New Strategies for the Defense of Capital Cases

Dennis N. Balske
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DENNIS N. BALSKE*

INTRODUCTION

CAPITAL CASES differ greatly from the typical criminal case. Emotions run higher. More publicity is generated, much of it prejudicial. Victory often takes the form of a life sentence or a conviction for a lesser included offense.¹

Practically all capital defendants are poor people. Accordingly, the lawyer representing a capital defendant is usually court-appointed and has probably never tried a death case. In smaller communities, he or she may have represented a few criminal defendants, but does not specialize in criminal law. In larger metropolitan areas, overworked public defenders often times must shoulder the responsibilities of capital cases. Sobered by the possible sentence faced in the event of conviction, the defense lawyer seeks out new ideas, publications in the field, and practical advice or actual assistance from lawyers with expertise in trying capital cases. This article attempts to provide the ideas, sources and expertise sought by these attorneys, as well as by more experienced attorneys who are seeking out new approaches to improve their skills.

I. INVOLVE THE DEFENDANT

Too many lawyers act like advocates all the time. Although advocacy has its place (in the courtroom), defendants are people. They are human. In order for you to so portray your client to the judge and jury, you must view your client first as a person, then as a defendant.

How do you view a cold-blooded, rapist murderer as a person, especially if you are a woman? How do you relate to someone who has killed four helpless young children? First, recognize the problem itself. Don’t keep your feelings inside. Be up front with yourself, and then be straight with your client. Your client will respect you for it, and you will have laid the critical foundation, trust, for all future communications.

Be patient with your client. Clients mistrust lawyers and understandably so. Don’t push them for “the truth” at your first meeting. Take the time to explain your role and what the client can expect from you. Nothing will hurt you more than clients who do not understand what you want and expect from them. So if you are seeking a life sentence in a hopeless case, tell your client. Once the client realizes that denying the facts or hiding

¹A lesser-included offense conviction is a possibility in every jurisdiction except Alabama. Alabama’s statutory scheme precludes the jury from considering lesser offenses. ALA. CODE tit. 13A, § 5-31 (Supp. 1978).

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damaging information will serve no purpose, it will be much easier for you to discover the reality of the situation.

Why should you assume the role of the psychological counselor with your client? Why even attempt to "get into the client's head?" There are two critical reasons. First, a jury faced with the question of life or death wants to know why your client committed the crime. No matter how bad the reason, a reason is better than none. It is the person that has no reason for killing that really scares jurors. Often times the real reason is different from the one your client gave in the confession. Usually, it is worse. All the better. The jury will respect your client for owning up to it, no matter how sinister the reason. Second, you must humanize your client. The jury will not be able to view the defendant as a person unless you do. You must take pains to build some common bond, so that by the time you and the defendant are in the courtroom before the jury, you are not sitting at opposite ends of the table and living in different worlds. A jury that sees you care for your client and vice versa will hesitate to kill that client.

Just as important as the bond you demonstrate to the jury is the defendant's communication with the jury. Have your client dress appropriately. Don't overdo it, but be sure the defendant wears clothes that both you and he or she agree are the right ones. Refer to your client appropriately. Don't refer to a nineteen-year-old youth as "Mr." or "the defendant." Call him by his first name whenever you refer to him in the jury's presence.

More importantly, involve your client in the proceedings. Have the client take notes during voir dire and seek out his or her opinion of each prospective juror. Let the defendant say something to the jury, especially if he or she is not going to testify. For example, during voir dire, have the defendant thank each juror for their attention and ask them if they can give him or her a fair trial. Even the least intelligent defendants can do this. Better yet, let the defendant make part of the closing argument. A defendant asking the jury to let him or her live will bring home the realities of the life or death decision to the jury in a way you never could.

To summarize, let your clients know it's their life, and that you will respect their decision. Spend time with them and leave the most serious issues for later in your relationship. Many times a client will not trust and open up to you until after you have proven your support in the courtroom at a bond or motion hearing. Be a counselor in the true sense of the word. Don't be proud. If you simply cannot communicate with

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2 Although Faretta v. California, 422 U.S. 806 (1975) does not go so far as to guarantee a defendant the right to participate as co-counsel, most courts will permit the defendant to participate, provided that the bounds of the client's participation are clearly drawn, because the case is a death-penalty case.
the defendant, for whatever reason, let your partner or law clerk try. Clients are no different than jurors, and we all know that certain ones simply don't like us, or vice versa. Chances are that your client will open up to someone, and it's your job to find that person, even if it's not you.

II. TREAT A DEATH CASE DIFFERENTLY

An important trial strategy, which must be initiated early and carried throughout the trial, is to sensitize the court and the prosecutor that this is a death-penalty case, death as a punishment is unique, and that death cases are tried differently than non-death cases. To do this successfully, you, personally, must first agree and accept the responsibility of working harder and opening your mind to some new approaches.

Most judges are sympathetic to the awesome responsibility you carry. Once you commit yourself to it, the judge will respond favorably. That is, once you inform the court that in your research and investigation you found that there are numerous motions and hearings which will be required prior to trial, and you convince the court that all are based on law rather than your imagination, you will have taken a giant step toward achieving your goal.

Don't wait until the week before trial to do this. At the first opportunity, tell the judge how important the case is to you and emphasize the pains you intend to suffer to insure that your client gets a fair trial.

Sensitizing the judge and prosecutor serves a number of purposes. By letting the prosecution know that you will be doing everything you can, you will bring home the realization that they will have to work hard and long to gain a death sentence. This lays the groundwork for possible plea bargaining. You will also be preparing the judge for what is to come, so that when faced with lengthy hearings, the court will not react adversely and cut you off. Finally, you will have planted the theme of your case in everyone's mind, namely, that a death case is different. It is the ultimate in importance, and it requires maximum safeguards to insure "reliability in the determination that death is the appropriate punishment."³

A. A Different Kind of Plea Bargaining

The possibility of settling a death case for a life term depends largely on the state in which the case is being tried. Among death-penalty states there are generally three types of life sentences: life without parole; life with a fixed-year-minimum, such as twenty-five years; or ordinary life, where the defendant is eligible for parole after serving seven to ten years.

In states like Arkansas, where a life sentence in a capital case is life without possibility of parole, or in Florida, where life in a capital case

means the defendant must serve a minimum of twenty-five years, it is not impossible to convince the victim’s family to agree on a life sentence. The court’s primary concern, if they are interested in something less than a death sentence, is to insure that the defendant is not out on the streets in seven to ten years.

Regrettably, there is no prescription for settling a death case, but there are some suggestions which should be considered. For instance, at the first meeting with the prosecutor, the court officials and law enforcement officials involved in the case, consider informing them that the defendant will settle for a life sentence. Thereafter keep up a steady stream of pressure, both actual and subtle, on anyone in a position to influence the acceptability of a life-sentence plea.

Always try to keep the channels of communication open between the prosecutor and the defense. That doesn’t mean you should acquiesce to everything the prosecution does. The prosecutor must be confronted when he has mistreated the defense. Usually confrontations aren’t necessary, and under normal circumstances chances for settlement depend significantly on the relations developed between the opposing attorneys. If the prosecutor respects the effort being made to save a client’s life, he is more likely to agree to a life sentence for the defendant.

It is equally important to keep the lines of communication open between the victim’s family and the defendant’s attorney. A victim’s family sometimes develops an emotional bond with the defendant that can be turned into sympathy. In order to arouse sympathy for the defendant, the feelings of the victim’s family must be treated delicately, because the family negatively views the defense counsel as an extension of the defendant.

Many such families believe the defense attorney is completely self-serving and willing to see a guilty defendant go loose in order to make a name. First efforts to communicate with the victim’s family are easily misunderstood. Thus, if you decide to attempt this approach, take into account the sensitive nature of the situation. On occasion you can expect a relative of a murder victim to report to the prosecutor that you tried to pressure the family into dropping the case. Nevertheless, this strategy should always be considered. If you choose to employ it, it is best for you to establish personal contact (early in the proceedings) with a key member of the victim’s family. Usually there are opportunities for this at the preliminary hearing or at some pretrial court appearance.

The best idea is just to walk up to the family, introduce yourself as the attorney for the defendant, express your sincere concern about their lost loved-one, assure them that your role is to represent the defendant within the bounds of the law, and say that you have nothing at all against them. This could prompt some conversation and provides an opportunity
to gauge the family's feelings. Half the battle is won as soon as the victim's family realizes that the defense attorney is reasonable.

1. Pretrial Motions and Plea Bargaining.

The pretrial stage is one of the most important phases of a death case. Used strategically, pretrial motions may be more effective than anything else in obtaining a life sentence. Pretrial motions are heard and argued in half-a-day or less only aid the prosecution.

The pretrial motions should be designed to do much more than obtain the specific relief requested. The motions allow the defense these advantages: (1) to take the momentum from the prosecution and to go on the offensive; (2) to show the prosecution and court early-on to expect a full-fledged fight at every stage of the trial on every material issue; (3) to bring up complex legal issues that require extensive work for the court and prosecutor; (4) to get error into the record before the evidentiary trial begins.

In addition, pretrial motions allow the defense: (1) to see the judge in action with no jury present and to adjust defense tactics accordingly; (2) to observe the prosecutor's style and his ability to examine witnesses; (3) to let the judge and prosecutor become familiar with the defense lawyer's team members; (4) to work with court officials and law enforcement officers in advance of jury selection; (5) to familiarize the defendant with court procedures and observe his or her demeanor; (6) to allow the defendant to testify, providing excellent practice and an opportunity to evaluate his or her jury testimony; (7) and to ease the tension of the court and prosecution. No one factor convinces the prosecutor to accept the idea of a life sentence, but when he recognizes from pretrial motions that the defense means business, the chances for getting a life sentence automatically improve.

2. Law Enforcement Officers and Plea Bargaining.

A friendly, respectful relationship with local law enforcement officials can play an important part in obtaining a life sentence. In most capital cases, especially those involving police deaths, law enforcement officers take the case personally and see the defense lawyer in a very negative light. Conflicts develop quickly when an aggressive defense lawyer attempts something that would be routine in a non-death case and is resisted by an investigator who feels the prosecutor's case must be protected.

In this writer's experience, no matter how ardent the officer, if you treat him or her with respect, keep personalities apart, and vigorously defend the case, the client will benefit. This is not to say roll over and play dead or give up any of your client's rights. Many cases require a confron-
iation with law enforcement officials as part of a trial strategy aimed at showing a gross violation of your client's rights.

A respectful relationship with law enforcement officers serves the same goals as a relationship with the victim's family. Quite often, and especially in rural southern communities, the sheriff will have as much say as the prosecutor in plea bargaining decisions. Moreover, your client is usually in the custody of these same officials throughout the trial, and a good relationship with the jailers can make the ordeal more bearable. Therefore, at the outset consider what law enforcement relationship will most benefit your client and structure your encounters with such personnel accordingly.

Each case will call for a slightly different approach to this defense strategy. Timing is important. Knowing who will have a say in the final decision, be it the sheriff, the prosecutor, the victim's family or a combination of the three, is critical. Humanizing the client cannot be underestimated, and firm, aggressive pretrial motions provide leverage. When victory means a life sentence, the defense must consider these factors and pursue every avenue at the earliest opportunity.

B. The Defense Team

When the stakes and responsibilities are extreme, both the defendant and the defense attorney need a great deal of support. No attorney should ever solo a capital case. There are simply too many things going on for one attorney to manage. Moreover, it is difficult to maintain one's sanity under such intense pressure without the support of another attorney. Thus, as an absolute minimum, every capital case should have two defense attorneys.

To do the best possible job, more than just attorneys are needed. If funds are available, or if an organization such as the National Jury Project is willing to assist, you should obtain the services of a juristic psychologist. The juristic psychologist can help you plan trial strategy, build additional personal ties to the client, and assist you in selecting the least death-prone jury. Investigators, law clerks, paralegals and volunteer workers can play equally important parts in the staging of the trial and especially during jury selection. In addition to their specific skills, the insights of such persons are often keen, and the moral support they provide cannot be underestimated.

Support for the defendant is just as, and sometimes more, important. Not only does the client need the same kind of moral support, but it is necessary to demonstrate to the jury that people care about your client in

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5 If you are representing an indigent, a motion should be made for funds to employ such an expert. A non-indigent on trial for his or her life would certainly employ such an expert. 6 Further discussion of the role of the juristic psychologist appears infra, in Section IV.
the same way the victim’s family cares about the loss of their loved one. It is therefore critical that the defense team insures the attendance of every possible relative and friend of the defendant and sees to it that their attendance is highly visible to the jurors. In addition, if your client is a member of a minority, you should seek out members of that minority who care whether your client is executed and assure them that their presence will make a difference to the jury hearing the case. Local members of churches and other organizations opposed to capital punishment can provide valuable moral support, both to the client and trial-worn attorneys. 7

All of this support serves many purposes. A sense of comradery develops which is difficult to describe, but is always beneficial. Court personnel, the prosecutor, the judge and law enforcement officers cannot help but be affected in some way, if only to see your client as a human being for the first time. In numbers there is strength, and although difficult to quantify, such strength invariably leads to positive results, both those expected and those never anticipated. 8

III. The Importance of Pretrial Motions

Extensive pretrial motions play a crucial role in every death-penalty case. When properly designed, these motions can accomplish much more than simply obtaining the requested relief. Carefully planned and drafted motions enable the defense to: (1) take the offense; (2) slow down the momentum of the prosecution; (3) demonstrate the commitment and competence of the defense; (4) raise complicated legal issues that will require research by the prosecution, thus taking the prosecution from its planned course of preparation; (5) build possibly reversible error into the record out of the jury’s presence; (6) gauge the reactions and performance of the judge and prosecution; (7) familiarize the defense team with the judge and prosecution and humanize the defendant; (8) adjust defense strategies; (9) familiarize the defendant with court procedures; (10) give the defendant an opportunity to testify, both as practice for the defendant and to

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7 This kind of community support should be sought at the outset. In some instances, when the support is particularly strong, it can have an effect on the plea-bargaining process and other aspects of the case.

8 For example, in one case a local actor and members of a nearby ACLU office helped the defense select the jury. Their personal knowledge of a few jurors’ backgrounds proved very helpful. They also interested some of their friends in coming and soon friends of the defense filled practically half the courtroom. Then, when the jury was sequestered some family members of the jurors attended the trial. They sat and interacted with the large, friendly defense gathering in full view of the jurors. Such a scenario must have had at least some positive, subjective impact on the jurors whose loved ones were overtly friendly to the defense.

9 Testimony given by the defendant in support of a motion to suppress evidence on fourth amendment grounds may not be subsequently introduced against him or her by the prosecution at trial on the issue of guilt. Simmons v. United States, 390 U.S. 377 (1968). However, in the event the defendant testifies differently at trial, it could be used to impeach him. Thus, meticulously plan and prepare your client for such pretrial testimony.
allow counsel a preview of the client's abilities as a witness; (11) discover the prosecution's case; and (12) discover evidence favorable to the defense.

Of course, motions, like any trial tactic, are only as good as the proof and legal arguments offered in their support. Frivolous motions should never be filed. On the other hand, never neglect to file a motion simply because you are certain the court will overrule it. If it serves one of the valid purposes described above, file it.

The typical capital case requires the filing of between ten and twenty-five pretrial motions. Specifically, most every case demands that you file, at the minimum, motions for: (1) formal discovery; (2) evidence potentially favorable to the defense; (3) suppression of statements made by the accused; (4) suppression of physical evidence and/or suggestive identification procedures; (5) dismissal of the indictment due to the unconstitutional composition of the grand and/or petit jury; (6) change of venue; (7) individual, sequestered voir dire; (8) dismissal of the indictment based on the facial and/or as applied unconstitutionality of the pertinent death penalty statute(s); (9) funds for expert witnesses; and (10) allowance of the defendant to participate in the trial. The particular facts of your case will dictate the nature and number of other necessary motions.

A. Preparing the Motions

An excellent starting point for the preparation of pretrial motions is a good trial manual. This writer highly recommends A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, (Student Edition 3) (A joint project of the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Joint Committee on Continuing Legal Education, 1975). This manual is recommended, both because of its comprehensiveness and because the author, Tony Amsterdam, has participated in virtually every important capital case argued before the United States Supreme Court.

10 Commonly referred to as a "Brady Motion," in recognition of the leading Supreme Court case requiring the prosecution to provide defense access to such information if material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963).

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12 The most comprehensive compilation of such motions is the SOUTHERN POVERTY LAW CENTER, DEATH PENALTY PROJECT, MOTIONS FOR CAPITAL CASES (1978). This can be obtained upon request from the Center at 1001 South Hull Street, Montgomery, Alabama 36104. It contains a motion checklist, actual motions from death-penalty trials, and a discussion of the use of such motions in capital cases. Other motion publications can be located through
with actual forms, a better idea of the substance of each motion and some
new ideas. You can then develop your own checklist of potential motions,
always with an eye toward expansion into new areas.\textsuperscript{13}

What you will not find in these books is a blueprint for the witnesses
you must call to support these motions. Unfortunately, many lawyers
simply file motions without introducing necessary evidentiary support.\textsuperscript{14}
Such motions are more detrimental than beneficial, because they: (1) have
little impact on the court; (2) provide no bases for reversible error; (3)
take little or no time to overrule; and (4) weaken the defense's credibility.
Thus, great care must be taken to insure that all necessary and available
evidence is introduced in support of every motion.\textsuperscript{15}

B. Three Critical Motions

Although the facts of each case dictate the relative importance of the
various available motions, three motions most often surface as the most
important: namely, the motion for change of venue, a motion seeking in-
dividual, sequestered voir dire, and a motion challenging the composition
of the grand and/or petit jury. Due to their importance and the attendant
complexities, these motions merit individual discussion.

1. The Change of Venue Motion

Most capital cases engender a great deal of publicity. Though the amount
of publicity may be insignificant, due to the nature or particular facts of the
crime and the smallness of the community might allow many potential jurors
to know of the crime and to have formed opinions regarding guilt. In any
event, virtually every capital case arouses enough attention to form the basis
for a change of venue motion.

\begin{quote}
the use of the SOUTHERN PRISONERS' DEFENSE COMMITTEE, DEATH PENALTY AIDS LITIGA-
TION CATALOGUE (1978), available upon request from the Committee at 1216 16th Avenue,
South, Nashville, Tennessee 37212 or 344 Camp Street, Suite 705, New Orleans, Louisiana
70130. The catalogue lists pleadings, briefs, articles and books relating to capital punishment
litigation, from which recipients can directly order copies at .06c per page.
\end{quote}

\textsuperscript{13}There are potentially as many motions available as your imagination will generate. For
example, a Motion to Remove Prejudicial Objects from the Jury Deliberation Room was
successfully utilized to obtain the removal of a blow-up of the front-page account of
President Kennedy's assassination, including a photograph and the headline, "President
Struck Down by Sniper's Bullet," from the jury deliberation room prior to trial.

\textsuperscript{14}The motion seeking funds for expert witnesses usually suffers this fate. Lawyers routinely
seek such funds, using logical argument in support, but no evidence. Mere argument not
only is less persuasive than testimony, but also will fail to supply a record from which you
can establish reversible error. If possible, call your proposed expert to testify. If the proposed
expert is unavailable, introduce an affidavit, listing the expert's qualifications and the funds
necessary to secure the expert's services, or call a skilled attorney friend, who has used
such experts and who can testify to the necessity for such an expert, as well as the fact
that such experts are always used for clients who can afford them.

\textsuperscript{15}For example, in a change of venue motion, every tape, transcript, newspaper article and
all other evidences of pretrial publicity, along with necessary circulation data from each
source, must be introduced, in addition to an analysis of the prejudicial nature of the
content of the publicity. In addition, the social scientist's results from a survey of com-

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Even if your grounds for changing venue are questionable, you should seek a venue change. At the very least, the introduction of supporting evidence will allow you to take the offensive. More importantly, though, any showing of prejudicial publicity that you make will serve as a basis for your motion for individual, sequestered voir dire. Specifically, when the court overrules the motion for change of venue, it will want to insure that any juror who knows of the case does not infect the entire panel. Accordingly, at this stage of the case the court will be in a position most open to a proposal to voir dire each juror separately, because by permitting individual voir dire, it will be able to protect non-exposed jurors from exposed jurors, thereby insulating the case from reversal for the denial of the venue-change motion.

What kinds of evidence should you introduce in support of this motion? A community survey, when possible, can be most persuasive. A survey requires some expertise and hard work, but it is not so difficult as it would seem.

As a general rule, surveys usually prove more useful in small, homogenous communities, as opposed to large, metropolitan areas. Information passes and is more easily retained when it is disseminated by “word of mouth,” as is often the case in smaller communities. Community members are also more likely to have known the victim, the victim’s family or friends, or local law enforcement officers handling the case in smaller communities.

If you are considering conducting a survey, contact the social science departments of the university nearest the trial site. Many times interested students and/or faculty members are willing to provide vital services free of charge or at a minimal cost. The testimony of such individuals, who are not connected with your office and have a demonstrated expertise, can prove highly persuasive.

Whether or not you conduct a survey, it will be necessary for you to introduce every single piece of publicity into evidence, such as video tapes, radio logs, transcripts and newspapers, along with circulation data.

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16 An explanation of this type of voir dire, and the necessity to obtain it, is discussed infra in Section IV.

17 This is only one, but perhaps the most persuasive, reason for allowing individual, sequestered voir dire. Additional reasons are presented in Section IV.


19 They are also easier to conduct in smaller communities, because a smaller sample is required to establish statistical validity.

20 In deciding whether to conduct a survey, keep in mind that the survey can be utilized to support your motion for individual voir dire, to gain descriptive data for jury selection, and in some instances, to identify the demographic characteristics of the jury pool for use in a jury composition challenge.
respecting the community from which jurors are selected. In addition to demonstrating the extent of the publicity, it is important to highlight the source and nature of the prejudice flowing therefrom. Lastly, be sure to supply the court with a supporting brief, containing both a discussion of the publicity itself and a persuasive review of relevant legal precedents. If your aim is individual, sequestered voir dire, rather than a venue change, conclude your brief or memorandum with an assertion that a denial of your venue motion will mandate the extra protections of such voir dire, at the very least.

2. The Motion for Individual, Sequestered Voir Dire

Nothing, repeat nothing, is more important in a death case, than individual, sequestered voir dire. If you lose every motion you file, but obtain this type of voir dire and use it conscientiously, you will have gained a major victory for your client.

Perhaps your greatest leverage to obtain this type of voir doir is the change of venue motion, discussed supra. Another indirect source of support is the motion to exclude the press from pretrial hearings to avoid prejudice to prospective jurors. Although you might not really care whether the press is excluded, through such a motion you can invoke Chief Justice Burger's rationale in Nebraska Press Association v. Stuart, to the effect that extensive jury voir dire would be an acceptable way to cure excessive publicity, as opposed to the extreme of banning the press.

There are many other valid reasons supporting the need for individual, sequestered voir dire. Collective voir dire of jurors in panels as to their familiarity with the crime, the victim or the probability of the defendant's innocence, will educate all jurors to prejudicial and incompetent material. The issues of the case may require sensitive and potentially embarrassing questions exploring the prospective juror's bias or prejudice. Group voir dire regarding capital punishment will lead to the exclusion of jurors ambivalent toward the death penalty, because jurors wishing to be ex-

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21 Publicity from governmental sources is considered especially prejudicial. See, e.g., Rideau v. Louisiana, 373 U.S. 723 (1963); Henslee v. United States, 246 F.2d 190 (5th Cir. 1957); United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963). Other important classifications are: confessions or admissions by the defendant(s), see Rideau v. Louisiana; prior criminal convictions or activities, see Marshall v. United States, 360 U.S. 310 (1959); opinions as to guilt, see Sheppard v. Maxwell, 384 U.S. 333, 356-357 (1966); inadmissible evidence, see Shepherd v. Florida, 341 U.S. 15 (1951); concern for the victim, see Frazier v. Superior Court, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971); racial prejudice, see Johnson v. Beto, 337 F. Supp. 1371 (S.D. Tex. 1972) aff'd., 469 F.2d 1396 (5th Cir. 1972); and any other relevant considerations, such as assertions of bad character and certain types of admissible evidence.

22 The reasons supporting the paramount importance of this type of voir dire are presented in Section IV of this article, infra.

cused will learn how to answer Witherspoon\textsuperscript{24} questions to gain disqualification. That is, they will see other persons being excused for conscientious opposition to the death penalty, and, although their belief may not meet the test, they will mimic the previous jurors' responses in order to be excused, either out of a sense of duty or simply to escape being chosen as a juror. Finally, collective voir dire will preclude the candor and honesty which is necessary in order for counsel to intelligently exercise statutory peremptory challenges.\textsuperscript{25}

Affidavits and testimony can also be introduced to support your position. If you have contacted a juristic psychologist, he or she can offer persuasive, expert testimony in support of your contentions. More importantly, such testimony will usually catch the court's attention. Many trial judges are bored. Seeing the opportunity for an interesting learning experience will often spell the difference in the court's decision. For this reason, it is important that your expert impress his or her experience on the judge, as well as the fact that with the expert's guidance, you will not be unnecessarily spending the court's time asking numerous irrelevant, experimental questions of each prospective juror.

If your juristic psychologist is unavailable, or you cannot use one, consider obtaining an affidavit from such a person, listing his or her credentials and presenting support for your position.\textsuperscript{26} If neither of these options are available, seek out an attorney or judge who knows the benefits of individual voir dire. By whatever vehicle, it is absolutely necessary that you allay the court's fears that you are going to turn voir dire into a circus and get the judge interested in what you are going to do.

Because of the importance of obtaining individual voir dire, pull out all the stops to get it. When all else fails, return to the theme of the case, \textit{i.e.}, a death case is different, and present forceful argument to the court in this regard. Over the years, the Supreme Court has issued numerous state-

\textsuperscript{24}Witherspoon v. Illinois, 391 U.S. 510 (1968). This case stands for the proposition that a prospective juror will be excluded if he or she is irrevocably committed to vote against the penalty of death regardless of the facts and circumstances of the case. \textit{Id.} at 522.

\textsuperscript{25}A comprehensive study conducted by Richard Christie, Professor of Social Psychology in the Graduate Facilities of Columbia University, confirms this conclusion. This study consisted of comparative review of the types and numbers of cause challenges elicited in cases with group, judge-conducted voir dire, group, judge-conducted voir dire with limited individual questioning, and solely individual voir dire, respectively. Generally, the study found that individualization disclosed bias and prejudice not discovered in group settings. The results of this study were presented to the federal trial court in affidavit form in the Kent State civil cases, in support of the plaintiffs' motion for individual, sequestered voir dire. The affidavit is reproduced in \textit{National Lawyer's Guild, Frontier Issues in Defense of Criminal Prosecutions} (1979), a manual utilized at an August 9, 1979 trial skills seminar. \textit{See also}, Bush, \textit{The Case for Expansive Voir Dire}, 2 Law and Psychology Rev. 9 (1976).

\textsuperscript{26}In particular, be sure the affidavit lists all of the cases and places where the expert has participated in individual, sequestered voir dire. The judge needs to be shown that many other courts have permitted such a procedure.
ments to this effect,27 which can be used to construct a strong foundation for your argument. If this approach is unsuccessful, consider agreeing to forego some of your less important motions as a trade-off to persuade the prosecution to join you in your motion.28

3. Jury Composition Challenges

One of the most time-consuming and least understood pretrial motions is the challenge to the composition of the grand and/or petit jury. At the same time, it is one of the most important, and every attorney should take the time to learn how to present one.29

Every defendant in a criminal case is entitled to an impartial jury drawn from a cross-section of the community.30 If a distinctive group in the community is excluded during the jury selection process, resulting in jury pools that are not reasonably representative of the community, a denial of the sixth amendment right to a jury selected from a cross-section of the community occurs.31 A separate constitutional violation, under the fourteenth amendment's guarantee of equal protection of the law, occurs whenever the state intentionally discriminates against any cognizable group in the community.32

Generally, then, a challenge will lie when the jury selection procedure results in a substantial underrepresentation of a distinctive group.33 The defendant need not be a member of the group to have standing to bring such a challenge.34 When considering whether grounds exist for a compositional challenge in a particular case, it is important to keep in mind it is the grand or petit35 jury pool itself which must be representative, as opposed to the individual panels.36


28 Such a tactic was successfully employed in a case where the trial judge intended not only to conduct group voir dire, but to conduct it himself. Because the prosecution was concerned about prejudicial pretrial publicity and the multitude of the defendant's pretrial motions, the prosecution joined the defense in seeking individual voir dire, in return for the defense's withdrawal of certain pretrial motions (none of which were important to the defense). The judge then acceded to the joint request.

29 For a comprehensive, how-to-do-it presentation as well as comprehensive legal discussion, see The Jury System: New Methods for Reducing Prejudice, supra note 18, at ch. 1; Jurywork: Systematic Techniques, supra note 18, at ch. 6.


31 419 U.S. at 522.


33 Castaneda v. Partida, 430 U.S. 482, 494 (1977); 419 U.S. at 522.


36 See Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972); Swain v. Alabama, 380 U.S.
Because of the complexities of the law governing various types of compositional challenges, further generalization is difficult and can be misleading. Therefore, only a short procedural description is presented below, with the caveat that the comprehensive articles previously cited should be consulted.

The law presumes all jury selection procedures to be valid. Accordingly, the challenger, the defendant, carries the burden of demonstrating a *prima facie* case. The kind of *prima facie* showing required differs, depending on whether the challenge is a sixth amendment, fair-cross-section challenge or a fourteenth amendment, equal-protection challenge.

In order to establish a *prima facie* violation of the fair-cross-section requirement, the challenger must show three things:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.87

Similarly, to establish a *prima facie* equal-protection violation, the defendant must demonstrate that the jury selection process “employed resulted in substantial underrepresentation”38 of a cognizable group, by showing that: (1) “[t]he group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied”,39 (2) substantial underrepresentation occurred “[o]ver a significant period of time”;40 and (3) the selection procedure itself “[i]s susceptible to abuse or not racially neutral.”41 Stated another way, an equal protection violation will be found when the selection procedure is discriminatory.42

With particular respect to establishing an equal-protection violation, the defendant is merely required to make the above-described *prima facie* showing. Proof of actual discrimination, lack of good faith or prejudice to the challenger is not required.43 Once the *prima facie* showing is made, the burden of going forward shifts to the prosecution, who must then rebut the presumption that the system is discriminatory.44 To carry this burden,

202, 208 (1965); see also Farmer, Jury Composition Challenges, 2 LAW & PSYCH. REV. 43 48-9 (1976).
38 430 U.S. at 482.
39 Id.
40 Id.
41 Id.
43 See, e.g., 396 U.S. at 346.
44 430 U.S. at 482.
the state must do more than rely on the simple protestations of jury commissioners that discrimination played no part in the selection, or on a presumption that the officials discharged their sworn duties. 45 If the prosecution fails to rebut the *prima facie* showing of purposeful discrimination, by competent testimony, a denial of equal protection of the law will have been established. 46

Similarly, in a fair-cross-section challenge, once the defendant makes a *prima facie* showing of an infringement of his constitutional right to a jury drawn from a fair-cross-section of the community, the burden shifts to the prosecution. 47 The prosecution then must justify this infringement "by showing attainment of a fair cross section to be incompatible with a significant state interest." 48 The prosecution's failure to do so will render the selection system unconstitutional, in violation of the Sixth and Fourteenth Amendments.

Admittedly, this discussion of the law governing jury challenges is oversimplified. Moreover, this oversimplification may lead the reader to conclude that the investigation and proof of systematic, unconstitutional jury composition is easier than it is in reality. For instance, discovery of the race of each individual on a jury list in preparing for a challenge on racial grounds sometimes entails consultation with numerous community leaders, because the source list itself may not contain racial designations. But at the same time, it is hoped that this simplified description will both demonstrate an understandable framework from which you can gauge the need for challenging the grand and/or petit jury composition, in every capital case, and will serve as a reference to more detailed works from which you can structure a particular challenge, in the event you determine a challenge is warranted.

IV. Voir Dire

Because the evidence of guilt in most capital cases is overwhelming, and because there lurks the possibility of a death sentence, even in cases where the evidence is weak, the emphasis in a capital case must be on selecting jurors who will be least willing and likely to vote for a death sentence. Moreover, jurors who are least likely to vote death are more apt to be good jurors on the question of guilt. To reach this goal, you must be able to probe deeply into the minds of each juror. Such a goal can best be accomplished through the use of individual, sequestered voir dire and a juristic psychologist.

The concept of individual, sequestered voir dire, the use of the juristic

45 Id. at 498, n. 19.
46 Id. at 500.
47 99 S. Ct. at 664.
48 Id. at 664-665.
psychologist, and optimum techniques for selecting the least death-prone jurors are impossible to fully explain in an article of this length. Therefore, this discussion should be taken for what it is; namely, a summary of the basics. To fully appreciate the workings of these concepts and the benefits to be gained therefrom, the reader should consult three very recent publications. 49

A. Preliminary Matters

Before you can successfully conduct the juror examinations, you must first lay the groundwork. Such preparation must include: (1) case analysis, 50 (2) preparation of an outline, 51 (3) securing the most advantageous voir dire conditions, 52 and (4) assembling a jury selection team. 53 Although these matters are "preliminary," their importance is paramount. For this reason, the publications listed above should be closely scrutinized and followed. Only after each step of preparation had been methodically accomplished can you begin to employ and reap the benefits from the techniques discussed below.

B. Use of the Jury Selection Team

Once the jury selection team is assembled, how is it best utilized? Won't each juror be intimidated by a large group of people watching his or her every move, whispering to each other and passing notes back and forth? What do you do differently when working as a team?

In order to maximize communication, team members should sit to-


50 See JURYWORK: SYSTEMATIC TECHNIQUES, supra note 18, at 11.

51 An outline of areas for questioning is preferable to a list of specific questions. The list often sterilizes the examination and interferes with the establishment of the rapport necessary for free interchange. See Carroll, supra note 49.

52 As stated previously, attorney-conducted, individual, sequestered voir dire offers the best conditions and should, as a starting point, always be sought. In cases where adamant opposition is encountered, try to persuade the judge to allow you to examine three or six jurors at a time. The smaller the group, if a group is necessary, the better the chance to obtain honest answers.

53 Ideally, a juristic psychologist should be associated. Such professionals are trained to decipher what a juror is "really saying," by closely observing body language and deriving proper connotations from each juror's choice of words. Although some persons who work as juristic psychologists have institutional training in psychology, the term "juristic psychologist" means a person trained in jury selection, as opposed to someone holding a specialized type of psychology degree. If a juristic psychologist is unavailable, persons with training or good instincts in interpersonal relations, such as guidance counselors, should be sought. Such persons, when provided with minimal guidance in what to look for, always provide invaluable assistance.

Likewise, the client plays an important role on the team. The client's perceptions are critical. Like the lay-person or juristic psychologist, the client is not bogged down in questioning the jurors, jury selection stereotypes and other factors affecting attorneys. Moreover, the client is in the best position to accurately perceive the juror's body language toward him or her.
gether centered around the client at the counsel table. The group's presence will be conspicuous. As spokesperson for the group, you should immediately explain the group's purpose. In this way, you can lay to rest any fears the juror might have. Specifically, the following type of introduction can serve this purpose:

Mr. or Mrs. Juror, the selection of a fair jury is very important to the court, the prosecution and to us. The questions I will ask you hopefully will help us better get to know you as a person and assist us in making a good choice. Because .................'s life is at stake, the responsibility for selecting fair people to sit on .................'s jury is very great. Frankly, I don't feel totally qualified to make those decisions myself, so I have asked these people here to assist me. This is ................., and this is .................. They will be assisting me. From time to time they will pass me notes, or I will go over and confer with them, because I might forget to ask you something important. I wanted you to know just what we're doing before we got started.

Such an approach is necessary, not only to put the juror at ease, but also to let the juror know that you consider the selection process to be very important and to give the juror a sense of accomplishment at being selected by the team. Use your judgment as to how the team's presence should be explained, but always explain it. Contrary to some lawyers' beliefs, jurors are not turned off by the participation of non-lawyers in the selection process.

After the introduction, feel free to consult with team members during voir dire. Glance over at counsel table occasionally to see if anyone has any suggestions. When you are having trouble communicating, or you just can't get a feel for where you're going, excuse yourself and consult the team. Remember why the team is there and use it. Many times the examining attorney, who is busy establishing rapport and thinking of questions to ask, is misled by the juror's friendliness or physical attraction. Encourage team members to be frank with their perceptions, particularly when they conflict with your own. In these situations, more often than not you will see that you were misled by the juror.

C. New Voir Dire Techniques

Too many lawyers neglect the information-gathering aspect of voir dire and instead concentrate on building rapport and educating the jury. Hence, most lawyers pick jurors on instinct, hunches, stereotypes and premonitions. Since the primary goal of voir dire in a capital case is the discovery of the least death-prone jurors, emphasis must be on the information-gathering function of voir dire. Such a change in emphasis will not be easy, but
once made, will provide you a wealth of information from which you

The principal change which must be made is to cast aside all those
close-ended questions you have assimilated or imitated over the years. For
example, instead of asking “Do you believe in capital punishment?” and
“Do you feel life imprisonment is a serious punishment?” ask each juror
“What are your views on capital punishment?” and “How do you feel about
life imprisonment as a sentence for murder?” Moreover, follow up each
ambiguous answer with a simple “Why?” In other words, do not leave
answers open to interpretation, but instead tell the juror you are uncertain
what he or she means and ask for clarification.

Three ingredients of communication must necessarily be combined with
open-minded questions in order to achieve a maximum amount of infor-
mation: (1) empathy; (2) respect; and
(3) congruence.

Empathy is that essence in a communication that says to the person be-
ing interviewed, “I have your feelings, thoughts, and behaviors” and
“I hear your world.” It is that experience of crawling into the other
person’s world and getting a feel for what it is like to live that per-
son’s feelings, thoughts and behavior. Respect or nonpossessive re-
gard expresses to the person that his world is respected and will not
be judged by the listener. This ingredient tells the other person that
he can be himself without fear of being labelled. The third element,
congruence, means the listener expresses what he is feeling on the
inside. This means that the listener is a whole and genuine person
as well. This is particularly important because unless the listener is
genuine, the respondent will not be.55

In other words, talk with the juror like you would talk with a good
friend: show that you are interested in the juror’s life, including his or her
job duties, family situation, likes and dislikes; treat the juror respectfullly and
as an equal; and express your real feelings to the juror. Only in this way
can you obtain complete and truthful responses to your open-ended ques-
tions.

D. The Witherspoon Problem

In a capital case, if a juror expresses an irrevocable committment to
vote against the penalty of death, regardless of the facts of the case, he or
she will be disqualified from jury service.56 The prosecution will always
attempt to solicit such an expression, because it enables the state to eliminate

54 One of the jurors, whose post-trial interview is summarized in VOIR DIRE FOR CAPITAL
CASES, supra note 49, at 105, stated that “the defense’s probing voir dire left him feeling that
the defense attorney ‘knew me better than my wife.’”
55 Bennett, supra note 49, at 15.
56 Witherspoon v. Illinois, 391 U.S. at 522.
jurors least prone to vote death." Therefore, you as attorney must always fight against these disqualifications, because saving a juror from automatic exclusion will force the prosecution to use up one of its peremptory challenges.

Whenever a prosecutor challenges a juror for cause on this basis, you should immediately request an opportunity to inquire further. Because judges are wary of a reversal for technical Witherspoon violations, as they should be, they will ordinarily permit further inquiry. The defense attorney should have copies of Witherspoon and related decisions on hand. In the event the judge is unwilling to comply with the request, strenuous argument should be made for the defendant's position based on the case law.

To accomplish rehabilitation, it is necessary to get the juror to admit that he or she would consider imposing capital punishment under some circumstance. It will be easier to elicit this admission if it is first explained that the immediate case is not being discussed, but rather any case in which the juror would consider returning a verdict that might result in a death sentence. Although the means for rehabilitation are as numerous as your logic and imagination will allow, two approaches are generally recognized for their effectiveness: the "citizen's duty" method and the "repulsive murderer" method.

The "citizen's duty" approach plays upon the juror's civic duty to serve as a juror, which in turn requires the juror to set aside his or her personal views and apply the law as the judge defines it. You must make the jurors feel they will be shirking their duties as citizens by refusing to set aside their personal views. The technique can best be understood by considering an excerpt from an actual case. After the prosecution challenged the juror for cause, based on the juror's opposition to capital punishment, the defense attorney asked the following line of questions:

Q. Of course, you understand that your service here as a juror is your civic duty?
A. Yes.

57 At the same time, due to these exclusions, the jury eventually selected will be more conviction prone. See White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, 58 COLUM. L. REV. 1176 (1973); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 HARV. L. REV. 567 (1971); Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias and the Use of Psychological Data to Use Legal Presumptions, 5 HARV. CIVIL. L. REV. 53 (1970); H. ZEISEL, SOME DATA ON JURORS' ATTITUDES TOWARD CAPITAL PUNISHMENT (1968).


59 VOIR DIRE FOR CAPITAL CASES, supra note 49, at 46.
Q. And that the Judge here, sitting in his capacity as judge, this is his civic duty?
A. Yes.
Q. He may or may not believe in capital punishment, but it is his duty to preside over this case, and he will instruct you on the law of the case, and it is your duty to consider the law of the State of Georgia as it is, and then to render a fair and impartial decision in the case. Do you feel that you can put those personal feelings aside and follow your civic duty and listen to the instructions that the court gives you in this case, and render a fair and impartial verdict in this case?
A. Yes.60

The "repulsive murderer" approach is usually used in the event the "citizen's duty" method fails, although it can be used first. This approach entails a description of infamous murders, such as the Manson killings, or of hypothetical murders, such as of family members of the juror, followed by questions designed to elicit the juror's recognition that he or she could vote for a verdict that would result in death under some circumstances.

In many instances, even if you succeed, the prosecutor or judge will destroy your rehabilitative efforts. Don't give up.61 Inquire until you again rehabilitate the juror or the situation becomes hopeless. Do not leave the questioning to the judge. You can best control the situation by conducting the examination yourself. No matter how frustrating it gets, remember that every juror you rehabilitate will require the prosecution to exercise a strike, and every juror the judge strikes short of a complete Witherspoon showing will result in reversible error.

E. Discovering the Least Death-Prone Jurors

Today's polls reflect that a solid majority of Americans favor capital punishment. Nevertheless, many of these individuals, if called upon to decide the life-or-death question themselves, would be very reluctant to vote for death. A major portion of your voir dire must be aimed at tapping these individuals.

You should begin this portion of the examination by simply asking, "What are your feelings on the death penalty?" Or "What are your views on capital punishment?" The juror's response to such a general question will be much more revealing than to more specific questions, at this point, because specific questions tend to lead the juror and to suggest responses. Stay with general questions as long as you can before moving to specifics.

60 Id. at 52.
61 There is one exception. If the judge grants the prosecutor's challenge, and the juror has not expressed opposition to capital punishment consistent with the Witherspoon standard, do not ask any questions, because you might cure what would otherwise be reversible error.
Most of the time the juror's answers will suggest the specific areas into which you should eventually inquire. For example, the juror who says, "I feel that the death penalty is appropriate for some crimes," should be asked, "What kinds of crimes come to mind when you think of the death penalty?" Some jurors will indicate that the death penalty is appropriate for mass murders, some will refer to the brutality of the particular crime, and some will say that every murderer should be executed. This kind of information is critical. Obviously, by discovering those who fall at the mass-murderer end of the spectrum, you will be finding the least death-prone jurors. More importantly, by discovering the kinds of murder which individual jurors most dislike, you will be able to avoid jurors who are enraged by the very type of murder your client committed.

Many prospective jurors have religious reasons affecting their views on capital punishment. Ask them if capital punishment comes to mind when they think of the Old Testament concept of an "eye for an eye." The reaction to this question is usually very revealing. The juror who answers, "That's what I've always been taught, and if I kill someone I would be expected to be killed," will fall far to one side of the death-prone scale, whereas the juror who states, "No, my momma always taught me to turn the other cheek," will fall to the other extreme. A follow-up question, like, "How do you feel the New Testament concept of 'turning the other cheek' fits with the 'eye for an eye' teaching?" will prove equally revealing. You don't need to be a Bible scholar or to feel like a hypocrite to ask these questions. In short, do not underestimate their importance, because these kinds of questions are often the most revealing, and do not shy away from them on account of your own religious beliefs or non-beliefs.

Another vital line of inquiry requires exploration of jurors' views of life imprisonment. Responses ranging from, "In some instances it can be worse than death," to "There's no such thing, because they always get out in a few years," are very revealing. To obtain the most revealing responses, remember to ask open-ended questions, such as "How do you feel about life imprisonment as a sentence?" as opposed to, "Do you feel life imprisonment is a strong punishment?"

Be sure to ask the jurors how they feel about the particular mitigating circumstances that are applicable to your case. When the facts of your case allow, ask questions such as, "How do you feel age should be considered in deciding between life imprisonment and the death sentence?" "How would you take into account the fact that the defendant was under the influence of alcohol or drugs at the time of his actions in deciding between life and death?" and "What effect would the fact that the defendant never

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62 Total candor is required to obtain useful information. Jurors are much more likely to be candid in one-on-one, as opposed to group, questioning. Therefore, to gain the most valuable information, you need to secure individual sequestered voir dire.
before committed a violent crime have on your decision between life and death?"  

The answers to these questions will provide direct input into your evaluation of the juror's proneness to vote death. There are a number of related, but less direct, areas which should be probed to gain further information for your evaluation. Specifically, you should attempt to discover the juror's attitudes toward: (1) law and order; (2) rehabilitation; and (3) victims of crime. You should also pose questions aimed at discovering whether the juror is: (1) an authoritarian, who will look to the judge and prosecutor for guidance; (2) open or close-minded, the open-minded juror being highly preferred; and (3) sensitive to sympathy, and if so, for the victim's family, for the defendant, or for both. Finally, be sure to scrutinize the body language of the juror, particularly with respect to prosecutors versus defense attorneys, and especially toward the defendant. For instance, do they lean forward in their seats when answering the prosecutor's questions, but cross their arms and legs, sit back and put their hands to their faces when the defense attorneys ask questions? Do they avoid looking at the defendant? It does not take an expert to decipher the meaning of these situations.

To summarize, selection of the least death-prone jurors requires astute observation and effective information gathering. Be flexible. If everyone on the team has good feelings about a juror, cut your questioning short before you convince the prosecutor to use a strike. On the other hand, if you cannot get a feel for the juror, dig deeper rather than take a chance on the unknown. Avoid traditional stereotypes. More than once in this writer's experience the most sensitive juror on the panel possessed an extensive, structured military background, typically considered to be stereotypically pro-prosecution. Both became foremen and were instrumental in returning non-death verdicts. Only by probing deeply into each juror's background and thoughts was the jury selection team able to compile the data which dictated acceptance of these seemingly prosecution-oriented jurors.

V. TRIAL

Although thorough factual investigation, a complete understanding of the legal issues and sound trial tactics are the key to success in every case,
including capital cases, there are a few strategies which need to be accentuated in a death case. First, the defense must insure that visible support will be present in the courtroom. A jury that observes numerous friends relatives and acquaintances of the defendant in the courtroom every day will find it easier to accept the defendant as a person, and in turn will find it more difficult to vote death, knowing what such a vote will mean to the defendant’s loved one’s.

An equally important support group is the defense team itself. Team members should openly display their feelings for the defendant when the jury is present. The defendant should be situated in the middle of the team where he or she will be viewed as a participating member, rather than at the end of the table as a cast-off, in the role society has already provided. Once the jury perceives the team’s feelings for the defendant, it will be more difficult for them to disregard your pleas for mercy.

Insuring that the trial will complement the overall strategy is critical. That is, if a life sentence is the goal toward which you are aiming, and the evidence of guilt is overwhelming and undeniable, then admit guilt, starting with voir dire and continuing through opening statement and closing argument. Disarm the prosecution by preparing the jury for the bad things to come. If an acquittal is a possibility, then be sure that you do not do anything that will destroy your credibility at the sentencing hearing, if a conviction results. In short, visualize the case as a play, in which the trial is only one of many acts, and then be sure that your trial presentation is consistent with the entire production.

Be aware of your adversary indoctrination and suppress your adversary tendencies when they will serve no purpose. For example, you might forego objecting to some evidence or testimony you would object to in the ordinary case, recognizing that being overtly open with the jury will enhance your credibility and the jury’s affection toward you when it comes time to seek mercy. In the same vein, you might make these objections, but after approaching the bench, out of the jury’s hearing. The more quickly the gory evidence goes before the jurors, the faster their memory of it will fade and the sooner you can shift the jury’s attention from the horrible nature of the crime to the issue of the case on which you want to focus, the defendant’s life.

VI. THE PENALTY PHASE

Unfortunately, this phase of a capital case only follows a guilty verdict, and no matter how prepared for it you are, a guilty verdict is very

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67 In making these decisions, keep in mind that it will almost always be necessary for the defendant to testify for his life at the sentencing hearing. Thus, for example, if your client wants to present an unbelievable alibi at trial, you should strenuously advise him or her of the consequence of the jury’s disbelief when it comes time for sentencing. A jury will not be highly receptive to a defendant who denies guilt at trial and turns around and admits it and asks mercy at the sentencing hearing.
painful. Fortunately, if you have tried the case properly, you will have set the stage for the final and victorious act. Therefore, rather than scurrying around to discover information to save your client, your job will consist of administering the most persuasive presentation possible from the wealth of information already accumulated, in such a way as to compliment, through consistency, your trial presentation.

Timing, of course, is important. No matter how well-prepared you are, it is usually preferable to seek a continuance, both to further prepare and to allow emotions to cool. You must yourself treat the sentencing phase as a separate trial and convince the jury that this is a new proceeding with a new issue.

Your first concern should be the preparation and presentation of pre-hearing motions. Since you will have made numerous pretrial motions, some of which are relevant to the penalty phase, renew all of these motions. In addition, consider motions seeking: (1) funds for additional expert witnesses; (2) discovery of the prosecution’s sentencing evidence; (3) limitations on evidence the prosecution intends to introduce; and (4) dismissal of aggravating circumstances, either because the evidence at trial did not prove them or because the evidence the prosecution intends to introduce cannot establish them. At this stage, as with pretrial motions, utilize motions to gain the offensive, to discover the prosecution’s case and to draw out reversible error. Be creative.

A. The Law

In order to plan the most effective presentation, familiarize yourself with current law. Generally, both sides are entitled to wide latitude. The prosecution will merely be restricted to evidence that is not prejudicial to the defendant whereas the defense will be free to present any and all evidence relevant to the nature and circumstances of the crime involved and the history and character of the defendant. Thus, you are free to introduce any and all evidence which arguably mitigates toward a life sentence, including hearsay in some instances.

In addition, the sentencing process in a capital case must comport with due process. According to Mr. Justice Stevens, “[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements

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68 Gregg v. Georgia, 428 U.S. at 204. “We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.” Id.

69 Id.

70 Lockett v. Ohio, 438 U.S. 586 (1978). “We . . . conclude that the eighth and fourteenth amendments require that the sentencer, . . . , not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death.” Id. at 604. See also Woodson v. North Carolina, 428 U.S. at 304.


of the Due Process Clause." 75 In this light, at least two state supreme courts, in their seminal decisions interpreting their respective post-Furman capital statutory schemes, have held that the prosecution must prove alleged aggravating circumstances, beyond a reasonable doubt, even though the statutes themselves do not require this particular burden of proof. 76

Essentially, then, capital punishment cannot be imposed unless the jury 77 finds at least one aggravating circumstance to exist, beyond a reasonable doubt. If it makes such a finding, the jury must then employ a weighing process, which varies from state to state, 78 by which it determines the sentence.

B. Defense Strategies

Because the state must prove the existence of aggravating circumstances beyond a reasonable doubt, one of your first decisions will be to determine whether to dispute the prosecution's evidence of aggravation. For instance, if the prosecution has charged every conceivable aggravating circumstance, including ones not even arguably applicable, and the judge has denied your motion to exclude these charges of aggravation, you will most probably want to discredit the prosecution's arguments. The smaller the number of aggravating circumstances found, the better off you are in the weighing process. On the other hand, if the prosecution has charged only those circumstances which it can, to your knowledge, establish, 79 you will probably fare best by admitting the existence of aggravation at the outset. In many

75 Id. at 358. See also Presnell v. Georgia, 439 U.S. 14 (1978). "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Id. at 16.


77 Of the 34 states enacting post-Furman Capital sentencing schemes, only six, Ohio, Arizona, Alabama, Idaho, Montana and Nebraska, provided for judge-only sentencing. Ohio Rev. Code Ann. § 2929.03 (Page 1975); Ariz. Rev. Stat. Ann. § 13-454 (1973); Ala. Code tit. 13A, § 5-33 (Supp. 1978); Idaho Code § 19-2515 (1977 Amend); Mont. Rev Code Ann. § 46-18-301 (1978); Neb. Rev Stat. § 29-2502 (1975 Reissue). The Ohio statutory scheme was struck down in Lockett, Arizona's was declared unconstitutional in Richmond v. Cardwell, 450 F. Supp. 519 (1978); Alabama's scheme is currently being reviewed by the Fifth Circuit Court of Appeals in Evans, and, as of June, 1979, Idaho, Montana and Nebraska account for only twelve of the over five hundred inmates on death row in the United States. Therefore, this article is directed solely at penalty-phase hearings where juries are empaneled to make findings of fact.

78 In Georgia, for example, even after finding the existence of at least one aggravating circumstance, the jury can recommend a life sentence without finding any mitigating circumstance. Gregg v. Georgia, 428 U.S. at 197. Contrastingly, in Florida and numerous other states, the jury is directed to consider whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances. See Proffitt v. Florida, 428 U.S. 242, 248 (1976).

79 Under most, if not all, capital-sentencing schemes, in order to have obtained a conviction, the prosecution will necessarily have proven at least one aggravating circumstance, beyond a reasonable doubt. To see this overlap between aggravated offenses and aggravating circumstances, compare, e.g., Ala. Code tit. 13A, § 5-31 (aggravated offenses) with § 5-35 (Supp. 1978) (aggravating circumstances).
cases you will simply have to accept aggravation and argue that, when compared to your evidence of mitigation, a life sentence is compelled.

Perhaps the most important consideration you must take into account is how to best utilize the client. When making this decision, keep in mind the following caveat: the jury wants to know why your client committed the crime, or at least why your client thinks he or she did it. If your client does not testify, or testifies and evades this question, you will run the risk that the jury will look upon the client as a “Manson” or machine, rather than as a person with faults. Stated differently, once the jurors see that there was a reason, no matter how revolting the reason might be, they can say to themselves, “Taking away this reason, would this person kill again,” or “Can I have mercy on a person who kills for such a reason.” If you can then convince them that the reason no longer exists, that life imprisonment can remove the reason, or that your client is a human being, who has admitted his or her faults and is entitled to mercy, you will have taken giant strides toward a life sentence.

In order for this strategy to succeed, the client must be totally honest. In some instances this is most difficult, because the client, perhaps not wanting to totally disgrace himself or herself, will have given the police a false reason. For example, a client hooked and hiding his or her addiction to drugs might want to keep this fact from his family, and will fabricate a non-drug-related reason for a killing that was related to drugs. Nevertheless, the truth will serve you best, because: (1) it is the truth; (2) a perceptive jury will see that it is the truth and appreciate the honesty; (3) the defendant will make a much better witness, not having to hide any untruths; (4) the jury will perceive the defendant as a person; and (5) you will be able to tell the jury that you have hidden nothing from them and that you will expect the same honesty from them. To most readers, just the mention of this “strategy” may seem patronizing, but it should not be so taken. Personal opinions regarding honesty aside, this “strategy” is simply good “sales practice” and should always be considered.

It is also important that the client, where appropriate, express remorse, both for the victim and the victim’s family. In addition, members of the defendant’s family should be encouraged to express any remorse that they feel. Finally, the client must honestly express contrition and seek the mercy, as opposed to forgiveness, of the jury.

In the sentencing phase, there are essentially two kinds of cases: those where family, friends, clergy, experts and combinations of these groups are available, and those where there is no one to speak in the client’s be-

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28 One of this writer’s clients told police that he simply got the urge to “blow somebody away,” when in fact he killed a woman in a rape attempt. He fabricated the story because the truth would disgrace him, particularly in his mother’s eyes. He testified to the real and seemingly more revolting reason, and he was given a life sentence.
half. Although most cases fall somewhere between these two extremes, separate analysis best demonstrates the considerations which must be taken into account, depending on whether you have a sympathetic or an unsympathetic client. 79

1. **The Sympathetic Client**

Too many attorneys thoughtlessly present the testimony of a few friends of the defendant, who say the defendant is a nice person, and rest. Many are also inclined to keep seemingly damaging testimony from the jury, when such testimony in fact can prove helpful. For example, the attorney may suppress his client's heavy drug usage, feeling that the jury will react negatively toward his client when the disclosure may play an important part in establishing mitigation. 80 Keep in mind the defense goal of the penalty-phase hearing, gaining a life sentence, as opposed to the usual guilt-phase goal of the defense, establishing reasonable doubt. Doubt-casting procedures must be reevaluated, recognized for what they are and replaced with mercy-generating tactics where appropriate. In essence, you must relate your client's life story in a way that will make the jury want to give him a second chance on life.

In order to have access to the real story, the defendant's family and friends must be advised of your strategy. Unless you tell them that damaging things in the defendant's past are as or more important than the good things, you will be unable to demonstrate the problems the defendant has faced since childhood. Let the parents know, for example, that by confessing their failures and sharing the blame for their child's actions, they will be making a major contribution. Once the word spreads through the family circle, a surprising number of tragic stories begin to surface. This process takes time and requires repeated visits, especially with the client's immediate family.

Once you have obtained as much information as possible from family and close friends, you will have access to other individuals who have either had an impact on the client's life or observed some significant developments during the defendant's lifetime. Generally, anyone who feels strongly for the client, or who can be made to feel so, is a potential witness, if he or she can provide one piece of the puzzle of the client's life story. These persons can also lead you to other important witnesses. For example, you might discover the friend who first introduced your client to drugs, but who has since gone straight. You might find a jail minister who regularly

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80 Independently conducted post-trial interviews in one of this writer's recent cases disclosed the importance of drug-related disclosures. See VOIR DIRE FOR CAPITAL CASES, supra note 49, at 105, 122, 146-147.
counsels with the defendant and who has developed strong feelings toward the client.

Importantly, the life story must be complete. That is, it must include information up to the day of the sentencing hearing itself. Testimony from jailers, clergy members, family, friends and the defendant must address changes in the defendant since the commission of the murder. For example, sincere testimony from a minister who has counseled with the client can serve a number of functions. In a recent case, where the minister was a young woman, who also counseled the families of crime victims, and the defendant had committed a rape-related murder, the minister’s testimony: (1) disclosed that the defendant had changed substantially for the better since committing the murder; (2) revealed that the defendant had expressed remorse for his actions; (3) showed she felt badly for the victim’s family, but nevertheless felt that mercy for the client was warranted; and (4) allayed any fears of the jurors that the defendant was a monster, because she, an attractive woman, visited and counseled the defendant often and alone.

Expert witnesses should also be considered. In most cases the defendant will have been psychiatrically and/or psychologically evaluated. Any results pointing toward mitigation should be presented, provided that the results do not open up new and damaging areas. In addition, if the defendant has an alcohol or drug problem, you should consider calling an expert to testify to the effects of the particular substance on your client at the time the killing was committed.

The last type of witness to be considered should be anti-death penalty witness. Before calling such a witness, make certain that this kind of testimony is absolutely necessary. In most instances, you are trying to focus the jury’s attention on the defendant and reasons for not killing him or her. If you have accomplished this goal, you will run the risk of shifting the jury’s attention to the propriety of the death penalty in society as a whole, an issue which you already know the jury favors. Therefore, in most instances such testimony can best be utilized in the case of the unsympathetic client.

2. The Unsympathetic Client

When no one is willing to go to bat for the defendant, and utilization of only the client will not be enough, you must consider attacking the death penalty itself. Three general categories of witnesses can be used for this purpose: religiously-oriented witnesses; deterrence experts; and experience-hardened officials.

Most jurors, and particularly Southern jurors, have religiously-based reasons for favoring or for hesitating to impose capital punishment. Your voir dire will have disclosed the religious sentiments of each juror. Take
these sentiments into account and tailor your religious testimony to these jurors by locating a clergy person who can relate to them. When no such witness is available, at least present religious arguments against capital punishment yourself during closing argument.

Deterrence experts are especially important in cases where voir dire has disclosed that many of the jurors based their support for capital punishment on their view that it acts as a deterrent. The authors of some of the leading works in this field often make themselves available for such testimony, depending on the time and location of the case.\textsuperscript{81} If the case indicates the likelihood of a need for such testimony, these experts should be contacted at the earliest possible date.\textsuperscript{82}

Experience-hardened officials include two kinds of execution witnesses, reporters and corrections officials. Many reporters who once favored the death penalty changed their views after witnessing executions, and their testimony can bring home the brutal realities of executions. A smaller number of corrections officials have had similar experiences, and their testimony can have dramatic impact on the jury. Additionally, these same officials can testify to the availability of secure facilities for lifetime incarceration, including extra-security precautions, the paucity of escapes and available rehabilitative services.

In summary, no matter how desperate the case, you can always argue against capital punishment in closing argument. Your chances of succeeding will increase significantly if you can base your arguments on the testimony of these kinds of experts. When you can tell the jury, authoritatively, after disclosing that capital punishment is irreverent, brutal and does not deter, that vengeance is the only reason they can have for killing your client, your chances of gaining a life sentence will increase dramatically.

3. Jury Instructions

Without plain, full and proper instructions, all of the defense presentation can go for naught. Do not underestimate or overlook the importance of defense-tendered instructions. For example, under the Georgia statute the jury can recommend a life sentence, even if it finds no mitigating circumstances.\textsuperscript{83} Thus, in Georgia, or in a state with a similar provision, the defense should always insist on an instruction to this effect. In a case where the aggravating outnumber the mitigating circumstances, the defense should


\textsuperscript{82} Criminologists and sociologists, who can testify to the history and discriminatory nature of capital punishment, should also be considered, especially when no deterrence expert is available.

\textsuperscript{83} See Gregg v. Georgia, 428 U.S. at 197; GA. CODE ANN. § 27-2534.1 (b) (1973).
seek an instruction that the procedure to be followed is not a mere counting process, but rather is a process in which the jurors must apply their reasoned judgment in deciding whether the situation calls for life imprisonment or requires the imposition of death, in light of the totality of the circumstances present. Only by closely studying your state's statutory scheme and relevant court interpretations will you be able to effectively prepare such instructions.

The area compelling the most attention in designing effective instructions should be the instructions regarding mitigating circumstances. Remember, under the Lockett decision, the sentencer cannot be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense proffered by the defense as a basis for a life sentence. Therefore, tender instructions which list, in simple language, all of those circumstances which the defense contends mitigate toward a sentence of less than death, such as: (1) a lack of parental guidance or of discipline in the home; (2) alcohol and/or drug addiction; (3) a fatherless upbringing; (4) the defendant's vulnerable mental state at the time of the crime; (5) the client's cooperation with the police; (6) marital problems at the time of the crime; (7) etc.

The list is endless, and as long as you have introduced evidence to support these circumstances, refusal by the court to so charge would constitute reversible error.

Moreover, most states list statutory mitigating circumstances, such as the age of the defendant at the time of the crime, the fact that the defendant was an accomplice whose participation was relatively minor, and the lack of a significant history of prior criminal activity. An instruction should be sought relative to each relevant statutory circumstance, in addition to the non-statutory circumstances. By seeking an instruction listing every conceivable mitigating circumstance, you should be able to obtain an instruction which requires the jury to consider many more mitigating than aggravating circumstances.

Lastly, be certain to request that the jury be permitted to take a copy of the list of mitigating circumstances with them into the deliberation room. Post-trial interviews in one of this writer's recent cases indicated that after reviewing the state's exhibits, the jury was leaning toward death. However, when one of the jurors picked up the list of mitigating circum-

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84 See 283 So.2d at 10.
85 438 U.S. at 604.
87 The sheer number of prosecution exhibits usually overwhelms the jury, because they serve as demonstrative evidence in the deliberation room. To counterbalance this effect, the defense should introduce as many exhibits as possible during the course of the hearing and should insist that the jurors be permitted to take the list of mitigating circumstances with them.
stances to be considered, the jury shifted its attention from the brutality of the crime to the life of the defendant and proceeded to discuss every circumstance, one by one, until they eventually returned with a life-sentence verdict.

**CONCLUSION**

The trenchant words of Mr. Justice Stewart, speaking for the plurality of the United States Supreme Court in *Woodson v. North Carolina,* accentuate the paramount consideration in a capital case—death is different. Accordingly, in a death case you must: (1) convince everyone involved that the case is different and requires a number of safeguards for your client that would not be triggered in other kinds of cases; and (2) be willing to treat the case differently yourself. If you are not receptive to the techniques discussed herein, be certain that your unreceptiveness is for a good reason, and not merely because they require a substantial investment of time and energy.

Every capital case is different, because different personalities are involved. Every attorney tries cases differently, for the same reason. The suggestions presented in this article are just that, suggestions. They are not intended to serve as a road map to be rotely followed in capital cases. Rather, they are presented for your consideration, alteration, modification, rejection, and most importantly, for your use when you deem them appropriate.

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88 At the request of the defense, the judge ordered the jury to take the following instruction with them into the deliberation room:

In deciding whether to recommend a sentence of death or of life imprisonment, you must consider all of the mitigating circumstances presented by the defense. That is, you should focus your attention on the characteristics of the person who committed the crime, .............. .............. Thus, you must consider the following mitigating circumstances.

a. The defendant has no record of criminal convictions for crimes involving force or violence to persons;
b. The murder was committed while the defendant was under the influence of extreme emotional disturbance;
c. At the time of the murder, the capacity of the defendant to appreciate the [wrongfulness] of his conduct was impaired as a result of a significant prior history of drugs and/or alcohol;
d. The youth of the defendant at the time of the crime;
e. The defendant cooperated with the police;
f. The defendant's prior family history that would reasonably be expected to contribute to the defendant's criminal conduct;
g. Any other factors the jury feels mitigate against the sentence of death.

89 428 U.S. at 305:

[the penalty of death is qualitatively different from a sentence of life imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one only of a year or two.]