.8.

⁹¹ *Id.* at 7–8 n.8.

⁹² *Id.*

⁹³ *Id.* at 7–8 n.8

⁹⁴ *Id.*

because the exams were standardized, he probably took the same three exams three or four times apiece.⁹⁵

Ernest Bugg was a juvenile services counselor who provided counseling to Fitzpatrick. He said that Fitzpatrick "frequently heard voices," would "phase right out of the room," and would engage in a "rocking motion" during which he would "carry on conversation with himself."⁹⁶ He would go from "high to low" moods "in a matter of minutes."⁹⁷

We retained several experts, as well. Dr. James Merikangas, a neurologist,⁹⁸ concluded that Fitzpatrick had organic brain syndrome and was "severely and diffusely impaired."⁹⁹ He said Fitzpatrick had suffered "an injury prior to birth" and had been brain "damaged all his life."¹⁰⁰ He said Fitzpatrick had "the mind of a child" even though he was twenty-seven years old at the time of the examination.¹⁰¹ Dr. George Barnard, a forensic psychiatrist,¹⁰² opined that Fitzpatrick had been "seriously mentally ill for a number of years going back actually to his childhood."¹⁰³ He stressed Fitzpatrick's "very long history" of "delusional ideas" that were "not based on reality," including delusions that he was a "great inventor."¹⁰⁴ He concluded that Fitzpatrick's ca-

⁹⁵ Brief for Appellant, *supra* note 21, at 7–8 n.8.

⁹⁶ *Id.* at 7 & n.7.

⁹⁷ *Id.* at 7 n.7.

⁹⁸ Dr. Merikangas graduated from Johns Hopkins University School of Medicine, was a resident in psychiatry and neurology at Yale University, and had been a member of the University of Pittsburgh and Yale University Schools of Medicine, teaching neurology and psychiatry. He had conducted thousands of neurological evaluations in sixteen years of practice, and was board-certified in both psychiatry and neurology. He had consulted with numerous governmental and private groups about the competence and mental state of people, including the Connecticut State Police, a state's attorney's office, a juvenile court, a circuit court, the Social Security Administration, and the United States Navy. He also had published about two-dozen articles in medical journals, edited one book, and had performed a large number of competency and responsibility evaluations. *Id.* at 2 n.1.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* at 2–3.

¹⁰¹ Brief for Appellant, *supra* note 21, at 2.

¹⁰² Dr. Barnard graduated from the University of North Carolina Medical School. He had taught, practiced medicine and psychiatry, and supervised in-patient psychiatric units at the University of Florida since 1963, where he was chief of the consultation and medical liaison section of the psychiatry department. Dr. Barnard had supervised several hundred medical doctors in this position and published approximately thirty articles. He had performed over 4,000 competency and criminal responsibility examinations at the time of the re-sentencing hearing. *Id.* at 5 n.3.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.* at 5–6.

capacity to "think rationally and act in a rational manner was substantially impaired."¹⁰⁵ At the time of the crime, Fitzpatrick was emotionally and mentally operating as a "pre-teenager."¹⁰⁶

Linking the Expert testimony to the Facts on April 29, 1980

The descriptions of Ernest's behavior in the real estate office confirmed that he was mentally disordered at the time of the incident. Ernest waited in the waiting room, pacing, even though there was no obstruction between him and people in the back of the real estate office, until Mary Helen Blake came out to assist him. She immediately noticed that something was wrong with him. She thought he had been drinking or was "high on drugs" and tried to smell his breath and peer into his eyes to see if they were dilated.¹⁰⁷ She said he was very "spacey" and "very high, excited."¹⁰⁸ He did not notice some of the people in the office, or see through the window the police cars going by, or hear various noises, although the other people in the office did. Blake said, "I don't think he really wanted to hurt us, he was just so nervous."¹⁰⁹ Eric Shaw, the delivery boy, testified that Fitzpatrick seemed "excited," "scared all the way through the whole thing," "pretty wild," "jumpy," "panicky." "He did not know what to do. He just seemed like he didn't plan everything that happened."¹¹⁰ Joy Sibila, a registered nurse of twenty years who was working at the real estate office, was more blunt: she said he appeared to be "psychotic," sounded "child-like," and behaved like a "psycho."¹¹¹ Having gathered all of the evidence we could, we prepared for the re-sentencing hearing.

When is a Roll of Quarters Better Than a Pretrial Motion?

The Sunday night before the Monday re-sentencing hearing was to begin, the Monday edition of the local paper came out, with a banner headline about the case and a story on the front page of the local section.¹¹² The article contained information that John Carr and I

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.*

¹⁰⁷ Brief for Appellant, *supra* note 21, at 10–11.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 11.

¹¹² See Ginny Graybiel, *Hearing May Decide Fate of Killer*, PENSACOLA NEWS J., May 4, 1987, at 1B.

thought was extremely prejudicial to Ernest, including a description of his juvenile record.¹¹³ We prepared a motion to keep the papers out of the jury room, where the venire panel would gather, and called the judge asking him to grant it. He summarily denied it. I was despondent. John looked at me, smiled, and said, “I have a van. How many quarters do you have?” On Monday morning there were no papers in the paper boxes surrounding the courthouse; we paid full price.

Selecting a Jury

In capital cases, voir dire may be the most important phase in the proceeding. It was in Fitzpatrick’s resentencing. The challenges were formidable. We began with the unique Florida rule that the jury sentencing recommendation in capital cases is by a simple majority. Escambia County residents overwhelmingly supported the death penalty and those on the venire panel whose views substantially impaired their ability to follow the Florida law were struck for cause. This death-qualification process was not neutral. We lost many more anti-death penalty jurors than the state did pro death penalty jurors.¹¹⁴ Many of the anti-death penalty venire jurors whom the court struck were African Americans. In total, the court, acting “for cause,” and the prosecutor, exercising preemptory challenges, struck six of the eight African American venire jurors.¹¹⁵

The Prosecutor’s Strike of Anita Jackson: “The other two blacks [on the jury] are better than she is, as far as black people go.”

Anita Jackson was one of the six black jurors who was stricken. The only apparent basis for the prosecutor’s strike of Jackson was her race.¹¹⁶ When the state said it was using a preemptory challenge to

¹¹³ *See id.*

¹¹⁴ Although the question appears balanced—“Would your views on the death penalty impair your ability to follow the state’s death penalty law?”—in practice, it disqualifies substantially more anti-death penalty jurors than pro-death penalty jurors. The state loses only the adamant “eye-for-an-eye” folks. The defense loses most of the jurors who have moral qualms about the death penalty, a larger group.

¹¹⁵ Brief for Appellant, *supra* note 21, at 47.

¹¹⁶ Jackson answered in the negative to the state’s question, which it posed only to black jurors: “Do you believe that blacks are more likely to receive the death penalty than whites?” *Id.* She stated that she would listen to and apply the law; that she could vote for the death penalty; that murder would be a “serious crime” that would justify the death penalty (qualifying it by noting it would depend on “what exactly happened and why it happened”); and that she could recommend the death

strike Jackson, it had not yet stated its position on the other two blacks who tentatively had been seated on the jury, subject to “back strikes.”¹¹⁷ The following colloquy occurred:

Millemann: [Objecting] The only reason that she's being stricken as a juror is because she's black, and I think this . . . falls squarely within [Batson].¹¹⁸

Prosecutor: That, of course, is nonsense.

The Court: Well, I don't think it's nonsense.¹¹⁹

Then, this gem from the prosecutor, who now is a judge:¹²⁰ “I think the other two blacks that are on here are better than she is, *as far as black people go*.”¹²¹ The judge overruled our objection, disclaiming any power to provide a remedy for a racial strike.¹²²

In the most remarkable voir dire ruling, however, the court overruled our “for cause” challenge to Harriet Majors. She said Paul Parks, whom Fitzpatrick shot in the real estate office, “and his wife, have just been among our very closest friends. We take vacations with them. We do all sorts of things together. We were *extremely* interested in [the Heist shooting] at the time [and] yes, we heard a great deal [about] it from Paul, Mr. Parks.”¹²³ Majors sat as a juror. The silver lining for us was that the ruling built reversible error into the record, assuring that there would be another sentencing hearing if necessary. It was a multi-year life insurance policy.

penalty even if the defendant had mental disorders, depending on the “kind of emotional problems he had.” *Id.*

¹¹⁷ *Id.* at 48. As the parties conduct voir dire, jurors are tentatively seated in the jury box in the order they are questioned. Counsel can seek to strike them before they are tentatively seated or reserve strikes until the 12 juror chairs and two alternate chairs are occupied. The peremptory challenges were allocated for jurors seated in the box (the majority), and two additional ones for the two alternate positions, one for the first alternate position, and one for the second.

¹¹⁸ See *Batson v. Kentucky*, 476 U.S. 79, 86–90 (1986); see also *State v. Neil*, 457 So. 2d 481, 486–87 (Fla. 1984) (enforcing *Batson*).

¹¹⁹ Brief for Appellant, *supra* note 21, at 48–49.

¹²⁰ See *David Rimmer*, FIRST JUD. CIRCUIT CT. OF FLA., <http://www.firstjudicialcircuit.org/judges/santa-rosa-county/david-rimmer> (last visited Jan. 5, 2013).

¹²¹ Brief for Appellant, *supra* note 21, at 48 (emphasis in original).

¹²² Under *Batson*, the judge could have stricken the venire panel and started again or seated the juror. See 476 U.S. at 100 n.24.

¹²³ Brief for Appellant, *supra* note 21, at 53 (emphasis in original).

We “won” one of the other voir dire battles. It would prove to be a fatal mistake. Over the prosecutor’s objection, we leapfrogged the Reverend Tommie McGrew, an African American, into the jury from the second alternate position.¹²⁴ He said, “There are some people I know [who] have got a mind of a child [but are] 50 years old.” Someone with a “child mind” should not be executed. This was our theory of the case. He was black. Ernest was black. It seemed like a perfect match. It proved to be just the opposite.

Trying the Case

The state put on the evidence it had introduced in the original guilt-innocence trial. Over our objections, the prosecutor also cross-examined our experts to introduce Fitzpatrick’s juvenile record, the very error, we argued unsuccessfully, that had persuaded the Florida Supreme Court to mandate the resentencing hearing.¹²⁵

We relied on three statutory mitigating circumstances and the absence of two aggravating circumstances. At the time of the crime, we argued, Fitzpatrick “was under the influence of extreme mental or emotional disturbance,”¹²⁶ his “capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired,”¹²⁷ and although he was twenty years old, functionally and emotionally, he was a child.¹²⁸ We also stressed that homicide was not “especially heinous, atrocious, or cruel,”¹²⁹ and was not “committed in a cold, calculated, and premeditated manner,”¹³⁰ the two aggravating circumstances that many argue justify the death penalty. My students, John Carr, and I had developed this five-factor theory of the case from the beginning and used it to guide our

¹²⁴ McGrew was in the second alternate’s position. It was our turn to exercise our peremptory challenges, and we had one strike on the second alternate position and one strike left on a juror in the group of twelve already in the jury box. The prosecutor had a peremptory challenge on the first alternate position. The issue was whether, when we struck the second alternate and then struck a juror in the group of twelve, McGrew would leapfrog over the first alternate position, precluding the State from striking him, and move onto the jury. We argued about this question for several minutes, with the judge ruling that McGrew would move into the group of twelve before the prosecutor could exercise his first alternate strike.

¹²⁵ *See supra* pp. 238–41.

¹²⁶ *See* FLA. STAT. § 921.141(6)(b) (1987).

¹²⁷ *See id.* § 921.141(6)(f).

¹²⁸ *See id.* § 921.141(6)(g).

¹²⁹ *See id.* § 921.141(6)(h).

¹³⁰ *See id.* § 921.141(6)(i).

fact finding, identify our pretrial motions, select our expert witnesses, and guide our re-sentencing hearing presentation of evidence and arguments.

We added, by the way, Fitzpatrick had not shot the deputy. The compelling evidence of this was admissible, we argued, even though the jury was bound by the original jury's contrary finding, which the original jury had made beyond a reasonable doubt. There remained "lingering" or "residual" doubt, we contended, which was a legally cognizable non-statutory mitigating circumstance.¹³¹ The judge refused to instruct the jury on this theory, but allowed us to present the evidence in response to the state's case, which walked the jury, step-by-step, through the complete incident in the real estate office. We hoped the jury got the point.

Closing Argument

We made our arguments. The state argued that Fitzpatrick had shot the deputy sheriff, and if not, so what? He had directly caused the death of Heist. Fitzpatrick, the prosecutor argued, had plenty of "walking around sense," and if he was crazy, he was dangerous crazy. Quoting the Old Testament, the prosecutor, who was a lay minister in his church, then approached the Reverend Tommie McGrew, saying,

Now [Fitzpatrick] wants you to think he is crazy all right. That's one of the oldest defenses in the book. If you have ever read the [O]ld [T]estament you know in First Samuel, Chapter 21, that King David used that very defense to escape from his enemies when he was going to be captured. He pretended to be mad and . . . let the spittle run down upon his beard¹³²

¹³¹ The U.S. Supreme Court has considered the issue of lingering doubt twice without clearly resolving the issue, but it has strongly suggested that it does not accept the argument. *See Franklin v. Lynaugh*, 487 U.S. 164, 173–74 (1988); *Oregon v. Guzek*, 546 U.S. 517, 525 (2006).

¹³² Transcript of Record of Re-sentencing at 1097, *State v. Fitzpatrick*, No. 80-1281-E (Fla. Escambia Cnty. Cir. Ct. July 2, 1987). Fearing capture, King David is described in Samuel I of the Old Testament as having created the false picture of insanity by adopting various crazy behaviors such as scribbling on doors and drooling over his beard. 1 *Samuel* 21:13.

The ruse worked for King David, the prosecutor said, arguing the jury should not let Fitzpatrick get away with the same ploy.

The Crying Juror

About three hours later, the jury returned, led back in by an African American woman juror who was crying. No one on the jury looked at us. We knew without being told. The recommendation was death. It was by a vote of seven-to-five. One changed vote in our favor, and we would have won. But, we had lost. The local newspaper reported the result. “By a single vote, an Escambia County Circuit Court jury recommended Monday that convicted murderer Ernest Fitzpatrick, Jr. die in Florida’s electric chair. Fitzpatrick, 27, who had stretched restlessly during the hearing, made faces, muttered, and was shushed by his father, looked blank when he heard the 7 to 5 recommendation.”¹³³ The article summarized John Carr’s argument that “Fitzpatrick was an immature, mentally ill, brain-damaged young man who deserved mercy,”¹³⁴ and noted “FBI ballistics expert Richard Poppleton’s surprise testimony” that “the bullet fragment that hit Heist’s head, resulting in his death, matched a bullet that deputies believe was shot by Sgt. Ed Smith, a second officer at the scene.”¹³⁵ The article quoted from the prosecutor’s argument too: “Deputy Heist paid the ultimate price. Shouldn’t [Fitzpatrick]?”¹³⁶

After the jury announced its verdict, Ernest tried to reassure us. “First time round, I didn’t get any votes; this time you got me five,” he said. I really didn’t feel any better. I felt worse that night when John and I ran into a court employee who had heard the jury through the door of the deliberation room. He asked us if we could “hear the yelling.” We said “no.” “Do you know who was leading the charge for execution?” “No,” we said.” “It was the Reverend Tommie McGrew,” he said, the juror that we had fought to put on the jury, apparently applying the death penalty according to the Old Testament. It appeared our misjudgment about the Reverend would cost Ernest his life.

Lawyers who tell stories about their cases often season them with macho. I can’t. I was devastated by the sentencing recommendation. I had a recurring dream. I was preparing our witnesses for the

¹³³ Ginny Graybiel, *Jury Says Killer Should be Executed*, PENSACOLA NEWS J., May 12, 1987, at 1A.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

hearing, optimistic about the outcome. Slowly, I would wake up, with the eventual flood of consciousness jolting me awake. The State of Florida was going to kill Ernest Fitzpatrick.

“I kicked the door open for you.”

We prepared to ask the judge to overrule the jury’s recommendation and impose a life sentence. Florida judges do overrule capital sentencing recommendations, but then, they did so more frequently by overruling the life recommendations of judges and imposing death.¹³⁷

At the judicial sentencing hearing, I sat next to Barbara Fitzpatrick, Ernest’s oldest sister. The judge began by finding the same five aggravating circumstances that he found after the first sentencing hearing.¹³⁸ He then turned to the statutory mitigating circumstances. Finding that “the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,” the court said: “Although expert testimony at the trial established that defendant was in complete control of his behavior, the expert testimony at the sentencing trial established that defendant was acting under the influence of extreme mental or emotional disturbance.”¹³⁹

With regard to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the court said:

Expert testimony at the trial established that defendant was fully aware of what he was doing, knew that it was wrong, and could conform his conduct to do right had he so desired. This testimony was contradicted during the sentencing trial, and based on this expert testimony, the Court finds that even though defendant was sane at the time of the capital felony, his capacity was substantially impaired.¹⁴⁰

¹³⁷ See LaTour R. Lafferty, *Florida’s Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?*, 23 FLA. ST. U. L. REV. 463, 476 (1995) (noting the increasing tendency of judges in Florida to override jury recommendations of life-sentences in favor of the death penalty).

¹³⁸ *Fitzpatrick v. State*, 437 So. 2d at 1072, 1077 (Fla. 1983).

¹³⁹ Sentencing Order at 2, *State v. Fitzpatrick*, No. 80-1281-E (Fla. Escambia Cnty. Co. Ct. July 2, 1987).

¹⁴⁰ *Id.* at 2–3.

Finally, concerning the youthful age mitigating circumstance, the court said: "Defendant was twenty years of age and had been on his own for several years after being rejected by his family. However, expert testimony as to defendant's borderline intelligence and emotional problems establish that defendant was operating at the level of maturity of a juvenile."¹⁴¹

Having found that, at the time of the crime, Fitzpatrick was extremely mentally or emotionally disturbed, substantially impaired, and a functional juvenile, the court then sentenced him—to *death*. It said,

It is, therefore ORDERED that the Defendant Ernest Fitzpatrick, Jr., under Count Four of the indictment for the crime of murder in the first degree, be committed to the custody of the Department of Corrections of the State of Florida to be punished by death in the electric chair or as otherwise provided by law.¹⁴²

I was close to elated. I knew the judge was going to accept the jury's death recommendation, but I did not expect him to embody our theory of the case in his findings. When I shared the "good news" with Barbara, she looked at me with disbelief, and assured me my optimism was naïve. This was Florida. The judge's opinion assured that Ernest would be executed.

The judge, however, did not seem to think so. I stopped by before leaving Pensacola to thank him for allowing me to represent Ernest and for his "many courtesies to out-of-state counsel."¹⁴³ He responded: "I kicked the door open for you." I told him I understood, and thanked him for it. I felt like saying: "You are not running for reelection, why didn't you just kick it down?" But, I didn't, expecting that I would be returning to Pensacola for another resentencing, perhaps before him again.¹⁴⁴

What had the judge done and why? His findings sent an unmistakable message to the Florida Supreme Court. Imagine the message as a cover letter from him to the Florida Supreme Court accompanying our appeal. This imaginary letter might read:

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* (emphasis in original).

¹⁴³ Good advocacy often is credible insincerity.

¹⁴⁴ Again, I believed the decision, over our objection, to seat Mrs. Majors on the jury guaranteed that the death sentence would be reversed. *See supra* pp. 253–54.

Dear Florida Supreme Court,

Attached is my death order in this case. It affirms the jury's recommendation. Please reverse both of us. We are both wrong. Mr. Fitzpatrick is a mentally ill, functional juvenile. He doesn't deserve death. I have to live in this community, however, as do the jurors. Fitzpatrick killed a good man who was a popular deputy sheriff. You have, effectively, life-tenure. You do not have to live here. Please rescue Mr. Fitzpatrick and me.

We had one thing left to do before I left Pensacola. We asked a respected Florida sociologist, Michael Radalet, to dig into his Florida death penalty databank to create a statistical profile for Ernest that we could use on appeal, and we filed a motion for sentencing reconsideration to get the information into the appellate record. Radalet found that from 1972, when Florida reinstated the death penalty, through the time of Fitzpatrick's resentencing, Florida judges had imposed 490 death penalties.¹⁴⁵ Fitzpatrick's case was one of only two in which the judge had found the two mental illness mitigating circumstances and the youthful age mitigator, and the Florida Supreme Court had reversed the death penalty in the other case.¹⁴⁶ In only nine cases had the trial judge found the two mental illness mitigating circumstances, and the Florida Supreme Court had reversed the death penalty in six of the nine cases.¹⁴⁷

Our point, intended for the Florida Supreme Court, was that trial judges in Florida did not impose death penalties after finding that the defendants had killed when they were mentally ill juveniles, and when they did, the Court reversed the death penalty. Let me be clear: there are substantial numbers of death-sentenced prisoners in Florida who were mentally ill and young when they killed. Judges, however, do not so *find* just before they order them executed, unless, that is, they are hoping to be reversed.

¹⁴⁵ Brief for Appellant, *supra* note 21, at 18.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 18 n.13.

The Florida Supreme Court Responds

My students and I largely wrote the appellate brief, although we asked an excellent Florida lawyer, Edward Stafman, to argue the appeal. In a per curiam opinion, the Florida Supreme Court accepted the trial judge's invitation.¹⁴⁸ It concluded that "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer."¹⁴⁹ It reversed the death penalty and instead of remanding for another sentencing hearing, imposed a life sentence with the possibility of parole.¹⁵⁰ Finding that the death penalty was disproportionate in this case, the Court said, "The record on resentencing is replete with evidence of Fitzpatrick's substantially impaired capacity, his extreme emotional disturbance, and low emotional age. Those present at the scene of the shooting testified that Fitzpatrick appeared 'psychotic,' 'high,' 'spacey,' 'panicky' and 'wild.'" ¹⁵¹ The Court described the expert testimony as "[t]he unanimous opinion" that "Fitzpatrick suffered from extreme emotional and mental disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired," and "that his "emotional age was between nine and twelve years old."¹⁵² The Court added, In contrast [to the mitigating evidence], the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent."¹⁵³ The Court emphasized "that the record on resentencing is substantially different from that of the original sentencing,"¹⁵⁴ and that "this additional evidence shows the mitigating circumstances outweigh the aggravating circumstances, and thus renders the death penalty inappropriate."¹⁵⁵

¹⁴⁸ *Fitzpatrick v. State*, 527 So. 2d 809, 810 (1988).

¹⁴⁹ *Id.* at 812.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 811–12.

¹⁵³ *Id.* at 812.

¹⁵⁴ *Fitzpatrick*, 527 So. 2d at 812.

¹⁵⁵ *Id.* The Court ignored our argument that Fitzpatrick had not shot Heist, adopting a statement of facts from the original appeal in which the Court had concluded that Fitzpatrick shot Heist. *Id.* at 810. Perhaps the Court thought that was true, or maybe that with the reversal of the death penalty and judicial imposition of a sentence of life imprisonment with the possibility of parole, the point was now legally moot. The State likely would argue that even if it was true that Fitzpatrick did not fire the fatal bullet, he would still have faced a first degree felony murder charge, a capital offense, because an innocent person was killed during the commission of both a robbery and kidnapping. *See State v. Williams*, 254 So. 2d 548, 551 (Fla. Dist.

When I got the news, I was in Aberdeen, Scotland, teaching in the law school's summer exchange program. I made sure Ernest got the news and then cried tears of relief that it was over and tears of happiness that the Court got it right.

At its core, this is a lawyer's story told from a lawyer's perspective about the essential tool of law practice, *the theory of the case*. It is *the* structural story, which synthesizes everything from initial fact investigation, through pretrial motions, trial preparation, witness selection, voir dire, and arguments and presentations at trial and on appeal. As I tell my first semester students in my criminal law/legal analysis and writing course, it is through this story, the theory of the case, that lawyers "write" appellate opinions. This is an important counterweight in the first year curriculum. Students tend to think law is delivered from appellate judges, from the top of the mountain, in the same way God gave the Ten Commandments to Moses.¹⁵⁶ Our accepted method of teaching in the first year reinforces this view, except we often point out how the appellate judges got God's message wrong, and occasionally, how God, himself, got it wrong.

The Fitzpatrick case study shows students *how* to construct a theory of the case, fact by fact and argument by argument, and how this lawyer-constructed theory of the case can become the core of an appellate opinion. We knew Ernest was a man-child in 1984 when we read his letter. The challenge was to get the Florida Supreme Court to say those words, as they did in 1988. This was four years and approximately 2,000 hours of my time, and many multiples of that of my students' time, after we had received Ernest's letter. Demonstrating the steps in this process to first semester students, from initial letter through final appellate opinion, is vitally important, especially since the pervasive first year educational model relies on disembodied appellate opinions and commentary, rather than case studies.

As important, the Fitzpatrick case study shows law students *why* it is essential to be disciplined and rigorous in learning the law, in learning how to develop facts, and in learning how to engage in the dialectic that combines the two to create a story—the theory of the case. It was such a story that John Carr, my students and I constructed and then told to two levels of Florida courts that saved Ernest Fitzpatrick's life.

Ct. App. 1971) (holding that the felony-murder statute applies "when an innocent person is killed as a sequential result of . . . one or more persons acting in furtherance of an intent or attempt to commit one of the felonies in such a statute").

¹⁵⁶ See *Exodus* 19: 20–21, 20: 7–17; *Deuteronomy* 5: 11–21.

IV. OTHER PERSONAL CASE STUDIES AND STORIES WITH DIFFERENT VOICES

I could describe each of the case studies that follows with the same detail as the Fitzpatrick case, but, given space limitations, here are the summaries:

A. Stories That Clients Tell on Their Own Behalf: The Battered Women Clemency Project

Sometimes, the most effective legal stories are those clients tell directly as advocates for themselves. Lawyers can help them tell their stories. In one project in which I was involved, four women incarcerated for killing their abusive male partners told their stories in a video called “A Plea for Justice.”¹⁵⁷ They spoke powerfully and directly, in this case to the Maryland governor and legislature, as part of a group clemency project that we began at the law school in 1987.¹⁵⁸ The video helped to persuade Governor William Donald Schaefer to grant clemency to eight abused women,¹⁵⁹ and it helped persuade the legislature to enact a law authorizing courts to admit histories of abuse in criminal prosecutions of abused defendants.¹⁶⁰ The role of the lawyer here is subsidiary. She is not the story-teller, but rather the coach, advisor, and advocate for the client, who is the story-teller. I use a case study based

¹⁵⁷ Videotape: A Plea for Justice (The Public Justice Center, Domestic Violence Task Force 1990) (on file with the Thurgood Marshall Law Library, University of Maryland Francis King Carey School of Law).

¹⁵⁸ Sharon Krevor-Weisbaum, then both a student of mine and the Executive Director of the Public Justice Center, was a leader in beginning this project. Rachel Wohl and Carolyn Jacobs, working through the Public Justice Center, and especially its the Domestic Violence Task Force, and the staff at the House of Ruth were the leaders in making the project successful. In the beginning, Karen Czapanskiy and I supervised a group of law students who interviewed many women prisoners to identify the best candidates for clemency. See Laura Lippman, *Battered Women Hoping for Chance at a New Defense*, EVENING SUN, May 14, 1990, at M1; Michael A. Millemann, Editorial, *Commutations: Justice and Mercy*, BALT. SUN, Mar. 31, 1991, at D1; Thomas W. Waldron, *Governor: Women Were “Pushed to the Brink,”* EVENING SUN, Feb. 20, 1991, at M1.

¹⁵⁹ See Howard Schneider, *Md. to Free Abused Women; Schaefer Commutes 8 Terms, Citing Violence*, WASH. POST, Feb. 19, 1991, at A1.

¹⁶⁰ See MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2012) (authorizing courts to admit evidence of “battered spouse syndrome” in homicide and serious assault prosecutions). An important rationale for clemency was that the women had not been able to present their histories of abuse as a mitigating factor. See Schneider, *supra* note 159.

on this project to teach self-defense, among other things, in my first year criminal law course and to explore law reform strategies.

B. Stories That Clients Tell Retrospectively: State v. Johnson

Clients also can tell their stories retrospectively. The clemency project grew out of a criminal defense clinic in which my students and I represented abused women who were charged with murder for killing their abusers. In a case study based on one of these cases, I interviewed Ms. Yvonne Johnson, a former client, ten years after we had represented her in a murder case. She had asserted self-defense, explaining that she came upon her boyfriend unexpectedly after she had evicted him from her house, and he chased her, knocked her down, and began choking her (or so she could have reasonably concluded) before she stabbed him twice. One wound was superficial; the other happened to penetrate his carotid artery. She was devastated because she loved the man she had killed and they had had a child together. In 1985, on the morning of trial, my two students and I negotiated an *Alford* plea¹⁶¹ for involuntary manslaughter, with a five-year suspended sentence and two years probation. She went home to her children from the courthouse and has never been in trouble since.

Ten years later, I asked her to come back to the law school for a videotaped interview that I could use in teaching with her case. She readily agreed since we had maintained friendly contact over the years. She was one of my favorite clients, which is part of the teaching material. Her reflections about the homicide, the case, her life since then, and the students who had represented her ten years before were fascinating.

The homicide had changed her life dramatically. She described being stalked by a cousin of the man she had killed, her post-traumatic stress, and living in virtual self-imposed isolation. She described the agony of telling their son, when he was five years old, that she had killed his father and why she had done so.

What did we, her lawyers, do right? A lot, she said. More important, what did we do wrong? Laughing, she recalled when her sister, who was an important witness, angrily kicked two students out of her house. They had asked her “Do you think she planned to do it?” The sister’s response: “What the hell do you mean? You are supposed

¹⁶¹ See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (establishing that a defendant can plead guilty without admitting guilt).

to be her lawyers, get out of here.”¹⁶² This story provides an important teaching moment about how lawyers should talk to clients and their families. Communicating allegiance and support is critically important. Clients must feel that their lawyers are unequivocally on their side.

There also was Yvonne’s assessment of the multiple moot courts we did to prepare her for trial, which we thought were so important. “You mean those pretend things (laughing)?” She said they did not and could not prepare her for the embarrassment, risks, and anxiety associated with a trial, which provided another important teaching moment. We might have enhanced the effectiveness of the preparation by conducting it in the courthouse, not in the law school, and showing Yvonne an actual trial. But, basically, we had to realize the limits of what we could do to try to pre-determine the result. In the end, it would be up to the jury.

Most poignant, she recounted how her brother-in-law had killed another sister of hers. Johnson had killed her abusive live-in boyfriend. Her sister had married hers and then had taken all possible legal steps to protect herself from his escalating violence. The sister had called the police, criminally prosecuted the cases, pressed for incarceration and treatment (he was a drug addict and alcoholic), obtained a civil put-out order, and finally moved out. Her husband tracked her down, pulled her from her second floor apartment to the street, and slashed her to death with a knife.

The stories of these two sisters offer stark contrasts and insights into the racial and gender bias that battered women face, in what could be a critical legal studies course. Yvonne killed, not waiting to be delivered by the law, and is alive. Her sister did everything possible under the law, waiting to be delivered, and is dead.

The most important feature of Yvonne’s retrospective interview, however, is the opportunity it gives the students to first realize, and then think about, their prejudgments. In the video, the students witness Yvonne’s warmth, good humor, and love for her children. In the video, they see that she is a good person and a good mother. These observations were just as true in 1984. In her paper record, however, she appears tough, aggressive, and street-wise, with a record for assaults. This is the Yvonne the students know before the video. At age fourteen, Yvonne became the functional mother of her younger siblings when both parents abandoned the family. In the 1960s and early

¹⁶² Ms. Johnson and I got them back in, and they subsequently developed a good relationship with the sister.

1970s, police twice came to her house to arrest two of her younger siblings. She stepped in the way and was convicted and sentenced to prison for conduct that was both non-violent and maternal. Her record was an indictment not of her but of the administration of “justice” at this time in Baltimore. I know this, because I practiced at this time in Baltimore. The students do not.

When the students see the videotape, there is stunned silence and a palpable sense of embarrassment. Uniformly, the students express surprise about the person they see in the video, with comments that clinical teachers are used to hearing after students first visit clients (e.g., “she seems really nice,” “a good person and mother”). The video challenges popular stereotypes and invites students to be skeptical about record descriptions of people at their worst moments. This is vital when clients are either invisible or are undeveloped stick figures in the snippets of appellate opinions that still comprise the bulk of first year legal education.

I use Yvonne’s case study to teach self-defense in criminal law, as the basis for the students’ first writing assignment in my legal analysis and writing course, and for the larger lessons that I describe above.

*C. Stories that Students Construct from Case Studies:
Filling in the Blanks*

There is another type of story in the case studies with which I teach. It is one that clinical students begin to write through their legal work and classroom students subsequently finish in a special theater course when they write the story as a play. The foundation of the play is a clinical case. My theater course co-teachers and I have used two cases of wrongfully convicted, life-sentenced prisoners to co-teach these drama courses.¹⁶³ In one case, we persuaded Governor Robert

¹⁶³ The course is called Lawyers, Legal Systems and Their Social Context, and my co-teachers were Robert Bowie, Jr., a lawyer who created his own firm, Bowie and Jensen, and who also is a playwright, and Elliott Rauh, Managing Director of the Baltimore-based Single Carrot Theater. Their inspired teaching, and in Elliott’s case direction, have made the courses extremely successful. See *Law and Legal Systems and their Social Context*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF LAW, http://www.law.umaryland.edu/academics/program/curriculum/catalog/course_details.html?coursenum=581D, (last visited Jan. 5, 2013); *Robert R. Bowie, Jr.*, BOWIE & JENSEN, <http://www.bowie-jensen.com/lawyers/robert-bowie-jr/> (last visited Jan. 5, 2013); *Elliott Rauh*, SINGLE CARROT THEATRE, http://singlecarrot.com/ensemble/elliott_rah (last visited Jan. 5, 2013).

Ehrlich to commute the prisoner's sentence to time served so he could be immediately paroled, after thirty-six years of wrongful incarceration.¹⁶⁴ The students wrote the play after he had been released. In the other case, the client was still locked up when the students wrote their play. Subsequently, after he had served almost thirty years in prison, Governor O'Malley granted clemency to him based on the extraordinary work of my colleague, Professor Renee Hutchins, and her students.¹⁶⁵

What is interesting about the plays is that they focus on the back stories that try to explain why the two innocent prisoners were wrongly convicted of homicides and sentenced to life imprisonment. These are hybrid stories, part clinical facts and part re-construction of what probably happened, to explain the miscarriages of justice.

In the "what probably happened" column in the first case, the students explored the relationship between the 1968 riots in Baltimore after the assassination of Dr. Martin Luther King and the arrest in 1968 and conviction in 1969 of the defendant, Walter Arvinger, who is black. The play also examined the grossly incompetent performance of defense counsel. This was a *capital trial*. The whole transcript, including trial and sentencing, was *ninety-three pages long*. The trial took about *half a day*. On the face of the transcript, Arvinger was innocent. I had never seen anything like it before. The play provided a better explanation of what probably happened than did the record.

In the other case, of Mark Farley Grant, the theatrical theme was what the community knows. The community in which Grant and the co-defendant lived knew from the beginning that Grant was innocent. They knew that the family of the co-defendant had threatened to kill the lead prosecution witness unless he falsely claimed Grant was the shooter. The play considers why this knowledge did not penetrate the criminal justice system. Professor Hutchins also discovered that the

¹⁶⁴ See Lee Hockstader, Editorial, *A Stain on Maryland; Walter Arvinger Spent 36 Years in Prison for a Crime He did not Commit*, WASH. POST, Nov. 30, 2004, at A19. See also Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education Into the First Year*, 12 CLINICAL L. REV. 441 (2006) (providing a more detailed account of the case). Students in several courses, including a legal writing course and a post-conviction clinic, worked on Mr. Arvinger's case. I created the post-conviction clinic in part to provide a structure to represent Mr. Arvinger after he wrote to me, claiming, thirty-four years into his life sentence, to be innocent. In fact, he was.

¹⁶⁵ Baltimore Sun journalist Dan Rodricks wrote several articles protesting the prisoner's incarceration and advocating his release. For the most recent article, see Dan Rodricks, *Road Back for Mark Farley Grant Starts on the Early Bus*, BALT. SUN, Sept. 9, 2012, at 3A.

prosecutor knew that the co-defendant had flunked a polygraph exam before the prosecutor entered into a plea agreement with him and put him on the stand to testify against Grant. There was a lot of dramatic material to work with here.

Both plays engaged the students in thinking more broadly about the criminal justice system and its relationship to local communities than occurs in most traditional criminal law courses and seminars. The cases also posed an array of professional responsibility and professionalism issues, including delivery of legal services issues, that the students analyzed in writing and presenting the plays.

Most interesting to me, the students who wrote the play about Grant when he was still confined commented on the sense of responsibility they felt to him as they wrote and performed the play. It was akin to how clinical students describe the commitments they have to their clients. In this respect, this story-telling, theater course had some of the hallmarks of a clinic.

D. The Stories that the Other Actors in the Cases Tell

This in some ways is the best teaching material. It is unscripted and uncontrolled.

In Fitzpatrick, there is the chief assistant attorney general who learned about deterrence when he was deterred by the death penalty, he says, from killing his wife; and the prosecutor who talked, Old Testament minister-to-minister, to the juror and won a death penalty; and the Atticus Finch lawyer, John Carr, who put his solo practice on hold to try to save Ernest Fitzpatrick's life; and the judge, who was not going to run for re-election, but could not do what he knew he should do, but then did it indirectly by inviting—one might say demanding—that the Florida Supreme Court do it instead. And, there are all the subsidiary lessons, including those contained in the Florida Execution Guidelines, which conscript in the killing of a person, all of the treatment, counseling and ministerial, as well as custodial staff, with all of the professional and ethical issues that this poses.

There are many other stories that might be interesting, for example, why the prosecutors in *Arvinger* and *Grant* sought convictions; why the defense counsel in these cases did not establish their clients' innocence; and why the trial judges and juries convicted both Arvinger and Grant.

What can be said, based on all of this, is that in all of these cases, the external actors—opposing counsel, judges, and other actors (like governors)—presented challenging moments and good teaching

material. Their stories were an important part of the students' education.

V. TEACHING

A. *What Personal Case Studies Can Teach*

Personal case studies have many pedagogical strengths, some of which I have suggested. They bring forgotten clients into the classroom; reaffirm the idealistic reasons many students come to law school; use practice to organize and critique theory and theory to organize and critique practice; introduce students to the work of lawyers, with examples of both good and bad legal work and good and bad lawyers and, thus, teach professional responsibility; provide several dimensions of critical legal theory to evaluate legal doctrine and process; and explore both the potential and limits of law.¹⁶⁶

It is especially important to teach with such case studies in the first semester when our students are being acculturated to the roles of lawyers and the law, and in the second semester, when the flames of idealism often flicker. Many of the arguments I offer in support of using case studies in first-year courses also supported the creation of our legal theory and practice program and its placement in the second semester of the first year.¹⁶⁷ Other professional schools, especially busi-

¹⁶⁶ See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1739–42 (1993); Nancy Levit, *Legal Storytelling: The Theory And The Practice—Reflective Writing Across The Curriculum*, 15 J. LEGAL WRITING INST. 253, 261–62 (2009) (arguing that learning the stories and background of parties in various cases allows students to better understand social conditions, the history of the litigation, the legal system at that time and place, and how human emotions attendant to cases play out over years).

¹⁶⁷ See Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1160 (1992) (“At the heart of the reconceived courses we call Legal Theory and Practice, lies the expectation that each lawyer can, and does, bear responsibilities to poor people.”); Richard Boldt & Marc Feldman, *The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Context*, 43 HASTINGS L.J. 1111, 1114, 1119–20 (1992); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175, 1179 (1992) (“In [Legal Theory and Practice/Civil Procedure (LTP/CP)], I made an effort to replace a vision of professional responsibility based solely on individual rights with one that includes an ‘ethic of care.’”); Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L.J. 1147, 1148 (1992) (arguing that “through the experiential component or the client representation portion of the Legal Theory and Practice (LTP) program,” “students

ness schools, use case studies to teach first year students for many of these same reasons.¹⁶⁸

I cannot overstate the importance the students attach to the clients in the case studies, including Ernest Fitzpatrick, Jr., Walter Arvinger,¹⁶⁹ Mark Farley Grant,¹⁷⁰ and Yvonne Johnson.¹⁷¹ It helped that the latter three either were able to come to class (Arvinger and Johnson) or to communicate by phone (Grant) with the students who were studying their cases in the various courses. The clients helped students to appreciate the very real and, at times, extraordinary consequences of law; to assess the exercises of discretion by lawyers, judges, and juries; and to challenge popular stereotypes in important ways. In a casebook-based curriculum, the case studies provide the only real introduction to clients that many students will receive in the first year.

The case studies also offer the opportunities for real-world cases to critique substantive law and process. Justice John Marshall Harlan II is one of my favorite Justices. As a law student, I watched him during arguments, nearly blind, peering at text inches away and asking the occasional penetrating question. In 1970, he wrote the opinion of the Court upholding standard-less death penalty schemes. He said, “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”¹⁷² I agree with his skepticism, although it leads me to reject the death penalty, not accept it as Harlan did.

In discussing the *Fitzpatrick* case, I ask my students whether they agree with Justice Harlan. Can we develop a fair system of capital punishment based on before-the-fact criteria? Are the Florida aggravating and mitigating circumstances such criteria? Do they fairly sort out who should live and who should die?

I also ask my students what the *Fitzpatrick* case teaches about the process in capital cases. Florida based much of its law upon the American Law Institute’s (“ALI’s”) capital sentencing provisions, in

gain a deeper understanding of lawyering as a human enterprise in which human interests and values are taken to be of primary importance”).

¹⁶⁸ See *Using Case Studies to Teach*, BOS. UNIV. CTR. FOR EXCELLENCE IN TEACHING, <http://www.bu.edu/ceit/teaching-resources/in-the-classroom/using-case-studies-to-teach/> (last visited Jan. 5, 2013).

¹⁶⁹ See *supra* p. 266.

¹⁷⁰ See *supra* pp. 266–67.

¹⁷¹ See *supra* pp. 263–65.

¹⁷² *McGautha v. California*, 402 U.S. 183, 204 (1971).

the original version of the Model Penal Code.¹⁷³ In 2009, the ALI reversed field and deleted the death penalty provisions.¹⁷⁴ It did so in major part because of its loss of confidence in the process by which capital sentences are imposed, especially the problems in providing competent representation at all phases of a case to capital defendants.¹⁷⁵ Fitzpatrick certainly informs that conversation.

This case also provides a powerful critique of the *M’Naghten* test of legal insanity, including of the possible human “costs” associated with it. If Fitzpatrick had been found legally insane after the juvenile incident, and provided institutional treatment and aftercare, would Heist have been killed?

The case studies also can incorporate critical legal studies into mainstream courses. We can lecture about the power of the local community to nullify law and the impact on the administration of justice of race, class, and gender, but the case studies that I use give students the opportunity to discover these lessons themselves and discuss them in class. By itself, *Fitzpatrick* raises many of these issues.

The case studies offer an array of professionalism and skills lessons, as well.¹⁷⁶ They include what clinical teachers and second and third-year clinical students can do to model the best ethical practices of lawyers. This is one of the most powerful ways to teach professional responsibility to first year students.

¹⁷³ MODEL PENAL CODE § 210.6 (1962).

¹⁷⁴ *Message from ALI Director Lance Liebman*, AM. LAW INST., http://www.ali.org/_news/10232009.htm (last visited Jan. 5, 2013).

¹⁷⁵ AM. LAW INST., THE REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 35–37 (2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

¹⁷⁶ Fitzpatrick, for example, presents an array of professionalism issues, including the decision of the local public defender to disqualify his office from representing Fitzpatrick, the ineffectiveness of Fitzpatrick’s initial trial and appellate lawyers, the failure of the prosecutor to disclose the test results on the bullet, our decision to represent Fitzpatrick, and John Carr’s willingness to put his small firm practice on virtual hold while he prepared and tried the resentencing case. Johnson presents professionalism issues as well. The case turned on why she had a knife when she saw her abuser, and where he had his hands—around her shoulders or neck—when she stabbed him by pushing him off. These critical issues presented ethical issues in interviewing her, preparing her for trial, and presenting her testimony at trial (if there had been a trial). There are many trial practice and tactical issues in these cases as well.

B. The Challenges of Teaching with Personal Case Studies

In using stories to teach, the major ground rule is that the information, materials, and accounts must be factually accurate. This promise is easier made than kept when the teacher, who was the lawyer in the matter, has confidential information or information that remains sensitive, although the case is over. There are several ways to deal with this issue. If the confidential information undermines the accuracy of the story, do not use that case as a study. Be explicit about the limits of the information you are providing. Make it clear that as the lawyer, you cannot disclose confidential information. Explain why. In exceptional cases, you may wish to seek additional client consent to use information after the case is concluded, as I did to use the videotaped interview of Yvonne Johnson as teaching material.

Another danger of personal case studies is the story-teller's bias. When a lawyer/teacher teaches with her own cases, she becomes part of the teaching material. Insofar as the lawyer/teacher is modeling good behaviors, this is a good thing, but it is not good if the professor's account is biased and students are dissuaded from participating because they believe the professor will resent their conflicting views.

I use three methods to try to limit the bias in my accounts of cases. I accept that I cannot eliminate all of it. First, I quote extensively from the opinion(s) in the case, the most important check on *my* bias (but not bias generally), and the other parts of the written record of the case. Second, I develop simulation exercises from the case studies and put students in roles in the cases (e.g., as prosecutors and defense counsel), asking them to make the best possible competing arguments from the facts. I make sure that I reinforce the opposing arguments in the cases. Third, I role-play the opposing counsel in the case as well. For example, in the Johnson case, I role-play the prosecutor and conduct a cross-examination of her that highlights the strong parts of the State's case. I ask the students whether as prosecutors, knowing that they could do this cross-examination, they would. This produces interesting discussions about the role of the prosecutor.

Finally, I try to teach with the mistakes I made as a lawyer in the cases as well as with what I might have done right. In *Fitzpatrick*, one of these mistakes was our decision to put Reverend McGrew on the jury.¹⁷⁷ Did we give too much weight to potential racial identity? Did we play with fire, and lose, because of our limited understanding of the Old Testament? Most important, how as lawyers should we have

¹⁷⁷ See *supra* at 36–38.

prepared for this possibility to avoid making mistakes? The teacher should lead a discussion critiquing the performance of the lawyer, even when they are the same person.

These are some ways in which I try to respond to the problems of teaching with personal case studies while using the many positive features of them to teach students things they cannot learn from traditional casebooks.

CONCLUSION

After submitting this Article to the Journal, I flew to Florida and visited Ernest Fitzpatrick. He was twenty years old in 1980. He now is fifty-three. He is in a prison outside Tallahassee, with rolls of razor wire between the fences like those I saw in the prison that housed Ernest in 1984. We talked for several hours. Unsurprisingly, he is largely the same person I knew from the 1980s, with the same basic personality and emotional features. I am sure he thought the same was true of me. He has moved progressively through several prisons, has an excellent disciplinary record (with no infractions for over twenty-three years), and has successfully completed an array of prison programs.

I went to see him for two reasons. First, I wanted to tell him about this Article and ask him for his permission to let me publish it. Form consent provisions in written retainer agreements are adequate, if explained, for most clients. For obvious reasons, I wanted to do more for Ernest. He agreed to the Article.

Second, of all the cases I have handled in my career, this one seems the most unfinished. I wanted to see if there were any more we could do for him legally at this point, specifically, whether we could help him with parole. As always in this case, the Florida criminal justice system is challenging. The parole commission has given Ernest a presumptive parole date of *2139*, that is not 26 but *126 years* from now. That converts his sentence from life with parole to life without parole, in apparent contravention of Florida legislative judgment and the decision of the Florida Supreme court in his case. Is this illegal? It should be, but I do not know what we will find. I have agreed that we will explore all of the legal arguments, and we have re-opened his case in the clinic.

In this case, as in all of the cases and matters that clinical teachers handle, we teach by what we do. In this Article, I argue that faculty can use personal case studies to teach not only clinical but also classroom courses. I point out what I believe are the benefits and the chal-

lenges of doing so. I believe that the considerable advantages outweigh the disadvantages, and more important, many generations of my classroom students seem to agree.

In the end, this is a wonderful way to practice law and to teach, and I am extraordinarily grateful for having had the opportunity to do this for so many years.